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THE NORTHEASTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 93
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF OHIO, ILLINOIS, INDIANA
MASSACHUSETTS, APPELLATE COURT OF
INDIANA, AND THE COURT OF
APPEALS OF NEW YORK

DECEMBER 20, 1910—MARCH 21, 1911

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

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WM. M. FARMER, CHIEF JUSTICE.²

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ALONZO K. VICKERS.¹

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WILLIAM CALEB LORING.

ARTHUR P. RUGG.

¹ Became Chief Justice June, 1910.

² Became Justice June, 1910.

³ Beginning January 3, 1911.

NEW YORK—Court of Appeals.**EDGAR M. CULLEN, CHIEF JUDGE.****ASSOCIATE JUDGES.****JOHN C. GRAY.****WILLARD BARTLETT.****ALBERT HAIGHT.****FRANK H. HISCOCK.****IRVING G. VANN.****EMORY A. CHASE.****WILLIAM E. WERNER.****FREDERICK COLLINS.****OHIO—Supreme Court.****AUGUSTUS N. SUMMERS, CHIEF JUSTICE.*****WILLIAM T. SPEAR, CHIEF JUSTICE.*****JUDGES.****WILLIAM B. CREW.*****JOHN A. SHAUCK.****WILLIAM T. SPEAR.*****JAMES L. PRICE.****WILLIAM Z. DAVIS.*****JAMES JOHNSON, JR.†****MAURICE H. DONAHUE.†***** Elected November 8, 1910.***** Retired January 1, 1911.***** Became Chief Justice January 1, 1911.****† Elected November 8, 1910.**

COURT RULES

SUPREME COURT OF OHIO—RULES OF PRACTICE

January Term, 1910

Rules Peculiar to the Business of the Supreme Court

Rule I

SESSIONS IN TERM.

The regular public sessions of the Supreme Court shall be held in the Supreme Court room, in the Capitol, on Tuesday and Thursday of every week during the term of the court, commencing at 9:00 o'clock a. m., standard time, on Tuesdays, and 9 o'clock a. m., standard time, on Thursdays, and on other days of the week by special assignment, as the convenience of the business may require.

The sessions of the consultation room shall be between the hours of 9:00 a. m. and 4:30 o'clock p. m., standard time.

Rule II.

ORDER OF BUSINESS.

The business of the general docket shall be proceeded in as follows:

Section 1. It is hereby made the duty of the plaintiff, or party holding the affirmative, within five months after the filing of the petition in error, to have filed with the clerk ten printed copies of a brief or argument thereon, printed and in size and form complying with the provisions of rule IV, as amended, containing a statement of the questions presented and a succinct statement of so much of the cause, referring to the pages of the printed record, as is necessary to show how the questions arise, and indicating the headings and points made, as required by rule IV, as amended, and whenever the constitutionality or construction of a statute is involved the brief shall contain a copy of such statute; and for want of such printed copies being so filed unless good reason be shown to the contrary, the cause will be dismissed for want of prosecution, or otherwise disposed of at the discretion of the court, as required by rule IV, as amended.

Section 2. It is hereby made the duty of the defendant in error, or party holding the

negative, if he desires to be heard, to file ten copies of a like brief, printed with like compliance with rule IV, as amended, within seven months after the filing of the petition in error.

Section 3. A copy of the printed record and of the brief of the plaintiff shall be served on defendant in error or his counsel forthwith; and the brief of defendant in error shall be served on opposite counsel forthwith upon the filing of the same. All reply briefs must be printed as required in sections 1 and 2 of this rule and filed and served on opposite counsel within eight months after the filing of the petition in error.

Section 4. Proof of service of all briefs shall be, immediately after the making of such service, filed with the clerk. And failure to so file may be ground for the dismissal of the cause.

Section 5. Causes will be taken up for decision in their order on the docket, and not otherwise, except on motion duly filed, and for special reasons, a cause may be taken out of its order and assigned for hearing or decision at a particular time, as authorized by section 440, Revised Statutes. But proceedings in error to reverse, vacate or modify a conviction of a felony or misdemeanor will be advanced by the court without motion, on the allowance of the filing of the petition.

Section 6. Any cause may be submitted, however, on behalf of either or both parties, whatever may be its place on the docket. When a cause is reached on the docket and neither party appears in person, or by attorney, it shall be marked submitted and shall be disposed of as the court shall deem fit and proper according to the state and condition of the cause.

Section 7. Parties desiring to be heard in oral argument must, in order to have their cases set for oral argument, notify the court of that fact not later than the time for filing of the brief of defendant in error, except that where a motion is made to advance a cause,

notice of oral argument must be given at or before the submission of such motion; otherwise, oral argument will be considered as waived.

Section 8. In all cases where the briefs filed in compliance with section one do not contain all points and authorities intended to be relied upon on oral argument, counsel must, five days before the cause is set for hearing, furnish opposite counsel with a brief statement of any additional points and authorities intended to be presented; and each member of the court and the reporter must be furnished with a copy the day before the oral argument. At the conclusion of the oral argument, time will not be given for the filing of briefs thereafter; and all cases assigned for oral argument must be submitted on the day they are assigned for such argument.

Section 9. No motion to take a cause out of its order and advance it for hearing, will be entertained on the part of the plaintiff, until it is ready to be submitted by him, and when allowed, time will be given the defendant, not exceeding sixty days, in which to prepare and file his brief; nor, on the part of the defendant, until the record has been printed (unless dispensed with); and when allowed the brief of the plaintiff must be filed sixty days thereafter, and that of the defendant in sixty days after the expiration of the time allowed by the plaintiff. If oral argument is desired by either party, notice must be given at or before the motion to take out of order is made.

Section 10. The sessions of the court, on Thursday of each week, will be devoted to the business of the motion docket and business especially assigned.

Section 11. A motion shall not, without special leave of the court, be orally argued beyond fifteen minutes on either side.

Section 12. An application for an extension of time in which to file a brief in any cause, must be by motion and on notice to the opposite party; and ten minutes will be allowed each side on the hearing of the motion. But it may be submitted by either upon a written statement of the reasons for or against the delay.

Rule IIa.

Where, in causes and matters in which the Court has original jurisdiction, it is necessary to take testimony, application must be made to the Court and an order directing the method of taking testimony obtained.

Rule III.

ORAL ARGUMENT.

When a cause on the general docket is argued orally, the time allowed for each side shall not exceed one hour, unless, for spe-

cial reasons to be adduced before the argument commences, the Court shall extend the time.

Rule IIIa.

RULE OF COURT ON ORAL ARGUMENT.

Where a case is orally argued before a division of the court, and reserved to the whole court for decision, neither party is entitled to further oral argument.

Rule IV.

PRINTING RECORDS, ETC.

No civil cause will [be] heard or considered, whether marked for oral argument or not, unless the plaintiff, or party holding the affirmative shall, in compliance with section 6711, Revised Statutes, have caused to be filed with the clerk, for the use of the court and reporter, ten printed copies of so much of the record, briefs, testimony and documents therein, as may be necessary to be considered by the court, the same to be printed with eleven point or small pica type, in uniform size, pamphlet form, six and one-fourth inches wide by nine and one-fourth inches long, and suitable for binding, with headings in capital letters and subheadings in bold-faced type not less than eight point, and with index, and in case any of said printed copies shall exceed one and one-quarter inches in thickness they shall be bound and numbered in two or more parts. The cover of each printed copy shall contain the number of the case, the title of this court, the title of the cause, and in error cases, the court from which the cause is brought to this court, and the names of the counsel. The cost of the printed record shall, upon filing of the printer's receipted bill, be taxed as costs in the cause; and for want of such printed copies, unless good reason be shown to the contrary, the cause will be dismissed for want of prosecution. It shall be the duty of the clerk to refuse to file and return to the parties presenting for filing, any printed matter which does not conform to this rule.

A copy of the printed record shall be furnished to opposite counsel forthwith and proof of such service of records shall be filed with the clerk.

Rule V.

PRINTING RECORDS, ETC.

It shall be the duty of the clerk, on the written precept of either party, his or their attorney to any suit pending in this court, and on such party depositing with the clerk such sum of money as may be reasonably necessary to defray the expenses, to make up from the files, in proper order to be printed for the purposes of the hearing or trial of a cause, a copy of the pleadings, exhibits, evidence and proceedings therein, preserving

the date of the commencement of the action and the date of the filing of each pleading, dispensing with the formal captions, verifications and official certificates, where the same may not be material to the questions to be adjudicated, and to cause to be printed fifteen copies thereof for the use of this court and the counsel in the cause; and the costs thereof, unless otherwise ordered by the court, shall be taxed in the cost bill, and such disposition or application shall be made of the said deposit as to the court shall seem equitable. Where the case is on error, the matter to be printed shall be indicated by the party filing the precipe, in accordance with rule IV.

Rule VI.

POINTS DECIDED.

A syllabus of the points decided by the court, in each cause, shall be stated in writing by the judge assigned to prepare the opinion of the court, which shall be confined to the points of law arising from the facts of the cause that have been determined by the court.

And the syllabus shall be submitted to the judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the judges concurring therein.

Rule VII.

APPLICATION IN ERROR.

When an application for leave to file a petition in error has been made in vacation to a judge of the Supreme Court and disallowed, no other application therefor shall be made, except to the court in session.

An application for a rehearing will not be entertained when made at a term subsequent to that at which the judgment is rendered, notwithstanding such rehearing is requested by one of the judges.

Rule VIII.

NOTICE OF APPLICATION IN ERRORS.

In cases where leave of the court or a judge to file a petition in error is required, notice in writing of the intended application, briefly specifying the errors relied on, shall be given to the adverse party, or his attorney, at least ten days when made to the court, and five days when made to a judge before the application shall be acted on, unless, in view of special circumstances attending the case, the court or judge should determine that justice required the time of such notice to be abbreviated or such notice to be dispensed with.

A copy of such notice, with the proof of the service thereof, and petition in error, shall accompany the application.

Rule IX.

RETURN OF PAPERS.

After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that court, the original papers shall be returned to the clerk of the proper court; when so returned, the clerk of the Supreme Court shall seal them up and direct them to the clerk of such court, and forward them as said clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express.

Rule X.

FILES OF CAUSES DISPOSED OF.

The papers in causes heretofore or hereafter disposed of (and not returned to the counties or withdrawn by leave of the court), shall be filed away in convenient packages by the clerk, with a label on each package, on which shall be written or printed, "Cases Decided," "General Docket," or "Motion Docket" (as the causes may require), and also the term at which the same were disposed of, and the numbers of the causes in each package; which numbers shall correspond with those of the docket of said term.

The papers in causes on the general docket shall be put in separate packages from those on the motion docket, and the papers of one term shall, as far as may be practicable, be kept in different pigeon holes or places of deposit from those of any other term.

REPORT OF CAUSES DISPOSED OF.

All causes disposed of on the general docket without opinion, except such as are dismissed by the consent of parties, or for failure to file printed record, or for want of preparation, shall be published in the reports of decisions of this court, by giving the style of the case, the character of this suit, the judgment of the court, and the cases cited, if any, as authority for the decision, and the attorneys of the parties.

Rule XI.

THE MINUTE BOOK AND ITS CONTENTS.

There shall be kept by the clerk a book, to be called the minute book, in which shall be separately entered every cause and motion hereafter docketed in this court, except motions in pending causes, which latter motions shall be noted in their respective causes, but shall not be separately entered in said book, and also the date of docketing the same, and the payment of fees and by whom paid.

He shall also briefly note therein the issuing and date of all process sued out of this court, the return day thereof, when returned, whether served or not, and the date of

service, if made; also, under the proper dates, the filing of all pleadings, depositions, briefs, or other papers that may be filed in the cause, in this court; and briefly note all motions in the cause that may be placed on the motion docket; and all orders and judgments of this court in the cause, with a reference to the journal and page where the same may be entered, and to the volume and page of the complete record thereof, if there be one.

He shall also note therein by whom and when any papers may be taken from his office, and when returned.

Rule XII.

WITHDRAWAL OF BRIEFS.

After a cause has been decided and reported, counsel may withdraw manuscript briefs from files.

Rule XIII.

WHEN RECORDS ARE TO BE COMPLETED.

In cases decided before the first of May in any term, if complete records therein are to be made in this court, they shall be completed before the first day of the ensuing October.

Rule XIV.

ADMISSION TO THE BAR.

Section 1. Except as provided in section 560 of the Revised Statutes concerning persons who have been admitted and practiced in the highest court of another state, or in the Supreme Court of the United States, for a period of five years, no person shall be admitted to the bar except upon an examination and certificate of the standing committee on examinations.

Section 2. There shall be appointed, to take effect on the first day of January, 1901, ten discreet and judicious attorneys and counselors-at-law to be known as the standing committee on examinations. Two members of the committee shall be appointed for one year, two for two years, two for three years, two for four years, and two for five years. Their successors shall be appointed for a term of five years each.

Section 3. The standing committee shall hold an examination of applicants for admission to the bar in the city of Columbus, on the first Tuesday of each June and December. No other examinations will be held. Examinations must be conducted under the direction of the committee, a majority of whom shall report in writing for or against the admission of each applicant.

Section 4. No applicant shall be admitted to the bar unless a majority of the members conducting the examinations shall certify that they find him to have a competent knowledge of the law and to have sufficient

general learning to discharge the duties of an attorney and counselor-at-law, and shall recommend his admission. Such certificate shall not be made unless the applicant has sustained on his written answers to the printed questions of the examiners an average grade of 75 per cent. on an examination embracing the following subjects: The law of real and personal property, torts, contracts, evidence, pleading, partnership, bailments, negotiable instruments, agency, suretyship, domestic relations, wills, corporations, equity, criminal law, constitutional law, and the canons of professional ethics adopted by the Ohio State Bar Association, at its 30th annual meeting, 1900.

No one will be admitted to the examination who has not attained the age of twenty-one years. The printed interrogatories and the answers of applicants thereto shall be submitted to the court with the report of the examiners, and, together with all certificates and papers required under this rule, shall be filed with the clerk and preserved.

RESPECTING REQUIREMENTS AS TO GENERAL LEARNING.

No one shall be admitted to the examination whose educational attainments are not clearly shown to be equal to those indicated by the four-year course of study in a public high school of this state of the first grade. Evidence of such attainments to be furnished by the applicant with his application for admission to the law examination, will be:

(a) A diploma or certificate of graduation from such high school, which certificate must show that such high school is a four-year high school of the first grade.

(b) A diploma from a college or university belonging to the Associated Colleges of Ohio.

(c) A certificate of matriculation in the freshman year or a higher class in the academic department of such college or university.

(d) A diploma, or a certificate of matriculation in the freshman or a higher class in the academic department, from a college or university outside the state of Ohio whose standing is certified as "approved" by any of the Associated Colleges of Ohio.

(e) A certificate or diploma from an academy or other school which would, without examination or further inquiry or condition, admit the holder to the freshman or a higher class in the college of liberal arts in any one of the Associated Colleges of Ohio. Such certificate or diploma to be certified thereon as "approved" by the proper officer of such college.

(f) A certificate from the state board of school examiners authorizing the holder to teach in the high schools of the four-year grade of Ohio; a county board certificate is not sufficient.

Applicants who do not present any of the above-stated evidences of educational attainments will be required to take an examination before the standing committee of the court appointed for that purpose, whose certificate that the applicant's qualifications are equal to those required for high school graduates will be sufficient evidence of general learning, and the same shall be filed with the clerk of the court at least six days prior to the examination for admission. This committee will hold two sessions each year, at Columbus, Ohio, one on the third Tuesday of May and one on the third Tuesday of November. A fee of two dollars will be required to be paid to the clerk of the court by each applicant before entering such examination.

This requirement as to general education shall apply to all whose certificates of entrance upon the study of law are filed with the clerk after December 31, 1900.

(Section 4, of rule XIV, as above amended, is in effect from and after the first day of January 1910.)

Section 5. Every resident of the state who commences the study of law on and after January 1, 1898, either under the tuition of an attorney-at-law, or at a law school, whether located in this state or elsewhere, shall file with the clerk of the Supreme Court the certificate of such attorney or of the chief officer of such law school, as the case may be, showing his name, age and residence, and the date when he commenced the study of law, which certificates shall be accompanied by a fee of fifty cents. As to all such persons the three years' study of law required by section 560 of the Revised Statutes, shall date from the filing of such certificate.

Section 6. Every resident of this state who shall have commenced the study of law prior to January 1, 1898, shall on or before the first day of March, 1898, file with the clerk a certificate of his preceptor, or of the chief officer of his law school, showing his name, age and residence, and the time when and the place where, and under whom, he commenced the study of law, which certificate shall be accompanied by a fee of fifty cents.

Section 7. Every person who shall commence the study of law while a nonresident of this state, and who has not been regularly admitted as an attorney-at-law in some court of record within the United States, shall, on coming into this state to reside, file with the clerk an affidavit showing that he has come into the state for the purpose of making it his permanent residence, and stating his name, age, and present or former residence, and also the certificate of his preceptor, or of the chief officer of his law school, showing the time when, and place or places where, and under whom, he has

studied law; which papers shall be accompanied by a fee of fifty cents.

The one year's residence in this state required of such persons by section 560 of the Revised Statutes shall date from the filing of such papers.

Section 8. Every person entitled to be admitted to the examination under section 560 of the Revised Statutes, on the ground that he has been regularly admitted as an attorney and counselor-at-law in some court of record within the United States, shall, not more than sixty nor less than thirty days before the time fixed for the examination, file with the clerk (1) an affidavit showing that he is a resident of this state or that he has come into the state for the purpose of making it his permanent residence, and stating his name, age and former and present residence. (2) His certificate of admission to the bar, which, if issued less than three years before such filing, must be accompanied by the certificate of his preceptor, showing the extent and character of his study of the law, and (3) the certificate of a judge of the court of record in which he has practiced law, showing the time such judge has personally known him, and his moral and professional standing at such bar, which application and papers shall be accompanied by an examination fee of \$6.00, and registry fee of fifty cents.

Section 9. If the filing of any affidavit, certificate or other paper required by this rule has been omitted by excusable mistake or without fault, the court may order such filing as of the proper date.

Section 10. Except as provided in section 8, concerning persons who have been admitted to the bar in some court of record within the United States, every person who desires to have his name enrolled for examination must not more than sixty days nor less than thirty days before the time fixed for the examination, file with the clerk his application for admission to the bar, giving his name, age, residence and postoffice address, and with such application the certificate of qualification required by section 560 or 561 of the Revised Statutes, as the case may be. Each applicant for admission to such examination shall be required to state in an affidavit filed by him on his application for admission to such examination, that he has read the Canons of Professional Ethics, adopted by the Ohio State Bar Association July 7, 1900, and has faithfully endeavored to make himself acquainted with the same, and that he will endeavor to conform his professional conduct thereto. Except as provided in section 561 of the Revised Statutes, each applicant must produce a certificate of qualification as required by section 560 of the Revised Statutes, signed by his preceptor, and in no case will the certificate of any other attorney or counselor-at-law

be received unless it be shown by the affidavit of the applicant that his preceptor is dead or that his certificate cannot, for some reason satisfactory to the court, be obtained. In case the length of study shown by the certificate fall short, by sixty days or less of a full three years' course, a supplemental certificate may be presented by the applicant at the time of the examination, showing with such former certificate, a full three years' study. And in every case the certificate must show that the certifier has personal knowledge of the length of time the applicant has been engaged in the study of law. The certificate shall also show the name and postoffice address of the applicant's preceptor.

(Section 10, of rule XIV, as above amended, is in effect from and after the first day of January, 1910.)

Section 11. No certificate, affidavit or other paper produced in conformity with this rule shall be deemed conclusive evidence of the fact therein stated, and in all cases the court must be satisfied of the truth thereof before the applicant shall be admitted to examination.

Section 12. Every application for admission to an examination must be accompanied by an examination fee of \$6.00, which will be returned to the applicant if his name is not placed on the examination roll. If his name is placed on the examination roll, and he fails to receive a certificate of qualification, he shall not be required to pay any further sum upon a second application. For each subsequent application a fee of \$6.00 shall be paid. If the applicant, on examination, shall be rejected, he may be admitted to the next examination upon filing a certificate that he has studied law six months subsequent to the date of his former examination; but no one shall be admitted to more than five examinations after the twentieth day of December, 1900, and the fifth examination shall not be less than two years after the fourth, and during the intervening two years said applicant shall regularly and attentively study law, and shall furnish the prescribed certificate thereof.

Section 13. After the expiration of the thirtieth day before the examination the court will examine the papers filed by the applicant, and cause him to be notified whether he will be admitted to the examination unconditionally, or subject to the production of a supplemental certificate of additional study, when that may be necessary, and if so admitted, will cause his name to be placed on the examination roll which will be delivered to the standing committee.

Section 14. The standing committee may, subject to the approval of the court, make rules not inconsistent herewith, for the conduct of the examinations, which, together

with this rule, shall be published in pamphlet form for distribution by the standing committee.

Section 15. The applicant upon receiving the oath of office, shall sign a roll showing the date of his admission and the place of his residence. The oath administered shall be as follows:

I do solemnly swear:

I will support the Constitution of the United States and the Constitution of the state of Ohio;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.

So help me God.

(Section 15, of rule XIV, as above amended, is in effect from and after the first day of January, 1910.)

Section 16. The clerk shall enter the date of the filing of all papers under this rule, with a pertinent description of the same, in a record provided for that purpose, and shall enter all sums received under this rule in a cash book, showing the date, from whom and for what received, and shall pay the same out upon the order of the Chief Justice in payment of the expenses of the examinations, and for no other purpose. That is to say: costs of necessary printing and stationery; necessary janitor or messenger service; necessary hall rent, postage and express charges and other necessary expenses; to the clerk for each certificate of admission issued to an applicant, \$1.00, and also the registration fees paid under this rule; to each member of the standing committee \$50.00, for each examination, and to each member of the committee on general learning \$10.00 for each session, and his necessary traveling expenses, actually incurred in the work of the committee.

If the funds are not sufficient, such pro rata distribution shall be made as the funds will warrant.

(Section 16, of rule XIV, as above amended, is in effect from and after the first day of January, 1910.)

Section 17. In all cases where the application for admission to the examination is

found to be insufficient, and is returned to the applicant for correction, a fee of fifty cents must accompany each application thereafter.

The following form contains all that is necessary for the certificate by a preceptor mentioned in rule XIV, sections 10-12:

I hereby certify, that _____ is a citizen of the United States and of the state of Ohio; that he has resided in said state for one year last past; that he is over twenty-one years of age, of good moral character; that he has regularly and attentively studied law under my tuition for the period of _____ years, from _____ to _____, previous to this application for admission; and that I believe him to be a person of sufficient knowledge and ability to discharge the duties of an attorney and counselor-at-law, and would therefore respectfully recommend his admission to the bar.

_____, Attorney-at-Law.
Dated at _____.

Admission to a law school, or to a law department of a university, is not matriculation within the meaning of section 4, of rule XIV, as recently revised.

Certificates of study given by schools known as correspondence law schools, or by lawyers without the state, certifying that the applicant has studied under their supervision within the state of Ohio, do not satisfy the Ohio statute and the rules respecting study ordered by the Supreme Court of Ohio, and such certificates will not be filed or in any way recognized.

ADMISSION WITHOUT EXAMINATION.

To be admitted to the bar of Ohio without examination, you must produce the following papers:

First. Certificate of admission as an attorney and counselor-at-law in the highest court of another state after two years' study of the law, and upon a regular examination, which study and examination must be shown either by a certificate of the facts or by a requirement thereof in the statute of such state.

Second. Certificate from the judge of the court in which you practiced, that you were an active practitioner in such state or in the Supreme Court of the United States for a period of not less than five years immediately preceding your removal to the state of Ohio. This certificate must be authenticated by the clerk of courts under seal.

Third. Certificate of good moral character, and recommendation from some attorney-at-law of this state, that you be admitted to the bar in Ohio.

Fourth. Your affidavit that you are a resident of this state or have come into the state to make it your permanent residence.

Fees, \$6.50.

See section 560, Revised Statutes.

RULE RELATING TO FOREIGN ATTORNEYS.

Attorneys-at-law residing without the state of Ohio, not members of the bar of this state, who have been retained in any case assigned for oral argument, may be heard therein upon being presented to the court by a member of the bar of Ohio.

Rule XV.

PETITIONS IN CRIMINAL CASES.

A motion for leave to file a petition in error in a criminal cause, with the transcripts, containing marginal references, together with the assignments of error, shall be filed with the clerk at least five days before the same shall stand for hearing, unless, for good cause shown in any case, the court otherwise order, and the proposed petition in error shall be submitted with the motion.

Rule XVI.

NOTICE OF MOTIONS.

No motion will be permitted to be placed upon the motion docket for hearing until proof of notice to opposing counsel for the filing and time for hearing such motion is filed with the clerk.

Rule XVII.

FILING OF MOTIONS.

A motion cannot be filed on the day set for its hearing, except by special leave of the court.

Rule XVIII.

BRIEFS ON MOTION FOR LEAVE.

Section 1. A motion for leave to file a petition in error will not be considered, unless counsel for the applicant file with the papers in the case either a printed or typewritten brief, containing a statement of the questions presented, and a short statement of so much of the case as may be necessary to show how the questions arise. And in all criminal cases, if leave is granted to file the petition in error, the clerk shall file the same instant.

Section 1a. In all criminal cases, the plaintiff in error within sixty days from the filing of the petition in error shall file with the clerk ten copies of a printed or typewritten brief containing a statement of the questions presented and the other matter required by section 1 of rule 2 herein. And the defendant in error shall, within ninety days after the filing of the petition in error, file with the clerk a like number of printed or typewritten briefs with like references. But the court, by special order, may fix a different period for filing said briefs.

Section 2. Petition in error in civil cases from the circuit court is filed without leave of court, fees \$5.00 and a fee of \$2.00 must accompany every motion.

Rule XIX.

MOTION TO AFFIRM.

In all cases in which the judgment of the circuit court, reversing the judgment of the court of common pleas, is wholly or partly on the ground that such judgment is not sustained by sufficient evidence, and a petition in error is filed in this court upon

the record of the circuit court, a motion to affirm such judgment forthwith shall be entertained.

Rule XX.

REHEARINGS.

No motion can be made or heard for a rehearing. Applications for a rehearing must be made at the same term at which the decision is announced, and within thirty days after such announcement. The application must be typewritten, and six copies thereof sent to the Chief Justice, and must be confined strictly to reasons for a rehearing. No reargument of the cause on such application will be considered.

Rules Other Than Those Peculiar to the Supreme Court

Rule XXI.

MAKING UP RECORDS.

Record of cases decided shall be made as follows:

Section 1. In all cases in which the Supreme Court and circuit court have original jurisdiction, a full record shall be made up.

Section 2. In cases in error in said courts, no record shall be made, except at the request and costs of the party desiring the same to be done; but the papers in all such cases shall be carefully preserved, filed and labeled in packages, numbered with corresponding numbers upon the margin of the journal where the final orders, respectively, are made.

Section 3. In cases in error in which the appellate court reverses the judgment of the court below, and orders further proceedings below to be had in the original case, the record afterward made up below shall contain the judgment of reversal and the further proceedings thereafter had in the court below; but the files of the appellate court, upon which said order of reversal was had, shall not be recorded in the court below, except at the request and costs of the party desiring the same to be done.

Rule XXII.

PRESERVATION OF RECORD AND FILES.

The clerk of the court shall be answerable for all records belonging to his office, and all papers filed in the court; and they shall not be taken from his custody unless by special order of court, or on the written consent of attorneys of record for all parties; but the parties may at all times have copies on paying the clerk therefor.

Rule XXIII.

MANDAMUS.

A writ of mandamus, unless otherwise specially ordered, shall be served on or before the second Monday next after the date thereof; and the writ shall command the defendant, or defendants, to return and answer the same on or before the third Saturday after said second Monday at the place of the holding of the court, to be named in the writ.

Rule XXIV.

CAUSES TAKEN UNDER ADVISEMENT, IN CIRCUIT COURT.

No case in the circuit court shall be reserved and taken under advisement for decision in another county on the circuit, except by the consent of both the parties or their counsel; and in such cause an order shall be made on the journal of the court that the cause is so taken under advisement for decision in a county, in the district to be named.

And after a decision of a cause on a circuit, it shall be certified back and entered in the court of the county from which it was taken.

Rule XXV.

CONTINUANCE.

In all applications for the continuance of a cause in the circuit court, and for a second continuance in the common pleas, on the ground of inability to procure the testimony of an absent witness, the party making the application shall state in his affidavit what he expects to prove by such witness, and also what acts of diligence he has employed to procure the testimony of such witness, and if the court find the testimony material, and that due diligence has been

used, said cause may be continued, unless the opposite party consent to the reading of such affidavit in evidence; in which case the trial may proceed, and said affidavit be read on the trial, and treated as a deposition of an absent witness.

First applications for continuance in the common pleas shall be subject to such regulations as that court shall adopt.

Rule XXVI.

RECORD IN CASE APPEALED.

In cases in which notice of appeal is entered in the common pleas and perfected, no record shall be made up in the court of common pleas, except at the request and cost of the party desiring the same to be done.

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(174 Ind. 729)

HOLLIDAY et al. v. ANHEIR. (No. 21,580.)
(Supreme Court of Indiana. Nov. 29, 1910.)

**APPEAL AND ERROR (§ 757*)—REVIEW—ERROR
WAIVED IN THE APPELLATE COURT.**

On appeal, defendants assigned as error, the overruling of their demurrer to the complaint and the sustaining of the demurrer to their answer. In their brief, they failed to set out a copy of each demurrer, their substance, a succinct statement or the ground thereof as required by clause 5 of Supreme Court rule 22. Plaintiff's brief objected to considering these errors, but defendants failed to remedy theirs. Held, that the errors assigned were waived in the appellate court and would not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8092; Dec. Dig. § 757.*]

Appeal from Circuit Court, White County; H. C. Sheridan, Special Judge.

Action by Anthony A. Anheir against Charles A. Holliday and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A. W. Reynolds and E. B. Sellers, for appellants. Palmer & Carr and William E. Uhl, for appellee.

MONKS, J. Appellee brought this action to foreclose certain sewer assessment liens. Said sewer was constructed in 1907, in the town of Monticello under section 285, and the sections there mentioned, of the Cities and Towns Act of 1905 (Acts 1905, pp. 404-407) being section 8959, Burns' Ann. St. 1908. The alleged errors relied on for reversal are: (1) The overruling of the separate demurrer to each paragraph of the complaint; (2) the sustaining of the demurrer to appellants' answer.

Appellee insists that as appellants have not set out in their brief a copy of each of said demurrers, their substance, a succinct statement or the grounds thereof as required by clause 5 of rule 22 of this court, said alleged errors are waived, citing a number of cases. Appellee's brief objecting to the consideration of said assignment of errors on account of appellants' failure to comply with said rule was filed on April 13, 1910, but appellants have for more than six months ignored the same and taken no steps to amend

their brief or otherwise comply with said rule. *Tisdale v. State*, 167 Ind. 83, 78 N. E. 324, and cases cited; *Ellison v. Ryan*, 43 Ind. App. 610, 612, 613, 87 N. E. 244; *State v. Lukins*, 48 Ind. App. 841, 87 N. E. 248. It has been uniformly held that when a party fails to comply with the requirements of said rule that he waives the error, if any was committed. *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 142, 72 N. E. 869, and cases cited. *Chicago, etc., R. Co. v. Walton*, 165 Ind. 253, 74 N. E. 1090; *Myers v. State*, 171 Ind. 678, 87 N. E. 141, and cases cited; *Hall v. McDonald*, 171 Ind. 17, 85 N. E. 707; *American Food Co. v. Halstead*, 165 Ind. 633, 76 N. E. 251, and cases cited; *Wirrick v. Boyles* (Ind. App.) 91 N. E. 621, 622. It follows that no question is presented for our determination.

Judgment is therefore affirmed.

(174 Ind. 730)

STATE ex rel. HARKRIDER v. HARRINGTON. (No. 21,591.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. APPEAL AND ERROR (§ 194*) — PREREQUISITES — NECESSITY OF TIMELY OBJECTION — RULING ON DEMURRER.

Where defendant answered after demurring, plaintiff waived his right to object to the consideration of the demurrer by arguing the issues raised by it, so that such objection could not for the first time be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 194;* Pleading, Cent. Dig. § 1399.]

2. MANDAMUS (§ 160*)—ALTERNATIVE WRIT—SUFFICIENCY—ALLOWANCE OF APPEAL.

An alternative writ of mandamus must show that the act sought to be compelled is within the power of the respondent and that it is his duty to do it, and hence an alternative writ directed to a township trustee seeking to compel him to allow an appeal to the county superintendent of schools from the denial of a petition for the establishment of a high school, must allege that the appeal was taken within 30 days from the decision complained of, as required by Burns' Ann. St. 1908, § 6687, and that an appeal bond with proper security was filed for approval by the trustee as required by sections 1790, 1791.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 826, 827; Dec. Dig. § 160.*]

Appeal from Circuit Court, Benton County; James T. Saunderson, Judge.

In the matter of the State of Indiana, on the relation of William R. Harkrider, against H. L. Harrington, Trustee of Center Township, Benton County, Ind. Judgment for defendant, and plaintiff appeals. Affirmed.

Will R. Wood, for appellant. B. B. Berry and Elmore Barce, for appellee.

MONKS, J. This proceeding was brought by the relator to compel appellee by writ of mandate to perform an alleged legal duty. It is alleged in the complaint and alternative writ: That the relator "is a resident of Center School township, Benton county, Ind., and has under his care and control a minor child of school age entitled to all the rights, privileges, and immunities of the public schools and of all the grades of the public schools, including the high school warranted by the laws of the state of Indiana." That on the 19th day of July, 1909, the relator, "together with 32 other citizens of said school township, entitled to the privileges of the school of said township, petitioned the defendant hereinabove named, H. L. Harrington, asking and requesting and praying that a graded school for the teaching of English, history, algebra, Latin and other languages, such as pertain to a high school course of teaching and training, be established and taught in District No. 5 in Center township, Benton county, Ind., of which said township said petitioners were then and there residents and authorized to file said petition." That said petition was on July 26, 1909, denied, and an appeal prayed to the county superintendent, and which was, on July 29, 1909, refused. "Wherefore your relator prays the court for a writ of mandamus requiring said defendant to grant the prayer of said petition for said appeal to said county superintendent, and for an order directing said defendant to grant said appeal and to transmit the petition filed for the establishment of said high school, together with all the other papers with reference to the same filed with him and all the orders and decisions in reference to the same, and for all other proper relief." The record shows that appellee filed a demurrer for want of facts to the complaint and alternative writ, "also a motion to quash the alternative writ," and "also a return to said alternative writ, which return is in two paragraphs." "After argument of counsel as to the sufficiency of the complaint and writ the court takes the matter under advisement." Afterwards on November 12, 1909, the court sustained said demurrer, to which ruling the relator excepted and refusing to plead further the court rendered judgment in favor of appellee.

The only error assigned calls in question the action of the court in sustaining said demurrer. The relator first insists that "a

party cannot at the same time demur to and answer a complaint. By answering he waives his demurrer"; citing *Hosier v. Ellison*, 14 Ind. 523; *City of Jeffersonville v. Steam Ferry Boat, etc.*, 35 Ind. 19; *Earhart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226. It may be conceded that the appellee, by filing the return to the alternative writ after he filed his demurrer to said writ, waived a ruling on said demurrer. But there is nothing in the record showing that the relator objected to the consideration or determination by the trial court of the issue of law presented by said demurrer to the alternative writ, on account of the same having been waived by the filing of said return; on the contrary the record shows, that after said demurrer and return were filed, the issue of law presented by said demurrer to the alternative writ was argued by counsel and submitted to the court and that afterwards the court sustained said demurrer to the alternative writ and rendered final judgment against the relator. It is well settled that objections like the one under consideration not seasonably made in the trial court are waived and completely lost because they cannot be made for the first time on appeal. *Elliott's Appellate Proc.* §§ 674, 675; *Pulley v. State*, 92 N. E. 550, 551, and cases cited. It follows that the relator having argued and submitted the issue of law made by the demurrer as to the sufficiency of the alternative writ without making any objection to the consideration of said issue on the ground of waiver, said objection was waived and cannot be made for the first time in this court.

The only question to determine is whether or not said alternative writ stated facts sufficient to constitute a cause of action against appellee. It is well settled that to be sufficient the alternative writ must allege facts showing that it is the officer's duty and that he has the power to perform the act sought to be enforced and that to avail himself of a statute the relator must by allegation and proof bring himself within its terms. *State ex rel. v. John, Trustee*, 170 Ind. 233, 84 N. E. 1, and cases cited; *Town of Windfall City v. State ex rel.*, 172 Ind. 302, 306, 88 N. E. 505, and cases cited; *Town of Windfall City v. State ex rel.*, 92 N. E. 57, 58, and cases cited; *Wier v. State*, 161 Ind. 435, 438, 68 N. E. 1023. An appeal may be taken from the decision of a township trustee relative to school matters, to the county superintendent (section 6667, *Burns' Ann. St.* 1908), but the same must be taken within 30 days from the rendition of such decision, and an appeal bond filed with said township trustee with security to be approved by the trustee. Sections 1790, 1791, *Burns' Ann. St.* 1908; *Wier v. State ex rel.*, 161 Ind. 435, 439, 68 N. E. 1023; *Edwards v. State*, 143 Ind. 84, 89, 42 N. E. 525. It is evident that an appeal can only be taken by complying with the conditions prescribed

by said sections as to the time of taking the same and filing the appeal bond with proper security. It is not averred in the alternative writ nor in the complaint therefor that any appeal bond with sufficient security was filed with or tendered to appellee for his approval.

It follows that said alternative writ was insufficient for this reason. Other objections are urged to the sufficiency of the alternative writ but as it is insufficient for the reason stated it is not necessary to consider them.

Judgment affirmed.

(174 Ind. 715)

STATE v. TUCKER. (No. 21,633.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. INCEST (§§ 1, 4*)—STATUTORY OFFENSE.

"Incest" is defined as "sexual intercourse between persons so nearly related that marriage between them would be unlawful," and the offense is purely statutory, since it was not a crime at common law, but was within the cognizance of, and punishable by, the ecclesiastical courts, and since the canon law has not become a part of the law of Indiana.

[Ed. Note.—For other cases, see Incest, Cent. Dig. §§ 1, 2; Dec. Dig. §§ 1, 4.*

For other definitions, see Words and Phrases, vol. 4, pp. 3491, 3492; vol. 8, p. 7634.]

2. WORDS AND PHRASES—"KIN."

The primary and ordinary meaning of the word "kin" is related by the tie of consanguinity.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 3931.]

3. INCEST (§ 5*)—OFFENSES—"NIECE."

To constitute incest under Burns' Ann. St. 1908, § 2352, punishing sexual intercourse between uncle and niece, when construed in connection with section 8357, making males and females not nearer of kin than second cousins competent to marry, the uncle and niece must be related by blood; the word "niece" in its primary sense including relationship by consanguinity.

[Ed. Note.—For other cases, see Incest, Cent. Dig. §§ 3, 4; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 5, pp. 4807, 4808.]

Appeal from Circuit Court, Crawford County; C. W. Cook, Judge.

James H. Tucker was indicted for crime, and, from a judgment overruling a demurrer to the answer and discharging accused, the State appeals. Affirmed.

James Bingham, Alexander G. Cavins, Edward M. White, and William H. Thompson, for the State. John H. Lockett and William T. Zenor, for appellee.

MONTGOMERY, J. Appellee was charged with criminal incest, in having had sexual intercourse with his niece, knowing her to be such. He filed a special answer averring that his alleged niece was not related to him by consanguinity, but was the daughter of his wife's sister, both of whom were liv-

ing. The state's demurrer to this answer was overruled, and, electing to stand upon such demurrer, the accused was discharged, and the state appealed and has assigned this ruling as error.

The propriety of the practice adopted to present the legal question involved has not been challenged, and we shall assume that the matter is properly before us for decision.

The relevant parts of the statute upon which this prosecution was based are as follows: "If any uncle or aunt shall have sexual intercourse with his or her niece, or nephew, having knowledge of his or her relationship, or if any nephew or niece shall have sexual intercourse with his or her aunt, or uncle, such nephew or niece being over the age of sixteen years and having knowledge of his or her relationship, he or she shall be guilty of incest, and on conviction shall be imprisoned in the state's prison not less than two (2) nor more than twenty-one (21) years, or may be imprisoned in the county jail not less than six (6) months nor more than one (1) year." Acts 1907, p. 101; section 2352, Burns' Ann. St. 1908.

The precise question for determination is whether sexual intercourse between an uncle and niece, related only by affinity, is incestuous within the meaning of this statute.

"Incest" is broadly defined as "sexual intercourse between persons so nearly related that marriage between them would be unlawful." Standard Dictionary. Marriage between persons nearly related is prohibited in every Christian country, and incest has been forbidden to some extent by general custom, from the earliest times, and by peoples very little advanced in civilization. It is generally agreed that marriages between persons in the direct lineal line of consanguinity, and also between brother and sister, are unlawful as against the law of nature, independent of any church canon or statutory prohibition. This inflexible rule arises from the institution of the family, the basis of civilized society; and, the rights, duties, habits, and affections, flowing from that relation. Family intermarriages and domestic licentiousness would inevitably confuse parental and filial duties and affections, and corrupt the moral sentiments of mankind. Christian nations generally, going beyond the family circle, and following with greater or less accuracy the Levitical law, have by specific enactment prohibited marriages between more remote collateral kindred related either by blood or marriage. Incestuous marriages or relations were not formerly punished criminally in England, but such marriages were subject to dissolution and annulment. Incest was not a crime at common law, but was within the cognizance of and punishable by the ecclesiastical courts. 4 Blackstone's Com. 64; Bolen v. People, 184 Ill. 338, 56 N. E. 408; State v. Smith, 30 La.

Ann. 846; *State v. Slaughter*, 70 Mo. 484; *State v. Keesler*, 78 N. C. 469; *State v. Jarvis*, 20 Or. 437, 28 Pac. 302, 23 Am. St. Rep. 141; *Tuberville v. State*, 4 Tex. 128.

In this state "marriage is declared to be a civil contract, into which males of the age of eighteen and females of the age of sixteen, not nearer of kin than second cousins, and not having a husband or a wife living, are capable of entering." Section 8357, Burns' Ann. St. 1908. Cousins are kindred related collaterally by descent from a common ancestor, but not a brother or sister. The "kin" mentioned in this statute are related by the tie of consanguinity, and that is the primary and ordinary meaning of the word. In Supreme Council, etc., v. Bennett, 47 N. J. Eq. 39, 43, 19 Atl. 785, 787, the court said: "The phrase 'related to,' 'relations,' and 'next of kin,' whether used in the statute, will, or contract, have by a perfectly uniform course of decision been held to include only relations by blood, and not connections by marriage, not even a husband or a wife. Bac. Ben. Soc. 260a; 2 Wms. Ex. (8th Am. Ed.) 1118 bottom; *Esty v. Clark*, 101 Mass. 36 [3 Am. Rep. 320]; *Kimball v. Story*, 108 Mass. 382."

Disabilities to marriage have been divided into two classes, canonical and civil; but the only disabilities existing in this country are civil. The marriage of a man to the daughter of his deceased wife's sister would not be unlawful under the provisions of our statute relating to marriage above quoted. But in England such a marriage was held to be within the Levitical degrees, and in violation of the canon law. *Ellerton et ux. v. Gastrell*, 1 Com. R. 318. A table of kindred and affinity, who by Scripture and the laws of England could not intermarry, was published by authority in 1563, and this table was adopted in 1603 as the ninety-ninth canon by a convocation acting in pursuance of license under the Great Seal to agree upon such canons as they approved. This table declared the marriage of a man to the daughter of his wife's sister incestuous and unlawful. *Shelford on Marriage & Divorce*, p. 147, note "h." The letter of the Levitical law did not prohibit such marriages, but they were held by the ecclesiastical courts to come within its spirit, since marital intercourse between blood kindred related in the same degree was therein forbidden. In the more recent English cases examined, involving criminal incest between uncle and niece, the relationship is shown to be by blood. *Burgess v. Burgess*, 1 Hagg. Cons. 384; *Griffiths v. Reed et al.*, 1 Hagg. 195. The canon law of England was never a part of the law of this state; but the crime of incest is purely statutory. In that jurisdiction the marriage of a man to his deceased wife's sister is regarded as incestuous; but it is otherwise in this state. An early statute provided "that male persons of the age of

age of twelve years, and not prohibited by the laws of God, may be joined in marriage." Acts 1818, p. 224. The section penalizing incest was as follows: "If any person shall be guilty of incest, the person or persons so offending shall upon conviction be publicly whipped not exceeding fifty stripes, and fined in any sum not exceeding one thousand dollars." Acts 1818, p. 95. While these statutes were in force, it was held that charging a man with having had illicit intercourse with his wife's sister did not constitute a charge of criminal incest. *Dukes v. Clark*, 2 Blackf. 20.

The statutes of other states shed no light on the question before us, since they generally provide in terms that the relationship must be by consanguinity to constitute incest, or, as in Ohio, specifically include relationship by affinity. All the cases decided by state courts involving the crime of incest between uncle and niece, which we have been able to find, disclose a relationship by blood. *State v. Reedy*, 44 Kan. 190, 24 Pac. 66; *State v. Gulton*, 51 La. Ann. 155, 24 South. 784; *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260; *State v. Harris*, 149 N. C. 513, 62 S. E. 1090, 128 Am. St. Rep. 669; *Shelly v. State*, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926; *State v. James*, 32 Utah, 152, 89 Pac. 460; *State v. Dana*, 59 Vt. 614, 10 Atl. 727; *State v. Pennington*, 41 W. Va. 599, 23 S. E. 918. Mr. Story, in his work on Conflict of Laws (section 115) says there is a clear and just moral difference between the marriage or sexual intercourse of persons related by consanguinity and that of persons related only by affinity.

It is, of course, within the power of the Legislature to inhibit marriages and to punish carnal intercourse as incestuous, between persons related only by affinity. The immediate question is whether the General Assembly of Indiana has included relations by affinity in the prohibitions of this act. The act is penal, and therefore its terms must be strictly construed. In its primary sense "niece" means and is understood to include relationship by consanguinity. The crime of incest, as we have seen, has grown out of the violations of marriage restrictions. The statute defining criminal incest should, accordingly, be construed in connection with that prescribing qualifications for marriage. Our statute governing marriage does not prohibit a marriage between uncle and niece by affinity, and some of the reasons forbidding incestuous relations do not apply to such a union. We are brought to the conclusion, therefore, that to constitute the crime of incest by uncle and niece under the provisions of the act under consideration they must be such kindred by the ties of consanguinity.

It follows that the court did not err in discharging appellee, and the judgment is affirmed.

(175 Ind. 450)

LOUISVILLE & S. I. TRACTION CO. v. KORBE. (No. 21,793.)¹

(Supreme Court of Indiana. Nov. 29, 1910.)

1. CARRIERS (§ 314*)—INJURIES TO PASSENGERS—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to a street car passenger while attempting to alight, which shows that a signal was given to stop the car at a regular stopping place, and that the accident happened at such stopping place, is not defective for failing to allege that the place of the accident occurred where the street railway company was required to stop to permit passengers to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273-1279; Dec. Dig. § 314.*]

2. APPEAL AND ERROR (§ 1031*)—ERRONEOUS INSTRUCTIONS—PRESUMPTIONS.

The legal presumption is that an erroneous instruction operated to the substantial prejudice of the defeated party, in the absence of a clear showing to the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4043; Dec. Dig. § 1031.*]

3. CARRIERS (§ 280*)—PASSENGERS—CARE REQUIRED.

A street railway company, as a carrier of passengers, is not an insurer of their safety, but must exercise the highest degree of care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1065-1092, 1096-1106, 1109, 1117; Dec. Dig. § 280.*]

4. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—INSTRUCTIONS.

An instruction, in an action for injuries to a street car passenger, caused by the sudden starting of the car on signal of the conductor while the passenger was alighting, that the conductor must see that no passenger was alighting was erroneous, as imposing on the conductor an absolute duty instead of the duty of exercising the highest degree of care.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1326-1337; Dec. Dig. § 321.*]

5. TRIAL (§ 251*)—INSTRUCTIONS.

Where the gist of the charge made by the complaint in an action for injuries to a street car passenger while alighting was the sudden starting of the car, throwing the passenger to the ground, a charge that if the car stopped in obedience to a signal and if while the passenger was on the running board to alight, the company's servants, without notice, negligently put the car in motion, throwing the passenger to the ground, it was liable, was not objectionable as not pertinent to the issue tendered by the complaint.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 537-595; Dec. Dig. § 251.*]

Appeal from Circuit Court, Clark County; Harry C. Montgomery, Judge.

Action by Mary Korbe against the Louisville & Southern Indiana Traction Company. From a judgment for plaintiff, defendant appealed to the Appellate Court and it transferred the case to the Supreme Court under Burns' Ann. St. 1908, § 1394. Reversed and new trial ordered.

For opinion in Appellate Court before transfer, see 90 N. E. 483.

George H. Voight and Charles D. Kelso, for appellant. Stotsenburg & Weathers, for appellee.

JORDAN, J. As disclosed by appellee's complaint, appellant railroad company is a corporation duly organized, etc. It owns and operates an electric street railroad in the city of New Albany, Floyd county, Ind., and is a common carrier of passengers for hire over its road. It further appears from the complaint that on August 29, 1908, plaintiff below (appellee herein) became and was accepted by appellant as a passenger on one of its cars so owned, controlled, managed, and conducted by it in the city of New Albany; that she became a passenger on the car at the north terminus of the State street line in said city and she desired to be carried as a passenger on the car to the intersection of State and Spring streets in that city, a regular stopping place on signal to the conductor of the car. As the car upon which she had taken passage reached said regular stopping place, one of the passengers thereon gave the usual signal to the conductor in charge of the car for stopping; that the conductor signaled the motorman to stop the car at said stopping place; that as the car was stopping the plaintiff arose from her seat therein and while it was moving very slowly she stepped with one foot on the running board of the car so that she could quickly alight therefrom when the car came to a full stop. While the plaintiff was so in the act of stepping on the running board, the conductor in charge of the car negligently signaled the motorman to start the car, and in response to such signal the car was suddenly, and to the plaintiff unexpectedly, started forward with a sudden and unexpected movement thereof, by reason of which plaintiff was thrown to the ground and injured.

The answer was a general denial. Trial by jury and general verdict returned in favor of plaintiff; also answers to a series of interrogatories were returned by the jury. Over appellant's motion for a new trial judgment was rendered on the general verdict. The errors relied upon for a reversal are: (1) Overruling demurrer to the complaint. (2) Overruling motion for a new trial.

The complaint is said to be defective because it does not allege that the place where the accident in question occurred was one where appellant company was required to stop for the purpose of permitting passengers to alight from its cars. This criticism, under the facts alleged, is untenable for the complaint shows that a signal was given to stop the car upon which plaintiff was a passenger at a regular stopping place, being the intersection of State and Spring streets in said city of New Albany. It was at the latter place where the accident happened. This point or place being a regular or usual stopping place on appellant's line to receive and discharge passengers, it certainly may be said to be one at which the company was re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹Rehearing denied, 94 N. E. 763.

quired to stop to receive and discharge passengers from its cars. The complaint is not open to the criticism in question.

The court, at the request of appellee, gave the jury instruction No. 4, which is as follows: "If a car stops at a place where cars are accustomed to stop for the discharge of passengers, a passenger desiring to alight has a right to assume that the car will remain standing long enough to enable all who desire to do so to safely alight from said car. You are instructed that stopping a reasonable time for a passenger to alight from such car is not sufficient but it is the duty of the conductor or other person in charge of a street car to see and know that no passenger is in the act of alighting from such car or in a dangerous position before putting the car, of which he is in charge, in motion again."

Counsel for appellant argue that this charge is bad because it does not distinguish between the duty to do a certain thing and the care necessary to be exercised in the performance of such duty. The charge is palpably erroneous, and, in the absence of a clear showing by appellee to the contrary, the legal presumption is that the instruction operated to the substantial prejudice of appellant. *Cleveland, etc., R. Co. v. Case*, 91 N. E. 238.

Appellant company, as a common carrier of passengers, is not an insurer of their safety. The law limits its duty in respect to its passengers to the exercise of the highest degree of care. *Indiana Union Traction Co. v. Kelter* (at last term) 92 N. E. 982, and authorities there cited.

In this latter case we said: "While appellant as a common carrier of passengers is not, under the law, an insurer of their safety, nevertheless the law requires of it the exercise of the highest degree of care consistent with the mode of its conveyance and the practical prosecution of its business for the safety and protection of its passengers, and it is bound to continue the exercise of such care until its passengers have alighted from the cars at the end of their destination at the usual place of stopping the cars."

The instruction in question is open to the vice that it advises the jury as a legal proposition that it is the duty of a conductor, or other person in charge of a street car, to see and know that no passenger is in the act of alighting therefrom or in a dangerous position before putting the car in motion. The negligence of appellant in starting its car while appellee was in the act of alighting therefrom was a question in issue to be determined by the jury. Or, in other words, the jury was to determine whether or not the conductor, had he exercised the care exacted by the law, might have seen or known that appellee was in the act of alighting from the car at the time it was started. The charge

was equivalent to informing the jury that under all circumstances it is the duty of a conductor in charge of a street car to see and know that no passenger is in the act of alighting from such car. Whether appellant's conductor in charge of the car in question, had he exercised the care required by law, could have seen or could have known that appellee was in the act of alighting from the car at the time he put it in motion was not a question of law, but one of fact to be determined by the jury under proper instructions by the trial court.

Appellant next complains of charge No. 10 given at the request of appellee. By this charge the court in substance advised the jury that if the preponderance of the evidence established that the car upon which the plaintiff was riding was stopped in obedience to a signal at said stopping place, and that at the time she went upon or was upon the running board provided for the purpose preparatory and for the purpose of alighting therefrom, and that while she was so situated and before she could alight but while in the act of alighting and while using due care, the defendant's servant in charge of the car, without notice or warning to the plaintiff, negligently put the car in motion and thereby, without negligence on plaintiff's part contributing thereto, threw her to the ground and injured her, defendant would be liable.

It is insisted that this instruction is not pertinent to the issue tendered by the complaint. In this, however, appellant's counsel are mistaken. The gist of the charge as made by the complaint is that appellant suddenly started its car, and by that act threw appellee to the ground, and she was thereby injured.

Other questions relative to instructions are argued by appellant's counsel, but as a new trial must be ordered and as it does not appear that these questions will again necessarily arise, we pass them without consideration.

For the error of the court in giving instruction No. 4 as requested by appellee, the judgment is reversed and a new trial ordered.

(174 Ind. 705)

STATE ex rel. DRUDGE v. DAVISSON,
County Surveyor. (No. 21,768.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. NEW TRIAL (§ 125*)—GROUNDS—INSUFFICIENCY OF THE EVIDENCE.

Under Burns' Ann. St. 1908, § 585, authorizing a new trial for insufficiency of the evidence, the cause for a new trial for insufficiency of the evidence must be addressed to the findings of the court or the verdict, and not to the sufficiency of the evidence to sustain the judgment based on the finding or verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 254, 255; Dec. Dig. § 125.*]

2. NEW TRIAL (§ 24*)—JUDGMENT (§ 305*)—IMPROPER JUDGMENT—REMEDY.

The remedy for an imperfect judgment rendered on the facts found is by a motion to modify the judgment, and not by a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 35; Dec. Dig. § 24;* Judgment, Cent. Dig. §§ 596, 597; Dec. Dig. § 305.*]

3. APPEAL AND ERROR (§ 294*)—ASSIGNMENTS OF ERROR—REVIEW.

Assignments that the judgment was not fairly supported by the evidence, that the decision of the court was not fairly supported by the evidence, that the judgment was clearly against the weight of the evidence, and that the decision of the court was clearly against the weight of the evidence, are not independent assignments of error, and the questions they seek to raise can be reviewed only through the medium of a motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1724-1735; Dec. Dig. § 294.*]

4. APPEAL AND ERROR (§ 995*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court will not weigh conflicting oral evidence or evidence of any character, where it cannot be placed in as favorable a situation as the trial court to correctly weigh it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. § 995.*]

Appeal from Circuit Court, Fulton County; Harry Bernetha, Judge.

Mandamus by the state on the relation of Jere Drudge against A. Clinton Davisson, county surveyor. From a judgment for defendant, relator appealed to the Appellate Court and it (92 N. E. 864) transferred the cause to the Supreme Court. Affirmed.

Rowley & Mattice, for appellant. J. H. Bibler and Holman & Stephenson, for appellee.

HADLEY, J. In a regular proceeding, the relator entered into a contract with appellee, as county surveyor, to clean out a part of an established public ditch. The relator, claiming to have completed the job according to the contract, demanded approval and acceptance by appellee, and payment, which was refused on the ground that the work was not performed as required by the contract. Whereupon, the relator brought mandamus to enforce, against appellee, an approval and payment. The only issue tried was, whether the work had been accomplished in accordance with the contract. The trial was before the court. Many witnesses were called and examined by both parties, and there was a finding and judgment against appellant.

The latter assigned but two reasons for a new trial, as follows: (1) The judgment is not sustained by sufficient evidence. (2) The judgment is contrary to law. The motion for a new trial was overruled, and in this court he makes the following assignments of error: (1) The court erred in overruling appellant's motion for a new trial. (2) The judgment appealed from is not fairly supported by the

evidence. (3) The decision of the court is not fairly supported by the evidence. (4) The judgment appealed from is clearly against the weight of the evidence. (5) The decision of the court is clearly against the weight of the evidence. As contended by appellee, these assignments are insufficient to present any question to this court.

First, as to the causes assigned for a new trial: The complaint is not addressed to the finding of the court, as the statute contemplates (section 585, Burns' Ann. St. 1908), but to the judgment based upon that finding. The important distinction between the two seems to have been overlooked. A finding of the court, or verdict of the jury, may be fully sustained by the evidence, and the judgment rendered upon that finding, or verdict, erroneous. Such an occurrence is not infrequent. Hence, our Code of Procedure requires that the remedy for an imperfect finding upon the facts in issue must be sought by a motion for a new trial, thus to give the trial court, upon a review, an opportunity to correct the error, and the remedy for an imperfect judgment rendered upon the facts found must be sought by a motion to modify the same. A new trial of the cause can effect no relief in cases where the vice or imperfection complained of is rooted in the form or substance of the judgment. Section 585, supra, enumerates eight causes for which a new trial may be granted, but we find no sanction in any of them for entertaining those presented by appellant. Such has been the unvarying ruling of this court. *Hall v. McDonald*, 171 Ind. 9-18, 85 N. E. 707; *Migatz v. Stieglitz*, 166 Ind. 361, 364, 77 N. E. 400; *Lynch v. Harvester Co.*, 159 Ind. 675, 65 N. E. 1025; *Gates v. Railroad Co.*, 154 Ind. 338, 56 N. E. 722; *Rodefer v. Fletcher*, 89 Ind. 563; *Rosenzweig v. Frazer*, 82 Ind. 342; *Hubbs v. State*, 20 Ind. App. 181, 50 N. E. 402.

Assignments numbered 2, 3, 4, and 5 are unknown to the statute, and cannot be recognized as independent assignments of error. The questions they seek to invoke can reach this court only through the medium of a motion for a new trial. *Van Buskirk v. Stover*, 162 Ind. 448, 450, 70 N. E. 520; *Zimmerman v. Gaumer*, 152 Ind. 552, 554, 53 N. E. 829; *Migatz v. Stieglitz*, 166 Ind. 361, 364, 77 N. E. 400; *Parkison v. Thompson*, 164 Ind. 609, 618, 73 N. E. 109.

We will say, however, in passing, with respect to the duty of this court to weigh oral evidence, that appellant plainly misapprehends the holding in *Parkison v. Thompson*, supra, the doctrine of that case, and which has been subsequently followed in *Ray v. Baker*, 165 Ind. 74, 91, 74 N. E. 619, *Seiberling v. Porter*, 165 Ind. 7, 12, 74 N. E. 516, *Karges Furniture Co. v. Union*, 165 Ind. 421, 423, 75 N. E. 877, 2 L. R. A. (N. S.) 788, *Tinkle v. Wallace*, 167 Ind. 382, 394, 79 N.

E. 355, is to the effect that this court, in cases where there is a substantial conflict in the testimony, will not undertake to weigh oral evidence, or evidence of any character, where this court cannot be placed in as favorable a situation as the trial court to correctly weigh it.

Judgment affirmed.

(174 Ind. 726)

INSKEEP et al. v. GILBERT et al.
(No. 21,791.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. DRAINS (§ 36*)—APPEAL—BOND—TIME TO FILE.

An appeal bond, filed and approved within 30 days after the overruling of a motion for a new trial in drainage proceedings, is within the time required by Burns' Ann. St. 1908, § 6143.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 36.*]

2. APPEAL AND ERROR (§ 395*) — APPEAL BONDS—DEFECTS—EFFECT.

Defects, if any, in an appeal bond are cured by Burns' Ann. St. 1908, § 1278, providing that no bond shall be void for want of form or substance, but the principal and surety shall be bound as contemplated by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2064-2070, 3127; Dec. Dig. § 395.*]

3. NEW TRIAL (§ 125*)—GROUNDS.

Assignments of causes for a new trial that the judgment is not sustained by evidence and that the judgment is contrary to law are unauthorized; the remedy against such errors being through an exception to or motion to modify the judgment.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 264, 255; Dec. Dig. § 125.*]

Appeal from Circuit Court, Wells County; Charles E. Sturgis, Judge.

Proceedings by Philip H. Gilbert and others for the tiling of an open public drain, and Sarah E. Inskeep and others filed remonstrances. From a judgment for petitioners, remonstrators appeal. Affirmed.

Frank W. Gordon and M. W. Walbert, for appellants. Elchhorn & Vaughn, for appellees.

MONKS, J. This proceeding was brought by appellees before the board of commissioners of Wells county under section 19 of the drainage act of 1905 (Acts 1907, p. 535), being section 6174, Burns' Ann. St. 1908, for the tiling of an open public drain.

At the proper time appellants each filed a separate remonstrance and the cause was tried by said board of commissioners and judgment rendered confirming the report and establishing said proposed work. Appellants appealed from said judgment to the court below where the cause was again tried and the court found in favor of appellees, and over the separate motion for each appellant for a new trial, rendered judgment confirming the assessments and establishing said

proposed work. From this judgment appellants appeal.

Appellees have filed a motion in this court to dismiss said appeal for the reason that the appeal bond was not filed within 30 days after the assessments were approved by the court below, as required by section 4 of the act of 1907 (Acts 1907, p. 515), being section 6143, Burns' Ann. St. 1908.

It was held by this court in *Smith v. Blesaida*, 90 N. E. 1009, that it is allowable to file a motion for a new trial in such cases and that said 30 days does not commence to run if such motion is filed after the assessments are approved by the court until said motion for a new trial is overruled. See, also, *Prough v. Prough*, 91 N. E. 387. It appears from the record that the appeal bond was filed and approved within 30 days after said motion for a new trial was overruled, which was within the time required by said section 6143, supra, as held by this court in *Smith v. Blesaida*, supra.

Objections are urged against the form of said bond but such defects, if any, are cured by section 1278, Burns' Ann. St. 1908. The motion to dismiss this appeal is therefore overruled.

The only errors properly assigned in this court call in question the action of the court in overruling each of appellants' separate motions for a new trial. The causes for a new trial assigned in each of said motions are "that the judgment of the court is not sustained by sufficient evidence," and "that the judgment of the court is contrary to law." It has been uniformly held that causes for a new trial in the language of those in appellants' motions were unauthorized and insufficient in civil cases. *Ewbank's Manual*, § 46; *Woollen's Trial Proc.* §§ 4420, 4424, and cases cited; *Notes to Clause 6*, § 585 Burns' Ann. St. 1908; *State ex rel. v. Davisson* (No. 21,763, this term) 93 N. E. 6; *Hall v. McDonald*, 171 Ind. 9, 18, 85 N. E. 707; *Migatz v. Stiegiltz*, 166 Ind. 361, 364, 365, 77 N. E. 400; *Lynch v. Harvester Co.*, 159 Ind. 675, 677, 65 N. E. 1025, and cases cited; *Gates v. Railroad Co.*, 154 Ind. 338, 343, 56 N. E. 722, and cases cited; *Rodefer v. Fletcher*, 89 Ind. 563, and cases cited; *Rosenzweig v. Fraser*, 82 Ind. 342; *Hubb v. State*, 20 Ind. App. 181, 50 N. E. 402.

In *Rodefer v. Fletcher*, supra, the causes for a new trial were assigned in the same terms as to the judgment as in the case at bar, and the court, quoting from *Rosenzweig v. Frazer*, supra, said: "These are not statutory causes for a new trial. * * * It is cause for a new trial if the verdict or finding is not sustained by the evidence or is contrary to law, but not so of the judgment. It frequently occurs that, upon verdicts or findings in strict accord with the law and the evidence, judgments contrary to both the law and the evidence are rendered. But, as has

been often decided, the remedy against such errors must be sought through an exception to, or a motion to modify, the judgment."

It follows that appellants' motions "for a new trial were not sufficient, either in form or substance, to call in question below the correctness of the court's finding under the law or evidence, and that the rulings upon such motions present no question for our decision."

Judgment affirmed.

(174 Ind. 670)

TAYLOR v. TAYLOR et al. (No. 21,899.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. WILLS (§ 53*)—TESTAMENTARY INCAPACITY—EVIDENCE.

In a suit to revoke a will for testamentary incapacity, much latitude should be allowed in the admission of evidence of testator's condition prior and subsequent to the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111-130; Dec. Dig. § 53.*]

2. WILLS (§ 53*)—TESTAMENTARY INCAPACITY—EVIDENCE.

The question of the admissibility of evidence of the mental condition of testator prior and subsequent to the execution of his will, attacked for testamentary incapacity, is one of relevancy, and the inquiry must be sufficiently near in point of time to aid the jury in determining the mental condition at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111-130; Dec. Dig. § 53.*]

3. APPEAL AND ERROR (§ 1056*)—ERRONEOUS RULINGS ON EVIDENCE—REVIEW.

The court will reverse for the rejection of material and competent evidence going to a material point in issue and not speculative.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

4. INSANE PERSONS (§ 26*)—INQUISITIONS—CONCLUSIVENESS OF ADJUDICATION.

An adjudication in lunacy proceedings that a person is of unsound mind and incapable of managing his estate is only prima facie evidence of mental incapacity.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 26.*]

5. WILLS (§ 53*)—TESTAMENTARY INCAPACITY—EVIDENCE—ADMISSIBILITY.

Where, in a suit to set aside the probate of a will on the ground of testamentary incapacity, the evidence showed that testatrix was stricken with apoplexy a year before the execution of her will, and that she survived about 7½ years, and there was direct evidence of her mental capacity at the time of the execution of her will, the exclusion of the petition, answer, and judgment in lunacy proceedings, resulting in an adjudication that she was of unsound mind, rendered five years after the making of the will, was not erroneous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111-130; Dec. Dig. § 53.*]

6. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS—REQUISITES.

A hypothetical question must embrace facts of which there is some evidence or which may fairly be inferred from the evidence, and where the facts assumed in the question are clearly

so exaggerated as to impair the opinion, or are such manifest assumptions as to be misleading, it should be excluded, and its admission may be prejudicial error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

7. EVIDENCE (§ 570*)—HYPOTHETICAL QUESTIONS—REQUISITES.

The value of an opinion given in response to a hypothetical question depends on there being evidence, admissions, or facts proved on which it is based.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 570.*]

8. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS—REQUISITES.

A party may put his hypothetical case in putting hypothetical questions to an expert as he claims it to be proved or within reasonable inferences from the evidence, and the jury will determine whether it is so supported by the evidence as to be of any value, or as to the weight they will give it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

9. EVIDENCE (§ 553*)—HYPOTHETICAL QUESTIONS—CROSS-EXAMINATION.

The opinion of an expert given in response to a hypothetical question may be tested by cross-examination, by omissions and additions to the original question, or by a new statement of facts.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 553.*]

10. APPEAL AND ERROR (§ 1053*)—ERRONEOUS ALLOWANCE OF QUESTIONS PUT TO EXPERTS—CURED BY INSTRUCTIONS.

The error in allowing a hypothetical question because inserting facts not supported by evidence was cured by an instruction that, if any of the facts contained in the question were not proved by evidence, they were not to be taken as true, and, if of such character as to destroy the reliability of the opinion based on the hypothesis stated, the jury should attach no weight to the opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

11. WILLS (§ 561*)—ESTATES DEVISED—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A testatrix owned the W. ½ of the N. E. ¼, and 20 acres of the N. E. ¼ and the S. 21.18 acres of the N. E. ½ of the N. E. ¼ of a section. A public highway ran north and south along the east line of the 21.18 acres. The house was on the latter tract and the barn on the adjacent 80-acre tract. By will she gave "41½/100 acres off the east end of the 121½/100 acre tract" to her husband for life with gift over, excepting a half acre erroneously described as located in northeast instead of the southeast corner, deeded to a third person and the east half of the remaining 80 acres she devised to another and the west half to another. *Held*, that the description in the quoted phrase was sufficient to locate the 41.18 acres lying farthest to the east, and the fact that the one-half acre was erroneously described did not prevent its identification.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1221-1224; Dec. Dig. § 561.*]

12. WILLS (§ 560*)—ESTATES DEVISED—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A will so describing the real estate devised as to furnish means of identifying it sufficiently describes the property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1216-1220; Dec. Dig. § 560.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

13. WILLS (§ 330*)—TESTAMENTARY CAPACITY—INSTRUCTIONS.

Where, in a suit to set aside the probate of a will, it was urged to show mental incapacity that testatrix furnished no outlet to land devised to the devisee attacking the will, an instruction that if the tracts devised to the devisee complaining and to another were without any public highway on their borders, and ingress and egress to and from them at the time the will was made were by means of private roadways, the roadways would be appurtenant to the tracts and would pass by the devise, and the devisee could not be lawfully excluded from their use, was sufficiently favorable to the devisee attacking the will, though it could be urged that the failure of testatrix to provide a way to land devised tended to show testamentary incapacity.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 330.*]

14. APPEAL AND ERROR (§ 301*)—QUESTIONS REVIEWABLE—NEW TRIAL.

The action of the court in excluding testimony on objections sustained not assigned as a cause for new trial will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743-1755; Dec. Dig. § 301.*]

15. APPEAL AND ERROR (§ 260*)—RULINGS ON EVIDENCE—EXCEPTIONS.

Where no exception was taken to the admission of evidence for a specified purpose, the action of the court was not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

Appeal from Circuit Court, Delaware County; Joseph G. Leffler, Judge.

Action by Henry H. Taylor against Samuel K. Taylor and others to revoke the probate of a will. From a judgment for defendants, plaintiff appeals. Affirmed.

C. B. Templer, W. A. Thompson, W. H. Thompson, and R. W. Sprague, for appellant. William W. Orr and Harry H. Orr, for appellees.

MYERS, C. J. Appellant filed his complaint July 3, 1907, making appellee Samuel K. Taylor, who is his brother and the executor, defendant, to set aside, and revoke the probate of the will of his mother on the grounds of her unsoundness of mind and undue influence exerted in the execution of her will. The sole error presented is upon overruling the motion for a new trial.

The testatrix was stricken with apoplexy July 12, 1899, at the age of 63 years, and died in January, 1907. The will was dated July 3, 1900. The stroke of apoplexy affected her speech, but she improved so that she could talk. It affected her locomotion, and the use of her entire left side, so that she could not walk thereafter, and was moved about in a wheeling chair. When first paralyzed, her mouth and one eye were drawn aside, but these conditions became almost normal before the will was made. The use of her left arm and left leg was never restored. She had a second stroke of apoplexy

in July, 1906. She was the wife of a farmer, and owned 121 acres of land upon which, with her husband, she resided. She had been a widow since 1905. She managed her domestic and household affairs from a period shortly after the first stroke, through directions to others, until her death. By her will she bequeathed all her personal property to her husband, devised 41 acres of land to him for life with remainder to her son Samuel, and also devised to Samuel 40 acres additional, and appellant 40 acres. Her husband had been for many years an invalid; she informed the justice of the peace who drew her will as to the disposition of her property, which was irregular in outline. After reviving from the stroke, she directed her servants as to the household affairs, the purchase of clothing, as to the garden, and the fowls, the marketing, and inquired about and took part in the arrangements for the farming operations. At times she cried without any expressed reason for it, though at one time she seemed to be affected by the possible results her affliction might have upon her husband and their property affairs. She read newspapers, inquired about the neighbors, and their families. She laughed and talked some with her closest friends, but was not able to talk freely. Samuel Taylor and his wife waited on her continuously for about nine months. The physicians testified as to the tendency of apoplexy to impair the mental faculties, and as to its tendency to be progressive. The evidence is conflicting as to soundness and unsoundness of mind at the time the will was executed. With no claims of undue influence, the jury found for appellees. The testatrix was declared of unsound mind and incapable of managing her estate upon a complaint filed January 6, 1906. Upon the trial the contestor offered in evidence the petition, answer of the clerk, and the judgment of the court. This evidence was excluded, and error is here predicated on that action. There was no evidence given, or offered, to the point that the testatrix was of unsound mind or enfeebled prior to the stroke of apoplexy. The evidence offered was of a status found to exist 5½ years afterward. It cannot be doubted that much latitude in point of time, both before and after the transaction under inquiry, is allowable in determining the question of soundness or unsoundness of mind. The reason for the rule is apparent. The consistency or inconsistency of acts or declarations, differences in conduct towards family, relatives, and friends, and differences in habits of life at different times, if they exist, are relevant to, and sometimes highly indicative of, conditions of mind, and therefore competent for the purpose of determining that question, when they are of such character as to denote the mental condition. In some states the statute authorizes

the inquiry de lunatico to be extended to a time anterior to the inquiry itself; but our statute does not authorize a retroactive inquiry to be made, or status fixed, though we recognize the prima facie status fixed by the adjudication, and hold that, even though a will is executed after an adjudication of unsoundness, mental capacity may be shown. *Harrison v. Bishop* (1891) 131 Ind. 161, 30 N. E. 1069, 81 Am. St. Rep. 422.

Reliance is based upon the admissibility of this evidence on *Nichol v. Thomas* (1876) 53 Ind. 42. This was an action to set aside a deed upon the ground of insanity of the grantor. The court admitted the judgment declaring the grantor unsound of mind in a proceeding instituted 7½ years later, as tending to show unsoundness when the deed was executed. Other evidence tended to show that he had been of unsound mind for 15 or 20 years before the deed was executed. The evidence of Dr. Mendenhall as to the grantor being, and having for four years previously been, of unsound mind, was held to have been erroneously excluded. This evidence was of a retroactive character, taking the mental condition of the grantor to within 3½ years of the date of the deed. While it was held that both the record of the adjudication, and the testimony of Dr. Mendenhall were admissible, the opinion does not point out the grounds of the admissibility of the evidence. It is quite clear that Dr. Mendenhall's testimony was admissible and competent because he was an expert, and was coupled with evidence of the impaired mental condition of the grantor having existed for many years prior to the conveyance. The doctor's testimony was directed specifically to detailed acts denoting mental condition; but that is a very different character of evidence from the record of an adjudication of unsoundness which is not retroactive in effect, and in case where no prior weakness is shown, except that it might be relevant as tending to show continuance of a condition shown to have existed long previously (a showing not present in this case, on the presumption of the continuance of a condition of mind once shown to exist), but a relevant fact may be excluded without constituting harmful error, when the fact, if admitted, would not constitute error, so that in that particular case the admission of the record was relevant and clearly not harmful owing to the presumption of continuing incapacity, while the exclusion of the testimony of Dr. Mendenhall was harmful by reason of the same presumption and the special facts disclosed by Dr. Mendenhall. That this was the view of the court in that case is disclosed by the citation of *Rush v. Megee* (1871) 36 Ind. 69. A number of cases are cited by appellant to the proposition that adjudications of insanity are competent evidence, even though the adjudication is subsequent to the execution of the deed or will.

An examination of these cases discloses that, with one or two exceptions, they are cases where under the statute, in proceedings de lunatico, provision was made for a retrospective finding, and it had been made; in others, the adjudication was made after the date of the transaction inquired into, and admitted, and the admission held not error; others, where there was evidence of mental capacity prior to the date under inquiry; other cases are instances where adjudication had preceded the date of the question in controversy, and involved the effect of the adjudication as to its conclusiveness, or mere prima facie existence of insanity. Whilst large latitude should be allowed in all such proceedings, and whilst there is no agreed limit of time within which the prior or subsequent condition is to be considered, the circumstances of each case in the very nature of things ought to control, and the discretion of the trial judge, though reviewable for abuse, ought to have weight. *Enlow v. State* (1900) 154 Ind. 664, 57 N. E. 539; *Bower v. Bower* (1895) 142 Ind. 194-197, 41 N. E. 523. The question in such cases is necessarily one of relevancy. *Howes v. Colburn* (1896) 165 Mass. 385, 43 N. E. 125; *Lane v. Moore* (1890) 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; *Shailer v. Bumstead* (1868) 99 Mass. 112; *Herster v. Herster* (1889) 122 Pa. 239, 16 Atl. 342, 9 Am. St. Rep. 95; *Robinson v. Hutchinson* (1853) 26 Vt. 88, 60 Am. Dec. 298; *In re Merriman's Appeal* (1896) 108 Mich. 454, 66 N. W. 372; *Pittard v. Foster* (1888) 12 Ill. App. 132; *Wigmore, Evidence*, §§ 233, 1671, and cases cited.

There are well considered cases holding a record of adjudication subsequent to the execution of the instrument incompetent, as only fixing a status as of the date of the adjudication, after a period as short as two years, and also as wholly inadmissible. *Howes v. Colburn*, supra; *Entwhistle v. Meikle* (1899) 180 Ill. 9, 54 N. E. 217; *Rhoades v. Fuller* (1897) 139 Mo. 179, 40 S. W. 760; *Chase v. Spencer* (1907) 150 Mich. 99, 113 N. W. 578; *Knox v. Haug* (1892) 48 Minn. 58, 50 N. W. 934; *In re Pinney's Will* (1890) 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *Hopson v. Boyd* (1845) 45 Ky. 296; *Shirley v. Taylor's Heirs* (1844) 44 Ky. 99; Page on Wills, § 402.

The inquiry must be sufficiently near in point of time to aid the jury in determining the mental condition at the time of the execution of the will. *Enlow v. State*, supra; *Herster v. Herster*, supra; *Lane v. Moore*, supra; *Nonnemacher v. Nonnemacher* (1894) 159 Pa. 634, 28 Atl. 439; *Gorgas v. Saxman* (1907) 216 Pa. 287, 65 Atl. 619; *Green v. State* (1894) 59 Ark. 246, 27 S. W. 5.

The argument here is simply an inference from a remote fact. In *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358, it was held where there was an offer to show, where a man had died of a named disease, that it might have had some effect upon his mind, that it was properly excluded as being too much of a

contingency. The most that could be claimed, and it is so claimed by appellant, is that the evidence offered might tend to show that one stricken with apoplexy might be affected mentally from that fact; but there was direct evidence given on that subject. It is true that the court will not stop to inquire as to the effect of rejecting material and competent evidence offered, but will reverse in such case; but it must be material and competent evidence, going to some material point in issue, and not speculative in its character, or involving some remote matter. In other words, it must be evidence which, though not necessarily direct, but certainly from which the jury might draw an inference of fact, and which, if believed by them to be true, might have an effect upon their minds, or verdict. We know as a matter of common knowledge that sane people become of unsound mind; therefore there must be some point of time when they thus become. And we know that persons of unsound mind may have intervals of such lucidity of mind that they are competent to execute wills (*Harrison v. Bishop*, supra); hence the fact that a witness has testified that one is of sound mind at one time is only remotely, if at all, affected by the fact of the same person 5½ years later filing a petition asserting such person to be of unsound mind, and incapable of managing his or her own estate, at that time. *Waterman v. Whitney* (1854) 11 N. Y. 157, 62 Am. Dec. 71.

The adjudication is only *prima facie* evidence of mental incapacity. *Blough v. Parry* (1896) 144 Ind. 463, 493, 40 N. E. 70, 43 N. E. 560.

We cannot perceive that the evidence was so clearly competent, or so material, that, if given, it could have had any effect or influence in determining the question of the mental capacity of the testatrix when the will was executed, when there was direct evidence to the point.

Complaint is made of the admission of the testimony of Dr. Kemper upon a hypothetical question, in which many of the facts are claimed to be assumed. It is true that a hypothetical question, if it is to be of any value, should embrace facts of which there is some evidence, or which may fairly be inferred from the evidence. The specific objection was that there was no evidence as to the extent and value of the property of appellant, or that the testatrix was at prayer meeting, and gave testimony, and that her husband had no property. There was evidence that appellant had married and left home at about the age of 18 years, while appellee Samuel, the younger, had remained at home until about 22 years of age, and had assisted his mother upon the farm, his father being an invalid for many years, and that prayer meetings were held at her house. No specific evidence has been pointed out to us as to the husband being without property, but it is shown that the land was con-

veyed to the testatrix in 1860 by her father, and that her husband had been for many years an invalid. If facts are assumed in a hypothetical question which are clearly so exaggerated as to impair the opinion, or are such manifest assumptions as to be misleading, confusing, and aside from evidence or fair inferences from the evidence, it should be excluded, and its admission might be prejudicial error in a given or specific case. But the weight and value of the opinion is a question for the jury, and depends for its value upon there being evidence, admissions, or facts proved, upon which it is based. *Louisville, etc., Co. v. Wood* (1887) 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Deig, Ex., v. Morehead* (1886) 110 Ind. 451, 11 N. E. 458; *Louisville Co. v. Falvey* (1886) 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; *Gueltig v. State* (1879) 68 Ind. 94, 32 Am. Rep. 99; *Howes v. Colburn*, supra; *Chicago, etc., Co. v. Roberts*, (1907) 229 Ill. 481, 82 N. E. 401; *Fairchild v. Bascomb* (1862) 35 Vt. 398; 17 Cyc. 244 et seq.

A party may put his hypothetical case as he claims it to be proven, or within reasonable inferences from the evidence, and the jury determines whether it is so supported by the evidence as to be of any value, or as to the weight and value they will give it. *Louisville, etc., Co. v. Wood*, supra; *Deig, Ex., v. Morehead*, supra; *Louisville, etc., Co. v. Falvey*, supra; *Goodwin v. State* (1884) 96 Ind. 550; *Grand Lodge v. Wieting* (1897) 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123; *Forsyth v. Doolittle* (1877) 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; *Kerr v. Lunsford* (1888) 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 683; *Cowley v. People* (1881) 83 N. Y. 464, 38 Am. Rep. 464; *Schissler v. State* (1904) 122 Wis. 365, 99 N. W. 593.

The opinion may be tested by cross-examination, by omissions and additions to the original question, or by an entirely new state of facts; and that was done in this instance. *Bower v. Bower*, supra; *Louisville Co. v. Wood*, supra; *Goodwin v. State*, supra; *Davidson v. State* (1893) 135 Ind. 254, 34 N. E. 972; *Johnson v. Thompson*, 72 Ind. 167, 37 Am. Rep. 152.

Even if the question was faulty by the insertion of some facts not supported by the evidence, so that, uncorrected, an error might occur, it was corrected by an instruction that, if any of the material facts contained in the question were not shown by the evidence to be true, they were not to be taken as true, because embraced in the question, and, if of such character as to destroy the reliability of the opinion based upon the hypothesis stated, they should attach no weight whatever to the opinion. This instruction was certainly as favorable as appellant could ask. *Thomas v. Dabblemont* (1903) 31 Ind. App. 146, 67 N. E. 463.

Criticism is made of instruction No. 7. By certiorari it is disclosed that the instruction as originally copied into the transcript

omitted the part which has been supplied by the certiorari, so as to remove the objection. The will is attacked as showing mental incapacity because of alleged indefiniteness and mistakes of description. The land consists of the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, 20 acres of the N. E. $\frac{1}{4}$, and the S. 21.18 acres of the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 31, township 21 N., range 10 E., in Delaware county. The only public highway on which any part of the land abuts runs north and south along the east line of the 21.18 acres. The residence and farm buildings are in the northwest corner of this 21.18-acre tract, and a lane ran west from the highway to the residence and farm buildings. By the will 41.18 acres off the east end of the tract, which is described as the one deeded to testatrix by her father, was devised to her husband for life, and to Samuel in fee, except one-half acre deeded to Val Taylor in the northeast corner of the tract, and the east half of the remaining 80 acres devised to Samuel, and the west half to appellant. It appears from the evidence that the half acre is in the southeast corner of the 20-acre tract which abuts on the highway. It is insisted that the description 41.18 acres off the east end of the 121.18-acre tract is an impossible one, and the fact that the excepted half acre is in the southeast corner, instead of the northeast, are facts evincing the lack of mental comprehension of her property by the testatrix. We do not think there could be any difficulty in locating the property intended by this will, as the 41.18 acres lying farthest to the east, and the fact that the one-half acre is described as located in the northeast, instead of the southeast, corner, being designated as the property sold to Val Taylor, renders the tract easily identified, and aids in identifying the 41.18 acres, by reason of the exception therefrom. There could have been a more accurate description; but calling it the east end, instead of the east side, is of little consequence when the whole description is considered together. What was intended is reasonably apparent. The house was on the 21.18-acre tract and the barn on the adjoining 80-acre tract, and they would naturally go together, especially when the testatrix was making provision for her invalid husband. *Warner v. Marshall* (1905) 166 Ind. 88, 110, 75 N. E. 582; *Elsea v. Adkins* (1905) 164 Ind. 580, 74 N. E. 242, 108 Am. St. Rep. 320; *Ames v. Ames* (Ind. App.) 91 N. E. 509; *Black v. Richards* (1883) 95 Ind. 184.

It is not the office of a deed or will to describe the property; but, if it furnishes the means of identifying it, it is sufficient. *Pate v. Bushong* (1903) 181 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287; *Edens v. Miller* (1897) 147 Ind. 208, 46 N. E. 526; *Rook v. Wilson* (1895) 142 Ind. 24, 41 N. E. 311, 51 Am. St. Rep. 163; *Priest v. Lackey* (1894) 140 Ind. 399, 39 N. E. 54; *Groves v. Culph* (1892) 132 Ind. 186, 31 N. E. 569.

It appears from the evidence that a lane ran west from the public highway to the barn lot of about one-half acre in area which was on the east side of the 80-acre tract and lies west of the house; that there was another lot west of, and communicating with, the barn lot, and there is some evidence that from this west lot a lane extended west to the west line of the farm. Under this state of the evidence, which was argued by appellant as tending to show the mental incapacity of the testatrix in furnishing no outlet to the land devised to appellant, the following instruction was given: "If you find from the evidence that the tracts of land devised by the instrument in question to Henry Taylor, the plaintiff, and the one to Samuel K. Taylor, the defendant, or either of them, are without any public highway on their borders, and ingress and egress to and from them was had at the time the will was made and at the death of Jane Taylor by means of a private lane or roadway leading from the public highway to said tract or tracts, over and across some other part or parts of Jane Taylor's farm, then such private lane or roadway would be appurtenant to said tracts, or tract, and would pass by the devise under the instrument, and such owner could not lawfully be excluded from the use of such lane or roadway, but would have the right to its free use at all times in gaining access to such tract, or tracts, of land. Under such conditions, such tracts, or tract, would be entitled to have attached and appurtenant to it a way of necessity, or right of ingress and egress over the contiguous parts or tracts of the said farm of Jane Taylor as had been formerly used by her for that purpose."

It is urged that this instruction is without any evidence to support it, as to there being any private lane or roadway leading to the land devised to appellant, and that it could not be appurtenant, for the reason that one cannot have an appurtenance in a property the full title of which is in himself. There was some evidence of a little lane extending from the west side of the lot west of the barn to the west side of the farm. It must be borne in mind that the issue here was not whether there was in fact, or in law, a way of ingress or egress to the land devised to appellant, but as to the mental capacity of the testatrix to make the will; but we infer from the record and the brief of counsel that the fact of no provision being made for a way to this land was a circumstance in determining the question of mental capacity. That may have been true; but this was not a case for the determination of way or no way, or where located, and, with the insistence upon the part of appellant, appellees were entitled to an instruction upon the legal effect of the conditions presented by the evidence as they claim it to be, as a presumption of law entering into the act of the testatrix in the

execution of the will. The location, character, and extent of the lanes, and their uses, were not gone into very fully in the evidence; but there was some evidence of the use of lanes intercepted by lots which extended from the highway to the west side of the farm.

There is some confusion of legal terms and legal sequences in the instruction, in the failure to note the distinction between a "way of strict necessity" and a "way appurtenant." A way of necessity may become a way appurtenant, but a way appurtenant does not arise alone from one of necessity; it may arise from grant or prescription. It will be noted that the language of the instruction is directed to a case of a lane or way leading to the rear tract, which furnished a way of ingress and egress. The fact that it might become a way appurtenant, by the severance under the will, if a way existed, or would arise from necessity from the severance, without regard to the existence of a way, could be of no consequence, for one or the other of these legal effects must arise irrespective of location, and could not affect the real issue in the case, unless it could be said that the failure to definitely refer to and provide a way tended to show unsoundness of mind, which we think is too restrained to become a necessary inference. The instruction is not a model; but, taken with the other instructions in the case, it could not have led the jury to any other conclusion than that it must appear that a way existed, which was more favorable to appellant than he was entitled to, and, even though it could be urged that the failure to provide a way tended to show unsoundness of mind, that fact was just as potent on that issue, as the instruction was drawn, as it would have been without the instruction.

One Eber had filed the petition in 1906 to have the testatrix declared of unsound mind and incapable of managing her own estate. He was a witness in the case, and testified to her soundness of mind at the time of the execution of the will. He was asked whether he was the same George W. Eber who had filed the petition stating that she was of unsound mind. He answered that he was, and on appellee's motion the answer was stricken out, and exception taken; but this action was not assigned as cause for a new trial.

One Sunderland was a witness in the case, and testified as to testatrix's soundness of mind when the will was executed. He was asked the question whether he had not testified in the insanity proceeding that she "was of unsound mind, and had been for six years." The court over objection admitted the answer of "No," saying "it is proper for the purpose of impeachment only." No exception was taken by appellant, and of course no question is here presented.

A witness who had testified that the testatrix was of sound mind when the will was executed on cross-examination was asked, "She did afterward get to be of unsound mind, didn't she?" Objection to this question was sustained.

A physician who had attended the testatrix at the time she was first stricken with apoplexy, and about the time the will was executed, and again after the second stroke, testified that she was of sound mind when the will was executed, and so continued until about the time of the death of her husband. On cross-examination he was asked, "She did become of unsound mind, didn't she, Doctor?" And upon objection that the defendant had asked him as to her mental condition down to the death of her husband, and that the inquiry should be limited to that time, the objection was sustained. Neither of these questions was presented, or saved by the motion for a new trial, and are not reviewable here. *Pulley v. State* (1910) 92 N. E. 550.

We have not been able to perceive any ground of objection to the proceedings or judgment to be well taken, and the judgment is affirmed.

(174 Ind. 708)

BAKER v. STATE. (No. 21,658.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. CRIMINAL LAW (§ 1130*)—APPEAL—TIME TO FILE BRIEFS.

Under Supreme Court rule 21, as amended June 20, 1901, authorizing the filing of briefs by appellee in criminal cases within 120 days after submission, a brief by the state on the appeal of accused filed 100 days after submission is filed in time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2965-2970; Dec. Dig. § 1130.*]

2. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—FILING—COMPLIANCE WITH STATUTE.

Under Burns' Ann. St. 1908, § 2163, requiring the filing with the clerk of bills of exceptions in criminal cases, a filing of a bill of exception in open court is in effect a placing thereof in the manual possession of the clerk for the court, and is a substantial compliance with the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2834-2861; Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CAUTIONARY INSTRUCTION.

An instruction that statements on cross-examination of enumerated witnesses of accused as to the crime made when accused was not present were not binding on him, but that the statements should be considered in determining whether the witnesses had any interest in the case to aid in determining the credit to be given them merely guided the jury, and the limitations were correct and for the benefit of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1776-1781, 1889-1894; Dec. Dig. § 785.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

Where the court charged that circumstances alone, to be sufficient to convict, must be so conclusive as not only to convince each juror of guilt beyond a reasonable doubt, but also exclude accused's contention that he was at home when the crime was committed, the refusal to charge that if facts enumerated created a reasonable doubt the jury must acquit was not erroneous, because in substance covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. CRIMINAL LAW (§§ 423, 425*)—ACTS AND DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

The acts or declarations of a conspirator are admissible against a co-conspirator when done or made in the prosecution of the conspiracy or in the furtherance of the object or common design, but where the conspiracy is ended by the consummation of the criminal design, mere narrations of what has taken place, having no tendency to promote the common design, are inadmissible against a co-conspirator not present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1010; Dec. Dig. §§ 423, 425.*]

6. CRIMINAL LAW (§ 424*)—ACTS AND DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Where, on a trial for murder, the state relied on a conspiracy between accused and third persons, statements by the third persons seven months after the homicide, and in the absence of accused, and not clearly relating to the homicide, were inadmissible, and the error in admitting them was prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Appeal from Circuit Court, Huntington County; Samuel E. Cook, Judge.

John Baker was convicted of involuntary manslaughter, and he appeals. Reversed, and new trial ordered.

John Baker, R. K. Erwin, and Bowers & Feightner, for appellant. James Bingham, Barrett & Morris, A. E. Thomas, A. G. Cavins, E. M. White, and W. H. Thompson, for the State.

HADLEY, J. The appellant was convicted of involuntary manslaughter on an indictment charging him (1) with the premeditated murder of Columbus Croy, and (2), while committing a burglary, with the felonious killing of Columbus Croy.

The first contention of his counsel is that the state was improperly allowed to file its brief in this appeal, which was received by the clerk and placed upon the files 100 days after the submission of the cause. Appellant's counsel labors under a misapprehension. On June 20, 1901, an amendment to rule 21 was made and filed in these words: "Except that in criminal cases such briefs (by appellee) shall be filed within 120 days after submission." Under this amendment the state's brief was timely filed.

The Attorney General insists that the three

several bills of exception, respectively containing instructions given, instructions requested and refused, and the motion for a new trial and affidavits in support thereof, are not in the record for want of proper identification. It is shown by the record that each of said bills, after being properly signed by the judge, was timely filed in open court. The Attorney General seeks to maintain that a filing in open court is not a compliance with section 2163, Burns' Ann. St. 1908, which requires all bills of exception in criminal cases to be filed with the clerk. We cannot accept his logic. The clerk is the custodian of all the files of the court, and a filing in open court is in effect a placing of the file in the manual possession of the clerk, for the court, which is a substantial compliance with the statute.

Complaint is made of the giving to the jury of instruction No. 32, in which the court, after naming certain witnesses that had been called by the defendant and who had been questioned on cross-examination as to whether or not they had made numerous statements concerning matters in relation to the crime, at various times after the death of Columbus Croy and at times and places when the defendant was not present, said: "You must have in mind that such statements, if any have been shown, are not binding on the defendants, but they are to be taken or considered by you in determining whether these witnesses have any interest, bias, prejudice, feeling, or knowledge of the crime, and to aid you in determining the weight, or credit to be given their testimony, and for no other purpose."

The objection made to the instructions is, that the singling out of a class of witnesses, and the calling of attention to the class of facts testified about in cross-examination, tended to cast suspicion and discredit upon such witnesses and their testimony. We think counsel wholly misconceived the object and natural effect of such an instruction. Clearly, the court was but calling attention to the particular witnesses and their testimony for the purpose of properly guiding the jury against an unwarranted application of testimony to the injury of the defendant. The limitations stated by the court were correct and discreet, and for the benefit of the defendant, for which he has no ground of complaint.

Complaint is likewise made of the refusal of the court to give to the jury requests numbered 25 and 26. These propositions set forth divers facts appearing in evidence, referring to the character of the wound found upon the deceased, the position of the body when found with relation to the saloon that, it is claimed by the state, was being burglarized at the time of the homicide, and from or near which it is claimed the fatal shot was fired, the condition of the clothing

on the body, from all of which attention is called to the possibility of accident and the impossibility of committing the crime in the manner contended for by the state, and which concluded with the statement that if such facts created in the minds of the jury a reasonable doubt as to any material point, it was their duty to give the benefit of such doubt to the defendant and acquit him. We think there was no error in the refusal of the court to give these last-named instructions, because their substance was fully covered by instructions 21, 22, 23, and 38, given by the court of its own motion.

In 21 the jury was advised that circumstantial evidence alone, in order to be sufficient for the conviction of the defendant, would have to be so plain and conclusive as not only to convince each juror of the defendant's guilt beyond a reasonable doubt, but it would have to go a step further and also exclude or drive out the defendant's contention that he was at home when the crime was committed. In other words, the circumstances proven in the case would have to show the defendant's guilt and also show that he was not at home when the crime was committed, and the circumstances would have to exclude or overcome every other claim or theory of innocence presented by the defendant before you can rely on them for a conviction. Numbers 22, 23, and 38 are in the same vein, and present the rule of reasonable doubt fully and in a manner eminently fair to the defendant. There was no error in refusing to give the instructions requested.

One La Duke, a witness for the state, testified, in substance that the defendant, John Baker, John Stout, Herman Miller, and he, on invitation of the defendant, some time shortly after midnight of June 17, 1907, went to the saloon of Joe Faulkner in the village of Woodburn to get a drink. The party had been drinking heavily before at other places. They approached the rear of the Faulkner saloon through a muddy alley. It was very dark. Defendant Baker led, Stout next, Miller next, and witness behind. As they neared the rear of the saloon the defendant picked up something and with it pried at the back door. Failing to effect an entrance he said, "Boys, let us go around to the side window," and so doing defendant struck and broke the window, then reached in, raised the window, and crawled in. After getting in he put his head and shoulders out of the window and requested Stout, who was standing nearest the front and sidewalk, to watch the front and requested Miller and the witness to watch the alley and rear. Stout thereupon stepped towards the front. The witness and Miller gave attention to the rear and soon heard some one coming rapidly down the alley and heard Stout, who was standing near the front of the saloon, say, "Stand back, stand back there, I say," and then he fired two shots towards the sidewalk.

It was further shown that Croy's dead body, pierced by bullets, was found a few feet south of the saloon on the sidewalk.

With this evidence of a conspiracy by the four persons above named to commit the crime of burglary, the court upon the trial permitted the state, over the objection of the defendant, to ask, and the said John Stout to answer, concerning a dialogue between him and Herman Miller, two of the alleged conspirators, in the presence and hearing of Clarence Omo, in the absence of the defendant and seven months after the complete consummation of the alleged conspiracy and death of Croy, to wit: "Q. Are you acquainted with Clarence Omo, otherwise known as Hafley? A. Yes, sir. Q. I will ask you if, two weeks before your arrest, at Bogenschutz's saloon, across from the courthouse, on Main street north, you saw Clarence Omo in that saloon at 11 or 11:30 o'clock? A. No, sir. Q. Ten o'clock? A. No, sir; I didn't see him at all. Q. And I will ask you if it isn't a fact that just before you stepped out from the rear convenience part of that saloon, just before you met him, you didn't say to Herman Miller, jointly charged with you in the murder of Columbus Croy, 'Forget it, Miller,' and didn't Miller respond to you, 'We did it, and they can't get us.' A. No, sir; I didn't make any such statement. Never was in Bogenschutz's saloon with Mr. Miller. Q. And at that time did you not state to Herman Miller, 'Forget it, Miller,' and did not respond 'We fixed him, all right.' A. No, sir; I did not make any such statement. Q. You may state whether you didn't, at the time and place mentioned, say to Clarence Omo, 'Shake hands,' and ask him what he was doing at Fort Wayne. A. I never saw Clarence Omo at the place. Q. And if you and Herman Miller weren't both at that time intoxicated? A. No, sir. Q. And just before you met Clarence Omo in the rear convenience portion of that saloon, did you not say to Herman Miller, 'Forget it, Miller,' and did not Herman Miller then say to you, 'Well, it is done; they can't get us. We fixed him, all right,' or words to that effect? A. No, sir; I did not." In rebuttal, over a like objection of the defendant, the court permitted Clarence Omo to testify affirmatively to the dialogue between Stout and Miller, as above set out.

Appellant's counsel earnestly contend that the admission of this evidence was prejudicial error, and we are led to agree with them. With respect to the declarations, or confessions, of co-conspirators, Judge Elliott very fairly and concisely states the rule, thus: "The authorities go to the proposition that the acts, or statements competent to be proved, must have been done, or made, in the prosecution of the criminal conspiracy, or in the furtherance of the object or common design of the conspiracy. * * * Such acts are proper only when they are either in themselves acts, or accompany and explain acts,

for which others are responsible; but they are not admissible when in the nature of narratives, description, or subsequent confessions. * * * Declarations made by one of the conspirators after the conspiracy has been effected, and the crime perpetrated, are not admissible in evidence against any except the persons making them." 4 Elliott's Ev. §§ 2942-2944, and many authorities cited in note. Mr. Greenleaf states it thus: "Care must be taken that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected." 1 Greenleaf's Ev. (16th Ed.) § 184a, and cases cited in note. To the same effect, see *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89; *Ford v. State*, 112 Ind. 373, 382, 14 N. E. 241; *Card v. State*, 109 Ind. 415, 9 N. E. 591.

Mr. Justice Mitchell, in the *Moore Case*, supra, said on the same subject: "If the conspiracy has ended by the consummation of the criminal design, mere admissions or narrations of what has taken place, which had no tendency to promote the common design, are not admissible against those who were not present when the admissions were made."

The testimony was evidently admitted upon the assumption, or theory, that the statements between Stout and Miller, made seven months after the burglary in question and homicide of Croy, related to those occurrences, and could have no other significance than a mere mention or statement of these past events. But what was there in the statements, or the surroundings, to warrant such assumption? No mention was made of any particular occurrence, or act, or time or place, or that any one other than the two in conversation had any participation or connection with the act alluded to. For aught that appears the reference might have been to some matter wholly foreign to the killing of Croy, and to some act that was neither infamous nor unlawful. The uncertainty of such loose statements illustrates the wisdom of Mr. Greenleaf's text above quoted, that care must be taken in the admission of such testimony. It is very clear that the testimony should have been excluded, and is of a character to make it quite impossible for this court to say it was not harmful.

Appellant makes the point that he was tried and acquitted by failure of the jury to make any finding under the second count of the indictment, which charges him with the killing of Croy, while engaged in the commission of an unlawful act, and was found guilty of involuntary manslaughter under the first count, which charges him with the willful killing of Croy, and insists that there is a fatal variance between the charge and the

proof. This question, together with divers others arising under the motion for a new trial and chiefly relating to the evidence, we do not consider, for the reason that they are of a character to make it improbable that they will arise again upon a retrial.

Judgment reversed, with instructions to grant appellant a new trial. The clerk will issue the proper order for a return of the prisoner to the sheriff of Huntington county.

(174 Ind. 691)

JOHNSON v. CITY OF INDIANAPOLIS
et al. (No. 21,500.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. MUNICIPAL CORPORATIONS (§ 33*)—ANNEXATION OF TERRITORY—PUBLICATION OF ORDINANCES.

Under Burns' Ann. St. 1908, § 8896, authorizing councils of cities to adopt ordinances annexing territory, and providing that an ordinance shall be published for at least two weeks in a newspaper in the city, etc., the publication of an annexation ordinance is not a condition precedent to its passage, but publication is merely a condition subsequent, and a failure to publish an ordinance does not affect the power of the council in the adoption thereof; but a failure to legally publish it may render it inoperative.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 81-97; Dec. Dig. § 33.*]

2. MUNICIPAL CORPORATIONS (§ 33*)—ANNEXING TERRITORY—COLLATERAL ATTACK.

A party seeking to enjoin the mayor and board of public works of a city from constructing a sewer so as to create a lien on land, on the ground that the land has never been legally annexed to the city, collaterally attacks the annexation proceeding, and the presumption must be indulged in favor of the acts of the council in the proceeding.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 96; Dec. Dig. § 33.*]

3. MUNICIPAL CORPORATIONS (§ 324*)—PUBLIC IMPROVEMENTS—COLLATERAL ATTACK.

A party seeking to enjoin the city authorities from constructing a sewer so as to create a lien on land, on the ground that the board of public works cannot lawfully decide that the improvement will be a benefit to property affected thereby, when all the evidence is that it will be of no benefit, and that the board belongs to the administrative department of the city government, so that its acts can be inquired into by a court to determine whether certain facts exist which call for the exercise of discretion of the board, collaterally attacks the proceedings of the board in constructing the sewer, and the presumption must be indulged in favor of the acts of the board.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 847-849; Dec. Dig. § 324.*]

4. MUNICIPAL CORPORATIONS (§ 33*)—ANNEXATION OF TERRITORY—COLLATERAL ATTACK.

An action collaterally attacking annexation proceedings of the council of a city cannot be maintained, unless it is apparent on the face of the proceedings that the council had no jurisdiction to annex the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 96; Dec. Dig. § 33.*]

5. STATUTES (§ 224*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The court in construing a statute to discover the intention of the Legislature may examine the entire statute as well as parts thereof, and may also examine acts of the Legislature in *pari materia*, passed either before or after the statute under interpretation, whether repealed or not.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300-306; Dec. Dig. § 224.*]

6. MUNICIPAL CORPORATIONS (§ 33*)—ANNEXATION OF TERRITORY—ORDINANCES—PUBLICATION.

Acts 1905, c. 129, § 242 (Burns' Ann. St. 1908, § 8896), authorizing the council of a city to adopt an ordinance annexing territory to the city, and providing that such ordinance "shall be published for at least two consecutive weeks," when read in connection with sections 97, 99, 117, 120, 124, 126, of the act relating to the publication of various notices once each week for a specified number of weeks, and in connection with the act authorizing the alteration of grade crossings in proceedings on notice published in a daily newspaper once each week for two consecutive weeks, and in connection with Acts 1889, c. 232, declaring that publication of affairs of the city government once each week for the number of weeks required by law shall be sufficient, provides for the publication of an annexation ordinance in one issue each week for two consecutive weeks.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 33.*]

7. MUNICIPAL CORPORATIONS (§ 33*)—ANNEXATION OF TERRITORY—PROCEEDINGS—APPEAL.

An owner of a part of agricultural lands annexed to a city by ordinance, adopted as authorized by Acts 1905, c. 129, § 242, who feels aggrieved by the action may, as authorized by section 243, appeal to the circuit or superior court, and where he fails to avail himself of such remedies he cannot, in proceedings to construct a sewer so as to create a lien on the land in the territory annexed, insist that the council did not have sufficient reason for annexing the territory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 93; Dec. Dig. § 33.*]

8. MUNICIPAL CORPORATIONS (§ 63*)—ACTS OF CITY COUNCILS—JUDICIAL REVIEW.

The expediency of acts of city councils in matters over which they have jurisdiction is not a judicial question, and so long as a city council does not transcend the scope of its authority to enact ordinances, or violate any of the limitations to the exercise of its powers, it will not, in the absence of fraud, be interfered with by injunction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.*]

9. MUNICIPAL CORPORATIONS (§ 299*)—PUBLIC IMPROVEMENTS—PROCEEDINGS—OBJECTIONS.

Under Acts 1905, c. 129, § 117 (Burns' Ann. St. 1908, § 8722), authorizing the board of public works to hear persons interested or whose property will be affected by a proposed improvement, on the question of special benefits, etc., the board may exercise its own honest judgment, and it need not decide the question of benefits on the weight of the evidence formally presented at the preliminary hearing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 800; Dec. Dig. § 299.*]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Charles E. Johnson against the City of Indianapolis and others. From a judgment for defendants rendered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Harding & Hovey and O. U. Newman, for appellant. Frederick E. Matson and E. B. Walker, for appellees.

JORDAN, J. Action by appellant against the city of Indianapolis, its mayor, and the members constituting its board of public works, to enjoin them from proceeding to construct a certain sewer, and also to enjoin them from levying an assessment to defray the costs of the improvement against the lands of appellant, which are situated within the taxing district. Appellee's several demurrers for want of facts were sustained to the complaint and appellant having elected to stand upon his complaint, judgment was rendered against him on demurrer. He appeals and assigns error on the ruling of the court in sustaining the demurrers.

The complaint discloses the name of the mayor of said city and the name of the several persons constituting its board of public works. Plaintiff further alleges therein that he is the owner in fee simple of the following described real estate situated in Marion county, state of Indiana, to wit: (Here his lands are described.) He charges that his land has never been platted and that none of the lands adjacent thereto have been platted or held for sale as town lots and have never been placed on the market for sale as town property; that he and his family have resided for many years in a dwelling upon his lands, and have during all said years and do now depend upon the cultivation thereof for a livelihood, and it is not now nor has it been his intention to subdivide his lands, or to offer them for city purposes.

It is charged that on the 3d day of December, 1906, the common council of said city of Indianapolis passed an alleged ordinance whereby it attempted to annex to the city the following described territory lying east thereof as theretofore bounded to wit: (Here the territory is described in which is embraced the land owned by appellant and herein in controversy.)

It is alleged that the common council of said city of Indianapolis in making the said annexation did not exercise the legislative authority conferred upon it by section 242 of the towns and cities act of 1905 in a reasonable manner, but that said action of the council was unreasonable in this, to wit, that the east line of said territory so embraced in said alleged annexation ordi-

nance is distant more than 7,000 feet from the east boundary line of the city as theretofore established, and said territory so attempted to be annexed to the city embraced more than 500 acres of unplatted farm lands which have never been used otherwise than for grazing, agricultural, and horticultural purposes.

It is further averred that the said annexation ordinance was passed by the common council of said city in order to bring said lands into the corporate limits so that they could be assessed by the city authorities for the construction of what is known and called "an intercepting sewer," which is proposed to be constructed from the east end of what is known as the East Michigan street sewer, northwardly through the east end of said city to East Tenth street.

It is charged that the action of the common council in passing such annexation ordinance was not a reasonable exercise of the authority conferred by section 242, but that it was an unreasonable and unwarranted exercise of the authority conferred by said section, and that the same should be set aside and held for naught; that no necessary or adequate notice of the passage of the alleged ordinance has ever been given, and that it was not "published for at least two consecutive weeks in a daily newspaper of general circulation published in said city of Indianapolis," as provided by section 242, but that the pretended ordinance was published for two days only in the Indianapolis Sun, which publications were made only in the issues of said newspaper of December 12 and December 19, 1906; whereas, it is charged, by the provisions of the law, it was necessary that the publication of such alleged ordinance should be made daily during at least two consecutive weeks, and plaintiff charges that by reason of the failure of said city to so publish said ordinance each day for two consecutive weeks, said pretended ordinance is unlawful and of no force or effect.

The complaint further proceeds to show that the board of public works of the city of Indianapolis, in August, 1907, adopted a resolution declaring the necessity and ordering the construction of an intercepting sewer, commencing at the east end of what is known as the East Michigan street sewer. (Here the route of the sewer is set out.) An estimate made by the city engineer in respect to the cost of the sewer in accordance with said resolution adopted by the board is shown, and that the board of public works has caused to be prepared a map showing the boundary lines thereof, the total area or district subject to be assessed for the construction thereof, as provided by section 117 of the aforesaid act, and that said map as so prepared shows that the plaintiff's land, and a great part of the other lands within the aforesaid territory

attempted to be annexed, are embraced within the boundary lines or area or district so to be assessed for the construction of said proposed sewer.

It is further averred that the plaintiff, and other owners of land within said territory so annexed, and which is embraced within the taxing district proposed to be assessed to raise money for the payment of the construction of said improvement, appeared before said board of public works and remonstrated against the passing of any resolution for establishing any such sewer, and that they introduced much evidence to show that the special benefits to the several lots and parcels of land within such area embraced within said district proposed to be assessed for such proposed sewer will not be equal to the estimated cost of the sewer, and that all the evidence introduced in said matter before the board of public works, tended to prove the negative of such question, and no evidence was offered, introduced, or heard by said board of public works tending in any way to prove the affirmative of said question. But notwithstanding all this, the said board "arbitrarily," "wrongfully," "fraudulently," and in opposition to all the evidence introduced on the matter, determined said question against the plaintiff and other landowners.

It is further disclosed by the averments of the complaint that the board has advertised to receive bids for the construction of said sewer in accordance with the resolution which it adopted, and it is charged that unless the board is restrained by order of the court it will, on October 7, 1907, receive bids and enter into a contract for the construction of the sewer, and that there will be entered against the real estate of the plaintiff, assessment liens that will be illegal and excessive in amount, etc. Wherefore, plaintiff prays for a temporary restraining order, and upon a final hearing of the cause that said defendants and each of them be forever enjoined from constructing and building said sewer.

Section 242 of the governing act pertaining to cities and towns, passed in 1905 (see Acts 1905, p. 219), the same being section 8896, Burns Ann. St. 1908, invests the common councils of cities with the power to declare and define by ordinance the entire corporate boundaries of the city, and provides that such ordinance, properly certified, shall be conclusive evidence in any court or proceeding of such boundaries, except as provided in the next section. It is further provided by this section that the "common council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, to such city, and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly an-

nexed and constitutes a part of such city, except as provided in the next section. *Immediately after the passage of every such ordinance as is provided for in this section, the same shall be published for at least two consecutive weeks in a daily newspaper of general circulation published in such city.*" (Our italics.)

By section 243 it is provided that "when- ever such territory is annexed to such city as provided in the foregoing section, whether by general ordinance defining the city bound- aries, or by special ordinance for the pur- pose of annexing territory, and such territory so sought to be annexed is unplatted ground, or lies within the corporate limits of any other town or city, an appeal may be taken from such annexation by one or more per- sons deeming himself or themselves aggrieved, or injuriously affected, filing their remonstrances in writing against such annexa- tion, together with a copy of such ordinance, in the circuit or superior courts of the coun- ty where such territory is situated within ten days after the last publication provided for in the preceding section; such written remonstrance or complaint shall state the reason why such annexation ought not in justice take place." Notice of appeal is re- quired to be given to the proper officers of the city seeking to make the annexation, and the city is to be made a defendant in the ap- peal. Continuing, the section provides that "the court shall thereupon proceed to hear and determine such appeal without the in- tervention of a jury, and shall give judg- ment upon the question of such annexation according to the evidence which either party may introduce relevant to the issue. * * *"

It is evident that the publication of an annexation ordinance is not, by the provi- sions of section 242, supra, made a condi- tion precedent to its passage, or, in other words, it is not required to be first publish- ed before it can legally be adopted by the common council; but publication is merely made a condition subsequent to its passage. The very object or purpose of such publica- tion is to inform or notify property owners, and others concerned, that the lands describ- ed in the ordinance have been annexed to and made a part of the city's territory. This is made evident by section 243, supra, which provides that the appeal therein awarded to the superior or circuit court of the county is to be taken "within ten days after the last publication provided for in the preceding section." Under the circumstances, a failure to publish the ordinance as required, could not affect the jurisdiction or power of the common council in the adoption thereof, but the effect of a failure to legally publish the ordinance, possibly would be to render it in- operative until the required publication had been made.

The points upon which counsel for appel- lant rely for reversal of the judgment of the lower court are as follows: "(1) The board of

public works of the city of Indianapolis could not legally let the contract for the construc- tion of the sewer in question so as to create a lien on plaintiff's land and the other land described in the complaint, for the cost thereof, because the land had never been le- gally annexed to the city. (2) That the board of public works of the city of Indian- apolis cannot lawfully decide that a contem- plated public improvement will be of bene- fit to property affected thereby, when all the evidence is that it will be of no benefit. (3) That the board of public works belongs to the administrative or ministerial depart- ment of the city government, and its acts can be inquired into by a court to determine whether or not certain facts exist which call for the exercise of discretion on the part of such board."

It is manifest that appellant's attack on the annexation proceeding of the common council, and the proceeding of the board of public works in constructing the sewer in question, is collateral, and, under the cir- cumstances, all presumptions must be indulg- ed in favor of the acts of these tribunals. This action cannot be maintained unless it is apparent upon the face of the proceedings of the common council that it had no juris- diction or power to annex the territory in question. *Featherston v. Small*, 77 Ind. 143; *Lake Erie, etc., R. Co. v. City of Alexandria*, 153 Ind. 521, 55 N. E. 435, and authorities there cited; *Baltimore, etc., R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016.

The position, however, assumed by coun- sel for appellant is that under the facts al- leged in the complaint, the ordinance adopt- ed by the common council in 1906, for the purpose of bringing within the city limits the contiguous territory by the council with- out a compliance with the requirement of section 242, supra, in regard to its publica- tion; hence it is insisted that an attempt to annex the lands in controversy was fu- tile and of no effect, and, under the circum- stances, they still lie or remain outside of the corporate limits of the city of Indianapo- lis, and therefore the board of public works has neither the power nor authority under section 117 of the act of 1905, supra (section 8722, Burns' Ann. St. 1908) to construct a sewer thereover, nor to assess them for the cost of such improvement. The particular invalidity imputed to the ordinance is that under the averments of the complaint it is disclosed that it was published each week in but one issue only of a daily paper during the two consecutive weeks; the contention being that under the provisions of section 242, supra, embraced in italics, it was requir- ed to be published in each daily issue of the paper during the prescribed period of publi- cation.

In upholding the publication of the ordi- nance, opposing counsel refer us to an act passed by the Legislature in 1889 (Acts 1889,

p. 481. See sections 1344 and 1346, Burns' Ann. St. 1906). The first section in this act provides: "That in all cities containing a population of ten thousand or more inhabitants, as shown by the last preceding census, all legal advertising required by law, pertaining to affairs connected with the city government, shall be made in a daily newspaper of general circulation, in such city, if one be published in said city." Section 3 of this act declares that "It shall be sufficient to make such publication one time each week on a given day, for the number of weeks now required by law," etc.

It is claimed by counsel that the provisions of this latter act control the question and that a publication of the ordinance in controversy "one time each week" during the prescribed two consecutive weeks is therefore sufficient. Appellant's counsel in response to this contention insist that the act of 1889, *supra*, falls within the purview of the cities and towns act of 1905, and therefore must be held to be repealed by section 272 of that act, which declares that "all former laws within the purview of this act are hereby repealed." From the conclusion, however, which we have reached, it is not essential that we here determine the controverted question in respect to the repeal of the act of 1889, *supra*. Section 242, *supra*, being silent in respect to the number of times that an annexation ordinance shall be published each week in a daily paper, therefore the section may be said to be open to judicial construction or interpretation. In construing a statute, the object or purpose of the court is to discover the intention of the Legislature. For such purpose an examination of the entire statute, as well as parts thereof, may be resorted to in order to discover the legislative intent. Acts of the Legislature in *pari materia* passed either before or after the enactment of the statute under interpretation, and whether repealed or unrepealed, may be referred to and considered in order to discern the legislative intent. These are well-settled rules or canons pertaining to the construction or interpretation of statutes.

Guided by these rules we may turn to an examination of the act of which section 242 is a part and we find that section 97 thereof, in providing for giving of notice by the board of public works in condemnation proceedings, declares that such notice "shall be published in a newspaper of general circulation published in such city, once each week, for two consecutive weeks."

By section 90 of the same act, the notice required to be given to nonresident owners in regard to the assessment of damages and benefits in condemnation proceedings is to be "by publication in some daily newspaper of general circulation in such city, *once each week*, for three successive weeks." (Our italics.)

Section 117 of the same statute, in requiring notice to be given of the adoption by the

board of public works of a resolution to construct a sewer or drain in the city, provides that such notice "be published *once each week* for two consecutive weeks in some daily newspaper of general circulation in such city." (Our italics.)

Section 120, which deals with assessments for sewers and drains made by the board of public works provides "that immediately after said assessment roll is completed and filed, the said board shall cause to be published in some daily newspaper of general circulation in said city, *once each week* for two consecutive weeks, a notice," etc. (Our italics.)

Section 124, which deals with the appropriation of lands for the construction of a levee and street, provides that the notice therein required to be given is to be "published in some daily newspaper of general circulation in such city, *once each week*, for two weeks." (Our italics.)

Section 126, in requiring notice to be given to a nonresident or unknown property owner of damages and benefits assessed against his property, provides that he shall be "notified by publication in some daily newspaper of general circulation in such city, *once each week*, for three successive weeks." (Our italics.)

Section 1 of an act which provides for the alteration of steam railroad grade crossings, etc., in cities of more than 100,000 population, provides that the board of public works shall give notice of the adoption of a resolution for the alteration of any grade crossing or crossing of any steam railroad track, etc., and that such notice shall be "published in some daily newspaper of general circulation in such city, *once each week*, for two consecutive weeks." (Our italics.) This latter statute was passed at the same session of the Legislature at which the cities and towns act of 1905 was passed, and immediately prior to the latter act.

In addition to the statutes to which we have referred, we may also refer to and consider the provision of the act of 1889, *supra*. Whether this act be repealed or unrepealed is immaterial in our endeavor to discover the legislative intention in respect to the provision of section 242 in controversy. The act of 1889 was passed some 16 years prior to the passage of the cities and towns act of 1905. It will be noted that the Legislature in thereby requiring that all legal advertising connected with the city government should be made in a daily newspaper, provided that a publication "one time each week" should be sufficient. In the light of the several provisions of the act of 1905, *supra*, to which we have referred, which deal with the publication by the city of legal notices pertaining to the affairs of the city government, and in view of the provision of the act of 1889 wherein, as shown, the Legislature considered and declared that a publication in a daily newspaper one time

each week should be sufficient, it would appear unreasonable to assert that the Legislature, under the provisions of section 242, intended that a different rule should govern in respect to the publication of legal notices by the city than that prescribed by the other sections of the act in regard to the same subject; or, in other words, that under the several provisions of the same act which require the publication of legal notices to be made in a daily newspaper, and which declare that a publication of the notice each week in one issue of such paper shall be sufficient; but, on the contrary, the notice required to be given by section 242 must thereunder be inserted and published in each daily issue of the newspaper during the entire period of publication. To accord such an interpretation to the provision of the section in controversy would appear to impress it with absurdity and inconsistency, which a court in construing the provisions of a statute should avoid. *Seller v. State ex rel.*, 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448. We conclude that under the provisions of section 242, *supra*, the Legislature meant and intended that the publication of the annexation ordinance therein provided for, in one issue each week for at least two consecutive weeks, in a daily newspaper of general circulation published in such city should be a sufficient publication of the ordinance. Therefore, appellant's contention that the ordinance in question is invalid and void because it was not published as required by the statute must fail.

Appellant advances argument to show that because the territory annexed to the city was used for agricultural, horticultural, and dairy purposes and that he and the other owners thereof did not intend to plat it into lots and place it upon the market for sale, etc., therefore, the common council was not justified in making the annexation, but his contention must be dismissed without consideration because he cannot in this collateral action raise the question in respect to the insufficiency of the reasons to justify the action of the council. If he, as the owner of a part of the lands annexed, felt aggrieved by the action of the council, section 243, *supra*, of the statute, afforded him an adequate remedy of appeal to the circuit or superior court. He neglected to avail himself of this remedy and therefore is not now in a position to insist that the common council did not have sufficient reasons for annexing the lands in question. The council had jurisdiction or authority under the law to make the annexation, and we must presume in this action that it found sufficient reasons to warrant its action.

In respect to the wisdom or expediency of the acts of common councils of cities in matters over which such councils have jurisdiction, courts are not concerned, for, as said in 3 Abbott on Municipal Corporations, § 1130: "It is a well-settled and equitable

doctrine that the domain of discretionary powers conferred upon municipal bodies will in no case be invaded by the courts. * * * So long as the municipal body does not transcend the scope of its authority to enact ordinances or violate any of the limitations to the exercise of such power, it will not, in the absence of fraud, be interfered with by injunction."

As a final proposition, counsel for appellant argue that the board of public works of the city of Indianapolis is without authority under the law to let the contract for the construction of the sewer in controversy for the reason that the board, as shown, decided against and over the evidence introduced by the property owners at the preliminary hearing provided for in section 117 of the act of 1905 (section 8722, Burns' Ann. St. 1908), that the special benefits to property accruing out of the construction of the sewer, within the district to be drained, would equal the estimated cost of the improvement; that, therefore, further proceedings by the board in the construction of the sewer should be enjoined or arrested.

This argument, under the law, is so untenable that it hardly can be said to merit serious consideration. There is nothing in the facts alleged in appellant's complaint which can be accepted in this action as showing that the board of public works in deciding as it did, adversely to the contention of appellant, transcended its legal power or authority. The power invested in the board to decide whether the benefits would equal the cost of the improvement, impliedly at least, carries with it the right to decide wrong as well as right. *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447. The board was not absolutely bound by the evidence presented, but it had the right in respect thereto to exercise its own honest judgment. *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624.

Section 117, *supra*, in providing for the adoption of a resolution by the board of public works ordering the construction of any local sewer or drain, provides that on the day named or fixed in the notice to be given "the board will hear all persons interested, or whose property is or will be affected by the proposed improvement, on the question as to whether the special benefits that will accrue to the property to be assessed, * * * will be equal to the estimated cost of the improvement. On the day named, any and all such interested persons who may appear before such board shall be accorded a full hearing on such question, and on any matter pertaining to the said proposed improvement. * * * If said board shall, after such hearing, decide that the special benefits accruing to said abutting property are equal to the estimated cost of the improvement, such finding shall be en-

tered of record and shall be final and conclusive on all parties, but if it be decided by the said board, after such hearing, that such special benefits will not equal such estimated cost, then said board shall proceed no further with such improvement," etc.

The insistence of appellant that the board of public works must decide the question of benefits upon the weight of the evidence which is formally presented at the preliminary hearing would completely defeat the very purpose or object of the statute, which permits the board, upon its own judgment, to begin and carry out the construction of a local sewer or drain. It follows, and we so hold, that appellant's complaint states no right of action. Therefore, the demurrers of appellees were properly sustained.

Judgment affirmed.

STUDEBAKER v. ALEXANDER. (No. 21,054.)¹

(Supreme Court of Indiana. Nov. 29, 1910.)

1. NEW TRIAL (§ 178*)—STATUTORY NEW TRIAL AS OF RIGHT—ACTIONS TO QUIET TITLE.

Under the direct provisions of Burns' Ann. St. 1908, § 1110, plaintiff in a suit to quiet title, no matter what form the issues may take, may claim a new trial as a right, thus in a suit to quiet title, where the point in issue was the validity of a tax deed, the plaintiff was entitled to a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 345; Dec. Dig. § 178.*]

2. NEW TRIAL (§ 183*)—STATUTORY NEW TRIAL AS OF RIGHT—CONDITIONS IN PERFORMANCE THEREOF.

Where the plaintiff in a suit to quiet title has given notice by filing a bond for costs and damages, within a year, she has become invested with the statutory right to a new trial under Burns' Ann. St. 1908, § 1110, that nothing but a new trial will satisfy, and the court has no discretion.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 183.*]

3. NEW TRIAL (§ 183*)—STATUTORY NEW TRIAL AS OF RIGHT—PROCEEDINGS TO PROCURE.

Under Burns' Ann. St. 1908, § 1110, the right to a new trial in suits to quiet title is so absolute that the motion therefor need not be in writing, nor need notice of application be given to the opposite party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 362-365; Dec. Dig. § 183.*]

4. JUDGMENT (§ 581*)—STATUTORY NEW TRIAL AS OF RIGHT—NATURE—VALIDITY OF JUDGMENT ON NEW TRIAL.

Where a new trial is secured in a suit to quiet title under the provisions of Burns' Ann. St. 1908, § 1110, without a formal vacation of the former judgment, the latter judgment is not void, especially where the successful party on the first trial participated in the second without objecting.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 581.*]

5. TRIAL (§ 402*)—VENIRE DE NOVO—GROUNDS.

A motion for a venire de novo, based only on the ground "that the court failed to find the facts," is properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 953; Dec. Dig. § 402.*]

6. DRAINS (§ 69*)—ASSESSMENTS—MODE.

In an action to quiet title, the validity of an assessment for drainage improvements was drawn in question. The assessment was based on Burns' Ann. St. 1901, § 5692, which provided for an estimate of the cost of location and construction and apportionment of the same to each landholder, etc. Burns' Ann. St. 1901, § 5697, provided that contracts for the construction should be let to the lowest responsible bidder, etc., while section 5698 permits the owner of land affected by improvements to construct the improvement through his property at the estimated cost thereof. Sections 5693 and 5694 provided, respectively, for the apportionment and confirmation of these assessments, and section 5701 provided that bonds should be issued for the amount of the assessments. Plaintiff insisted that her assessment should be reduced by the difference between the amount of the estimated cost and the contract price of doing the work. Held that, this contention could not be sustained, for section 5698, which provided that an owner may construct the improvements himself at the estimated cost, did not excuse him from further contribution; there being no statute supporting plaintiff's claim; and bonds having been issued and expenses incurred upon the basis of the assessment.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 69.*]

Appeal from Circuit Court, Wells, County; J. H. C. Smith, Judge.

Action to quiet title by Della M. Studenaker against Charles W. Alexander. From the judgment, plaintiff appeals. Affirmed. See, also, 91 N. E. 606.

Mock & Sons, for appellant. Simmons & Dailey, for appellee.

HADLEY, J. Appellant instituted her action in one paragraph against appellee to quiet her title to the lands described in the complaint. Appellee answered in general denial of the complaint and filed his cross-complaint, in which he admitted the title to the land to be in the plaintiff, but set up a tax claim against the same, which he asked should be declared a lien and foreclosed against the land. Trial was had and judgment rendered in favor of appellant as to her title, and in favor of appellee as to his lien, and a decree was entered giving appellee judgment for the amount of his lien and ordering that on default of payment the land should be sold and the proceeds applied to the satisfaction of the lien, and the overplus paid to the appellant. This much of the proceeding was had before a special judge. Judgment was entered on June 3, 1905. Afterwards, on September 7, 1905, appellant filed a motion and an approved bond demanding that the court set aside the judgment rendered in the cause and grant her a new trial as a matter of right, under the provisions of section 1110, Burns' Ann. St. 1908.

Subsequently, on December 14, 1905, the special judge before whom the proceedings were had, without notice acting upon the motion for a new trial, resigned his jurisdiction of the case, whereupon the cause was re-assigned to another special judge, who, with-

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

out taking any action on the motion for a new trial and without objection by either party, set the cause for a retrial, and it was thereafter retried on May 3, 1906, and judgment rendered in substance the same as the former, and from which last judgment appellant is prosecuting this appeal.

Appellee insists that the last judgment was void, and that nothing is presented to this court thereon, for the reason that the record shows that there is now a former judgment in said cause that has never been appealed from or vacated. Appellant insists that while no action of the court was had on the motion for a new trial as of right, upon the filing of the motion, accompanied with an approved bond, the court had no discretion but to grant it, and since the parties proceed to trial without objection, the record should be considered as if the former judgment was vacated and the parties held to have waived all objections to proceeding with the second trial.

With respect to a new trial as of right, it is well settled that if the sole object of the suit, as shown by the complaint, is to recover possession, or quiet the title to real estate, in the plaintiff, by removing all adverse claims, the plaintiff, or cross-plaintiff, as the case may be, is entitled to a new trial of the whole case as a matter of right. Hence, we have held that in such actions any form the issues may afterward assume will not abridge the right of a party to a new trial as of right. *Bisel v. Tucker*, 121 Ind. 249, 23 N. E. 81; *Island Coal Co. v. Streitlemier*, 139 Ind. 83, 37 N. E. 340; *Nutter v. Hendricks*, 150 Ind. 605, 50 N. E. 748; *Lodge, etc., v. Routh*, 163 Ind. 1-9, 71 N. E. 148.

The single paragraph of appellant's complaint was an ordinary assertion of title and demand to have it quieted against any and all claims of appellee. The only issue tendered by the answer and cross-complaint was that appellee had a just claim against the land, and demanded its enforcement. The issue formed and tried was, whether the plaintiff's title was free from the claim set up by the defendant. Upon the trial the plaintiff lost, and was entitled to a new trial as a matter of right under section 1110, *Burns' Ann. St. 1906*.

It is contended that this view is in conflict with the ruling in *Pool v. Davis*, 135 Ind. 323, 34 N. E. 1130. We think it is, in so far as that case seems to hold that a cross-complainant, by admitting title in the plaintiff as alleged, and setting up a lien thereon, may thus defeat the plaintiff's right to a new trial under section 1110, *supra*. The cases of *Wilson v. Brookshire*, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792, *Bradford v. School Tp.*, 107 Ind. 280, 7 N. E. 256, and *Butler University v. Conrad*, 94 Ind. 353, upon which the *Pool Case* is constructed, afford it no support. The doctrine of the cases referred to is to the effect that when a plaintiff, or cross-complainant, unites with his action to recover possession or quiet title to

land some other substantive cause of action in which a new trial as of right is not demandable, he thereby waives his right under section 1110, and each one of the cases cited was of the latter character. The many adjudications of this court are reviewed in *Bisel v. Tucker*, *supra*, and the rule therein clearly stated, and in so far as *Pool v. Davis*, *supra*, conflicts with the doctrine of *Bisel v. Tucker*, *supra*, the former is overruled.

We hold that appellant was entitled to a new trial as a matter of right, and having given notice of her demand by filing within the year a bond for costs and damages that might be assessed upon a retrial, she became invested with a statutory right that nothing but a new trial will satisfy. In a proper case the court has no discretion. *Tomlinson v. Tomlinson*, 162 Ind. 530, 70 N. E. 881; *Anderson v. Anderson*, 128 Ind. 254, 27 N. E. 724. The right thereto is so absolute that the motion therefor need not be in writing. *Heberd v. Wines*, 105 Ind. 237, 4 N. E. 457; *College v. Wilkinson*, 89 Ind. 23. It is not even necessary to give notice of the application to the adversary party. *Stanley v. Holiday*, 113 Ind. 525, 16 N. E. 513; *Steeple v. Downing*, 60 Ind. 478.

Proceeding with the second trial without a formal vacation of the former judgment was irregular and erroneous, but did not render the subsequent proceeding void. In proceeding without a nullification of the former judgment, appellant acquired no right that the statute did not give her, and the appellee surrendered no right that he possessed. Appearing and proceeding with the trial to final judgment, without objection, was effective to vacate the former judgment and give validity to the latter in the sense that the irregularity is made by acquiescence unquestionable by either party. We hold, therefore, that the judgment rendered in the second trial was appealable.

Appellant's brief in the statement of points and the presentation of argument is so confused as to create in our minds a state of uncertainty as to the errors relied upon for a reversal. Appellant's assignments are: Error of the court in overruling her motion for a *venire de novo*, for a new trial, and in its conclusions of law.

No proposition or point relating to the motion for a *venire de novo* is stated, and no authority cited in support of it but *Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523, which makes no mention of such a motion. Furthermore, the only reason presented in the argument in support of the motion is, "that the court failed to find the facts." This is no reason at all, and the motion was properly overruled.

It is shown that appellee purchased appellant's land at a regular and legal sale thereof by the treasurer of Wells county on February 11, 1910, to enforce a ditch assessment laid upon the land in 1893, under the drainage act of 1891 (Acts 1891, p. 455; sections 5690, 5717, *Burns' Ann. St. 1906*), and

which assessment appellant assumed and agreed to pay in her purchase of the land in 1894.

The substance of the special finding is to the effect that on February 4, 1893, the duly appointed drainage commissioners filed in the auditor's office their report, setting forth the lands benefited by the construction of the proposed drain and the amount of benefits to each tract, etc., including the lands of appellant. On March 20, 1893, said report was duly approved by the board of commissioners, and the assessment of benefits therein stated confirmed. Divers payments were made by appellant on said assessments, and on February 11, 1901, there was a balance of principal, interest, and penalty due of \$455.40, and said lands were then sold to appellee, as above stated, for that amount. Appellant on the 1st day of April, 1901, tendered to the treasurer of Wells county \$130.80 as the balance due from her on said assessment and for the general taxes for that year, and the tender being refused, the amount was, in May, 1904, paid to the clerk of the Wells circuit court wherein the suit was pending.

Our best understanding of appellant's brief is that she lodges her case upon the following facts: The statute provides (section 5692, Burns' Ann. St. 1901) that the viewers when making the view and assessment of benefits "shall apportion the number of lineal feet and cubic yards of earth to each tract in proportion to the benefits which will result to each from the improvement and also make an estimate of the cost of location and construction, and apportion the same to each and specify the manner in which the improvement shall be made," etc. Section 5697, Burns' Ann. St. 1901, provides that the contracts for construction shall be for sections not less than the number of lineal feet apportioned to each tract and to the lowest responsible bidder, and bonds shall be taken to secure performance. The evidence discloses that appellant's total assessments were \$948.10 and that she waived her right to construct that portion of the ditch allotted to her land as her proportionate share of benefits and cost of construction, and her allotment was therefore put up at public sale and sold to the lowest bidder for \$863.75.

We take appellant's insistence to be (1) that if a party assessed with benefits exercises his right to construct that portion of the ditch designated by the viewers as his proportionate share of benefits and estimated cost of location and construction, he thereby pays all that is justly due from him from a construction of the ditch, and in effect thereby discharges his entire assessment as made by the viewers and confirmed by the board of commissioners; (2) that if an allotment is bid off at the public sale thereof, by a stranger, for a sum of less than the benefits assessed, and who gives bond to secure the execution of the work,

the owner is entitled to a credit on his assessment for the difference between his assessment and the sum for which his allotment was sold, which in appellant's case was \$284.85. In other words, she contends that since the construction of the share allotted to her land was let for \$284.35 less than the benefits assessed to her lands, she is, therefore, entitled to a credit on her assessment for the difference between her assessment and the cost of construction. We cannot accept her construction of the statute. And the statute alone must govern.

Relating to assessments, section 5693 provides that the viewers shall assess and apportion the benefits and cost of construction in lineal feet to the several tracts of land affected. Section 5694 provides for a hearing of the report by the board of commissioners who, when satisfied that all persons affected by the proposed improvement have had notice of the hearing and that all assessments made therein are fair and equitable, the board shall approve and confirm the same. The assessments thus approved and confirmed shall, by the terms of section 5701, be placed by the county auditor upon a special tax duplicate and "such assessments shall constitute a first and paramount lien upon the lands assessed in the same manner and form as other taxes." After the assessments have been confirmed and become a lien against the several tracts, the statute (section 5697) provides for the letting of contracts for the construction of the drain. Such contracts shall be let by allotments, as made to the several tracts, by selling the same at public auction to the lowest bidder. But by a provision in section 5698 "the owner of any land affected by the improvement shall have an opportunity of constructing that part of the improvement apportioned to his land, at the estimated cost thereof."

There is not a suggestion anywhere in the law that the owner who elects to and does construct the share of the ditch allotted to his lands shall thereby be discharged from further contribution to the improvement, or that his assessment shall be affected in any other way than, with the money received for the construction in his pocket, the owner shall be better prepared to pay it as it matures. Neither is there anything in the statute that warrants the construction that, if an allotment is bid off for less than the assessment, the landowner is entitled to credit on his assessment for the difference. The only benefit, or advantage, that we perceive that would accrue to the owner by working out his allotment is that he become entitled to receive for the work from the proceeds of the bond sale the full amount of the estimated cost thereof, rather than become the lowest bidder for the work.

Under appellant's contention, what would be the result if every landowner constructed

the portion allotted to his land and thereby satisfied the assessment of benefits against his land? Or what would be the result if all allotments were sold and constructed for a sum one-fourth less than the estimated cost of construction, as in this case, and the assessments of the several owners credited with such difference? Where would the money come from to pay expenses of survey, view, officer's fees, court costs and other legitimate charges? And, more than all, where would the money come from to pay the bonds issued and sold by the county, under the provision of section 5700, and based for payment expressly on the assessments that had been made and confirmed?

The statute provides that after the contracts for the construction of the ditch have all been made and secured by bonds, and all the other expenses and damages incident to the location and construction of the ditch have been ascertained, the board of commissioners shall issue and sell the bonds of the county, "based on such assessments," in denominations not less than \$100 and payable in not more than 20 yearly installments, with interest not exceeding 6 per cent., payable semiannually.

The record shows that the commissioners, acting under the mandate of the statute, sold \$60,000 of bonds of the county, "based on said assessments," in 10 years' installments, with 6 per cent. interest from date, payable semiannually, which amount of \$60,000 was, as shown by the special finding, inadequate to pay all costs and expenses incident to the location and construction of the ditch. The object in selling bonds is not apparent, if all costs and charges of the improvement may be paid by the landowners by working out their assessments. It is clear that appellant was not entitled to credit on her assessment for the difference between her assessment and the cost of constructing her allotment.

Appellant assails divers special findings as not being sustained by sufficient evidence, leaving divers others unquestioned which, under the ruling in *Major v. Miller*, 165 Ind. 275, 75 N. E. 159, presents no question concerning the sufficiency of the evidence to sustain the finding. She also further complains of a failure of the court to find certain facts that are clearly immaterial, as shown by what has heretofore been said.

Divers other reasons for a new trial are assigned relating to the evidence, all of which we have examined and find no error. Each of the conclusions of law upon the special finding was correct. The questions of laches and estoppel arising incidentally in the case are not considered. We find no error.

The judgment is affirmed.

(175 Ind. 567).

GRAND TRUNK WESTERN RY. CO. v. POOLE. (No. 21,508.)¹

(Supreme Court of Indiana. Nov. 29, 1910.)

1. PLEADING (§ 192*)—DEMURRER—MATTERS NOT APPEARING ON FACE OF PLEADING.

Contributory negligence must affirmatively appear on the face of the complaint to justify the sustaining of a demurrer thereto on that ground.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 428; Dec. Dig. § 192.*]

2. MASTER AND SERVANT (§ 260*)—INJURY TO SERVANT—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to a switchman caught in a defectively blocked frog which alleges that it was the custom of the railroad company to block its frogs, that the switchman knew it, that he had no knowledge of the unsafe condition of the frog, that relying on the custom and being absorbed in the performance of his duties he did not discover the defect causing the injury, sufficiently repelled any claim that the accident was the result of an assumed risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 844-848; Dec. Dig. § 260.*]

3. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—INCONSISTENT FINDINGS—GENERAL AND SPECIAL VERDICT.

Where, in an action for injuries to a switchman, the jury specifically found that the switchman when injured was performing his work in the customary way and that another way suggested was always dangerous, the special verdict did not contradict the general verdict for him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—REQUISITES.

The court need not embody every legal proposition applicable to the case in a single instruction, but it is sufficient where the instructions as a whole correctly state the law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. MASTER AND SERVANT (§ 229*)—INJURY TO SERVANT—CARE REQUIRED OF SERVANT.

A servant in the discharge of his duties must exercise the degree of care which men of ordinary prudence usually exercise for their own safety in similar circumstances.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 674; Dec. Dig. § 229.*]

6. MASTER AND SERVANT (§ 238*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The manner in which railroad men of reasonable prudence were accustomed to adjust couplers on slowly moving cars, where such practice was not manifestly negligent, fixed the standard by which a switchman's conduct in adjusting the coupler on a slowly moving car must be tested, though neither he nor the railroad company knew of the custom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 747; Dec. Dig. § 238.*]

7. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—INSTRUCTIONS—PROXIMATE CAUSE.

An instruction in an action for injuries to a switchman caught in a defectively blocked frog that the negligence may be the proximate cause of an injury of which it is not the sole or immediate cause, and that if the railroad company was negligent in either of the particulars charged and the negligence concurred with some other causes in bringing about the injury, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Rehearing denied.

company's negligence was a proximate cause, correctly charges on proximate cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1145; Dec. Dig. § 291.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

Such instruction does not deny the jury the right to determine the proximate cause of the injury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

9. MASTER AND SERVANT (§ 240*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The question in each case of injury to a railroad employé is whether the particular act involved was attended with such manifest or known danger that a person of ordinary prudence would not have attempted its performance under the existing circumstances, and a switchman knowing that blocked and unblocked frogs present dangers, and believing that the frogs are blocked, is not guilty of contributory negligence in walking in front of a moving car in the performance of his duties, so as to preclude a recovery for his injuries caused by being caught in a defectively blocked frog.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 755, 756; Dec. Dig. § 240.*]

10. MASTER AND SERVANT (§ 291*)—INJURY TO SERVANT—EVIDENCE—INSTRUCTIONS.

Where the complaint in an action for injuries to a switchman caught in a defectively blocked frog was founded on the state and federal statute imposing on railroad companies an imperative duty to use no car unless equipped with automatic couplers in working condition, an instruction as to the duty to inspect foreign cars was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1136; Dec. Dig. § 291.*]

11. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—NEGLIGENCE.

Proof of a defective coupler in use, in violation of the statutory requirement that cars shall be equipped with automatic couplers in working condition, shows a prima facie case of negligence of the railroad company, and if the exercise of any degree of care will excuse the use of a defective coupler, the burden of showing the facts rests on it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 880, 886; Dec. Dig. § 265.*]

12. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Where every way of performing work was dangerous, instructions as to the choice of an unsafe way to do work when a known safe way was available were properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1189; Dec. Dig. § 296.*]

13. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.

That a coupler on a car would not couple by impact without previous adjustment by hand showed that the car was not equipped with an automatic coupler, in accordance with the federal statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 962; Dec. Dig. § 278.*]

14. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a switchman attempting to adjust a defective coupler on a car about two hours after he commenced work as a switchman, evidence of the instructions, if any,

given him by the foreman of the railroad company was admissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

15. MASTER AND SERVANT (§ 297*)—SPECIAL INTERROGATORIES—SUFFICIENCY.

Where, in an action for injuries to a switchman caught in a defectively blocked frog while walking in front of a moving car to adjust a coupling thereof, the evidence showed that the foreman was present giving signals concurrently with the switchman and the court submitted to the jury in various forms whether the switchman could have signaled the engineer to stop with safety to himself, the answer, "always dangerous," was equivalent to a negative answer.

[Ed. Note.—For other cases, see Master & Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

16. TRIAL (§ 352*)—SPECIAL INTERROGATORIES—SUFFICIENCY.

Special interrogatories submitted to a jury should be so framed as to admit of a direct answer of "yes" or "no."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-845; Dec. Dig. § 352.*]

17. MASTER AND SERVANT (§ 231*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The conduct of a servant sustaining an injury while in the performance of his duties must, in determining whether he was guilty of contributory negligence, be judged in connection with the master's negligence and the fact that the servant could rely on the master performing its duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. § 231.*]

18. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a switchman injured by being caught in a defectively blocked frog while attempting to adjust the coupler in front of a moving car was guilty of contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1125; Dec. Dig. § 289.*]

Appeal from Circuit Court, La Porte County; John C. Richter, Judge.

Action by David Norman Poole against the Grand Trunk Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Anderson, Parker & Crabill and S. J. Crumpacker, for appellant. Travis & Irwin and Slick & Slick, for appellee.

MONTGOMERY, J. Appellee recovered judgment for a personal injury sustained while in appellant's service on account of its alleged negligence. His complaint was in three paragraphs, and the overruling of demurrers to each of them has been assigned as error demanding our first consideration.

It is alleged in the first paragraph of the complaint that appellee entered appellant's service as a switchman at 6 o'clock on October 8, 1906, and was injured in the Oliver yards at South Bend about 8:30 a. m. of that day. That appellant had in said yards four side tracks south of the main track

and connected by a "lead" track; and it became appellee's duty to couple a loaded car which was being moved along said lead track at the rate of two miles per hour, to a car standing on side track No. 2; that the cars were equipped with automatic couplers, but the pin of the coupling on the forward end of the loaded car had been pulled from its socket and could not be replaced by means of the lever, and it was necessary for appellee to go in front of said car and replace the pin in its socket and adjust the coupling by hand, so that the cars would couple automatically; that appellee stepped in front of the moving car for the purpose stated, and while walking along, absorbed in replacing the pin and adjusting said coupling and in the exercise of due care, the shoe on his left foot caught and became wedged in a frog formed by the converging rails at the south side of side track No. 2, and while trying to extricate his foot from said frog, he was struck by the moving car, thrown down and under its wheels, run over, and thereby injured. It is charged that appellant knowingly, negligently, and carelessly permitted the blocking in said frog to be and become so worn and rotted away that only a small piece of wood about six inches in length remained, which was not large enough to block the frog properly, but was wholly unsuitable and inadequate to block the same and to keep the feet of employes from becoming fastened therein; that said piece of wood was not nailed or fastened, but lay loose in said frog, and appellee's foot was caught and he was thrown down and injured by reason of the fact that said frog was improperly, defectively, and inadequately blocked as aforesaid.

It is further alleged that it had been and was appellant's custom, practice, and mode of doing business to block all frogs upon its lines, switches, and side tracks, which fact was known to appellee and relied upon by him at the time he entered its service and was injured; and that prior to his injury he had no knowledge of the defective blocking of said frog, but that appellant knew of the defective and dangerous condition of said frog in time to have repaired the same before this accident, and negligently failed and omitted to do so.

Appellant challenges the sufficiency of this paragraph claiming that it discloses contributory negligence, or that appellee's injury was the result of a risk assumed by him. Appellee avers in general terms that he was in the exercise of due care when injured, and the particular facts alleged do not contradict this averment. It is well settled that contributory negligence must affirmatively appear on the face of the complaint, to justify the sustaining of a demurrer thereto for such cause. It is charged that appellant's custom and practice was to block

all its frogs, which fact was known to appellee, and that he had no knowledge of the unsafe condition of the frog in question, and relying on such custom and practice and being absorbed in the performance of his duties, he did not discover the defect which caused his injury. These allegations were abundantly sufficient to repel any claim that the accident was the result of an assumed risk. Appellant's objections to this paragraph are untenable, and its demurrer was correctly overruled.

The second paragraph contained all the allegations of the first, and further charged that appellant negligently permitted the coupling on the forward end of the moving car to be and remain in a nonautomatic, inoperative, and defective condition, in that the cotter pin which fits into the lower end of the coupling pin and prevents the same from pulling out of its socket became and was lost, so that it was necessary in order to operate said coupling to go in front of said car and replace said coupling pin and adjust the coupling prior to each impact.

The third paragraph of complaint contained all the allegations of the first, and in addition alleged a breach of the federal statute making it unlawful for an interstate carrier to permit a car to be used in moving interstate traffic which is not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars. Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174).

The first paragraph having been held good, it is manifest that, for the same as well as additional reasons, the second and third paragraphs were properly held sufficient.

The jury with the general verdict returned answers to a number of special interrogatories, and appellant moved the court for judgment in its favor on the special interrogatories and answers thereto, notwithstanding the general verdict. This motion was overruled and this ruling assigned as error. It is urged in this connection that appellee was guilty of negligence in attempting to adjust the coupler in a dangerous manner when he might have adopted another and safe way. This contention is not sustained by the special findings of the jury. It is specifically found that appellee when injured was performing his work in the way usual and customary in appellant's Oliver yards, and that the other way suggested, in which the coupler might have been adjusted, was "always dangerous." The answers to interrogatories do not contradict the general verdict, and appellant's motion for judgment was rightly overruled.

A new trial was sought on the grounds of error in giving and in refusing certain instructions, in the admission and rejection of certain evidence, in not requiring the jury

to make more full and specific answers to certain interrogatories, and because the verdict is not sustained by sufficient evidence, and is contrary to law.

Instruction No. 2 is attacked because the element of assumed risk is not included. The law upon the subject of assumption of risk was fully and correctly covered in instruction No. 5 given at the request of appellant. The court is not required to embody every legal proposition applicable to the case in a single instruction, but it is sufficient if the instructions as a whole correctly advise the jury upon the law.

Complaint is made of the giving of instructions Nos. 5, 8, and 9 at appellee's request. These instructions were addressed to the question of liability for a violation of the federal statute requiring automatic couplers. The third paragraph of complaint declared upon a breach of this statute, there was evidence making the giving of such instructions proper, and taking the instructions together they accurately and fully express the law upon the proposition to which they relate.

The court advised the jury that if the evidence showed the existence of a general practice and custom in appellant's Oliver yards at, and for, several years prior to, the time of this accident, of employes going in front of slowly moving cars to adjust couplings, of which appellant knew or in the exercise of ordinary care ought to have known, and in which it knowingly acquiesced, and of which practice and custom appellee knew and relied upon, it would be competent to consider such general practice and custom in connection with other facts and circumstances in evidence, in determining whether appellee was guilty of contributory negligence at the time of receiving his injury. The instruction was unduly guarded and its statements more favorable to appellant than the applicable rule of law required. Appellee, in the discharge of his duties, was held to the exercise of only ordinary care, or that degree of care and watchfulness which men of ordinary prudence usually exercise for their own safety in similar circumstances. The manner in which other railroad men of reasonable prudence were accustomed to adjust couplers on slowly moving cars, provided such practice was not manifestly negligent, would fix the standard by which appellee's conduct must be tested. This would be true even in the absence of knowledge of such custom by either appellant or appellee. Evidence of a practice and custom in accord with appellee's conduct was competent, and this instruction was relevant and proper. *Pittsburgh, etc., R. Co. v. Nicholas*, 165 Ind. 679, 684, 76 N. E. 522; *Pennsylvania Co. v. McCormack*, 131 Ind. 250, 257, 30 N. E. 27; *O'Meilla v. Kansas City, etc., R. Co.*, 115 Mo. 205, 21 S. W. 503; *La Barre v. Grand Trunk, etc., R. Co.*, 133 Mich. 192, 94 N. W. 735; *Weed v. Chicago, St. P., etc., Ry. Co.*,

5 Neb. (Unof.) 623, 99 N. W. 827; *Louisville & N. R. Co. v. York*, 128 Ala. 305, 30 South. 676; *Pioneer, etc., Co. v. Sandberg*, 98 Ill. App. 36.

Instruction No. 20, given at appellee's request, reads as follows: "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. If you find from the evidence that defendant was negligent in either particular alleged in the complaint, and that said negligence in that particular concurred with some other cause or causes in bringing about and causing plaintiff's injury, the defendant's said negligence would be a proximate cause within the meaning of that term as used in these instructions." Appellant contends that this instruction denied the jury the right to determine the proximate cause of appellee's injury. In our opinion, the instruction cannot be fairly so interpreted, and is not erroneous. *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 168, 40 Am. Rep. 230; *Cleveland, etc., Ry. Co. v. Wynant*, 134 Ind. 681, 84 N. E. 569; *Board of Com'rs v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Chicago, etc., R. Co. v. Pritchard*, 168 Ind. 398, 409, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; 29 Cyc. 496-7.

Instruction No. 24, relating to the assessment of damages, of which appellant complains, is almost a literal copy of *Pittsburg, etc., Ry. Co. v. Montgomery*, 152 Ind. 1, 26, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301.

The court refused appellant's tendered instructions numbered two and five, which were so drawn as to declare appellee guilty of contributory negligence because frogs, both blocked and unblocked, were known to him to present elements of danger to one walking in front of a moving car. Almost every act of operative railroading presents elements of known danger to the employe in such service, but this fact does not make him chargeable with negligence in undertaking such work. The question in each case is whether the particular act involved was attended with such manifest or known danger that a person of ordinary prudence should not have attempted its performance under existing circumstances. The proffered instructions were properly refused, and the question whether appellee was guilty of contributory negligence in this case was not one of law for the court, but one of fact for the determination of the jury, in the light of all the evidence, and the instructions of the court upon that subject.

Appellant's instructions 7 and 8 related to its duty to inspect foreign cars. These instructions might have been relevant and proper in a common-law action, based upon a defect in a foreign car, but the paragraphs of appellee's complaint involving the defective coupling on a foreign car were founded on the specific provisions of state and federal statutes, imposing upon appellant an imperative duty to use no car, without re-

gard to ownership, unless equipped with automatic couplers in normal working condition. The tendered instructions were clearly irrelevant.

Instruction No. 9 requested by appellant sought to have the jury charged that the defect in the coupler shown in this case was not such as reasonably to give appellant notice of danger to appellee in the performance of his duties, and that no recovery based upon such defect could be had. In the most favorable view to be taken of the proposition advanced, the question was not one of law, but was properly submitted to the jury for decision, and this instruction was rightly refused.

Appellant's instruction No. 10 declared there was no evidence to charge it with knowledge of the absence of the cotter pin, and hence no proof of negligence in failing to make proper repairs. The showing of a defective coupler in use in violation of statutory requirements constituted a *prima facie* case of negligence, and if the exercise of any degree of care would excuse the use of the coupler without such pin, a question we are not called upon to decide, the obligation or burden of showing the extenuating facts rested upon appellant. This instruction proceeded upon an erroneous theory and was properly refused.

Instructions 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 24 tendered by appellant purported to state the law with regard to the choice of an unsafe way to do work when a known safe way was equally available. A consideration of these instructions is unnecessary. In view of the special finding of the jury that the suggested safe ways were "always dangerous." *Pittsburgh, etc., Ry. Co. v. Collins*, 168 Ind. 467, 476, 80 N. E. 415; *New Castle Bridge Co. v. Doty*, 168 Ind. 259, 271, 79 N. E. 485; *City of Muncie v. Hey*, 164 Ind. 570, 577, 74 N. E. 250; *Baltimore, etc., Ry. Co. v. Harbin*, 160 Ind. 441, 443, 67 N. E. 109; *Roush v. Roush*, 154 Ind. 562, 573, 55 N. E. 1017.

The twenty-fifth instruction tendered and refused declared as a matter of law that the car in question was equipped with an automatic coupler in accordance with the requirements of the federal statute. It was shown without dispute that the coupler would not couple by impact without previous adjustment by hand. This condition was not in accord with the manifest purpose and requirements of the law, and the instruction was erroneous.

Appellee, as a witness, was asked whether before receiving his injury, and on the same morning, Mr. Kellogg, appellant's foreman and yardmaster, instructed him with reference to going in front of moving cars, or going between moving cars to adjust defective couplers, and answered in the affirmative. He was then asked to relate what Mr. Kellogg said to him on this subject. Appellant's objection to the question was over-

ruled. Appellee's insistence is that he was adjusting the coupler at the time he was injured, in conformity with instructions. He had entered upon his duties as switchman but two hours before and it was certainly competent for either party to prove what, if any, instructions had been given him touching the manner of performing the duties assigned to him. The objection was correctly overruled. *Indiana Car Co. v. Parker*, 100 Ind. 181, 198; *Rogers v. Overton*, 87 Ind. 410.

The jury, in answer to an interrogatory, found that after opening the switch to track No. 2, appellee could have signaled the engineer to stop, and then after the engine and cars had stopped, gone in front of the car in question and replaced the lock pin in the coupler. They were asked in various forms whether this could have been done by appellee with safety to himself, and answered in every instance, "always dangerous." Appellant requested the court to require the jury to answer specifically "yes" or "no," but its request was denied, and complaint is made of this ruling. The jury had found that the engineer in charge of the engine at the time of the accident, in distributing cars about the yards, was controlled and directed as to the movements of the engine by signals from appellee, and also by signals from Robert Kellogg, the yard foreman. It was further shown that the foreman was present at the time giving signals concurrently with appellee. The answer of the jury is responsive to the questions propounded, and is equivalent to a simple "no." The query was, could appellee have done the suggested act with safety to himself, and the response was "always dangerous"—the clear meaning of which was, "not with safety to himself," or "no." If the interrogatory had been made sufficiently comprehensive to insure the engine remaining stationary while the coupler was being adjusted, a different answer would have seemed proper, but under the circumstances shown, the thought in the minds of the jurors doubtless was that the engine was liable to move at the signal of the foreman, at any moment, making it always dangerous to go in front of the cars to which it was attached. Interrogatories should ordinarily be so framed as to admit of a direct answer of yes or no, but we cannot say that the court committed harmful error in refusing to require such answer to the interrogatories under consideration. *Fort Wayne, etc., Co. v. Page*, 170 Ind. 585, 594, 84 N. E. 145, 23 L. R. A. (N. S.) 946; *Salem-Bedford Stone Co. v. Hilt*, 26 Ind. App. 543, 59 N. E. 97.

The legality of the verdict is challenged on the ground that it is not sustained by sufficient evidence. Appellant insists that appellee was guilty of contributory negligence in trying to adjust the coupler in front of a moving car when approaching a frog and other obstructions known to him to be in the track. Cases are cited in which the court

held the injured party negligent as a matter of law, but they are readily distinguishable from this. In some of them a rule of the company prohibited an employé from going in front of a moving car in the performance of his duties, and this rule was violated without the knowledge or consent of the company, and in other cases the complaining employé had exclusive control of the movements of the engine, and voluntarily undertook to do his work in an unusual and manifestly dangerous way, when he could have pursued a known practical and safe way. Appellee's conduct in this case must be viewed and judged in connection with appellant's alleged negligence. Appellant had undertaken to block all the frogs in its yards, and appellee knew and relied upon this fact. A blocked frog may not be wholly free from danger, but we cannot say that this accident would have happened as it did, if the blocking had been properly done or been in good condition. The evidence showed the blocking to have been rotten and in bad shape, and in this condition it was likely to be more dangerous than would have been a frog known to be wholly unblocked, because of its apparent security. The engineer was not subject to the exclusive control and direction of appellee. In view of all the attendant facts and circumstances the question of contributory negligence was rightly submitted to the jury for determination, and we cannot say that their conclusion was not warranted by the evidence.

The motion for a new trial was correctly overruled, and the judgment is affirmed.

(47 Ind. App. 118)

HOLT v. MYERS. (No. 7,096.)†

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1910.)

1. APPEAL AND ERROR (§ 928*)—OMISSION OF EVIDENCE FROM RECORD—EFFECT.

Where the evidence is not in the record on appeal, the judgment will not be reversed because of an instruction given, if it would be proper under any state of facts provable under the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

2. ANIMALS (§ 68*)—NOTICE OF VICIOUS PROPENSITIES—LIABILITY FOR INJURY.

A person who keeps a vicious dog with knowledge of his vicious disposition is liable to any person injured by the animal without his fault.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 225, 226; Dec. Dig. § 68.*]

3. ANIMALS (§ 68*)—VICIOUS DOG—ACTION FOR INJURIES—ALLEGATIONS NECESSARY.

In an action to recover for injuries from a vicious dog, plaintiff need not allege or prove any negligence of the owner in securing the animal, where he had knowledge of its vicious disposition.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 225; Dec. Dig. § 68.*]

4. APPEAL AND ERROR (§ 1066*)—INSTRUCTIONS.

In an action for injuries from a vicious dog, instructions that plaintiff must show that defendant either knew, or should have known by reasonable care, the dog's disposition; that the finding should be for plaintiff if defendant either knew the dog's disposition, or should have known it by reasonable care and failed to confine the dog; that the burden of proof was upon the plaintiff to prove that defendant either knew, or should have known by reasonable care, the dog's disposition—were harmless so far as they dealt with constructive notice, if the evidence showed that defendant kept the dog with actual knowledge of his vicious disposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Action for injuries by Sterling R. Holt against Fred Myers. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 43 Ind. App. 538, 88 N. E. 80.

Kealing & Hugg, for appellant. E. M. Hornaday, for appellee.

COMSTOCK, J. Appellee sued appellant to recover damages for injuries alleged to have been inflicted upon him by a vicious dog owned by appellant. The cause was put at issue by general denial to the amended complaint. The jury to which the cause was submitted returned a verdict in favor of appellee for \$300. Appellant filed his motion for a new trial, which was overruled upon appellee remitting \$150 of the verdict, and judgment rendered against the appellant for \$150, and costs.

The only error relied upon for reversal is the action of the court in overruling appellant's motion for a new trial, and, of the reasons therefor, only that the court erred in giving instructions 9, 11 and 12, of its own motion, are discussed. So much of said instructions as follows will suffice to make clear appellant's claim. Said ninth instruction reads: "Before the plaintiff is entitled to recover, the evidence must show by a fair preponderance that the defendant kept a vicious dog at his place, which he permitted to run at large, and on the public highway near his place, and that he knew, or *should have known by the exercise of reasonable care*, that said dog was vicious and likely to attack and injure persons while passing along the public highway. * * *" Said eleventh instruction reads: "If you find from a preponderance of all the evidence that the defendant kept a dog which had a propensity to bite mankind, and which fact was known to the defendant, or *should have been known by the exercise of reasonable care*, then it was his duty to keep said dog confined, and, if he failed to do so, and through such failure plaintiff was damaged, then they should find for the plaintiff," etc. The twelfth reads: "The burden of proof is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied, 83 N. E. 1002.

upon the plaintiff to prove to your satisfaction by a fair preponderance of the evidence that the defendant knew, *or should have known by the exercise of reasonable care*, that the dog alleged to have injured plaintiff had bitten or attacked others prior to the time," etc. The words italicized constitute the alleged error.

It is claimed that the court erred in each of these instructions as placing upon the appellant a greater degree of care than the law requires; that they charge him with constructive notice of acts committed by his dog. In other words, the instructions complained of put upon appellant a continuing duty of watchfulness over his dog, equivalent to the duty of inspection on the part of a master to his servant. It is also the claim of appellant that the vicious character, propensities, or acts of the dog must be brought to the knowledge of the owner.

No attempt is shown to make the evidence a part of the record. Where the evidence is not in the record, a judgment will not be reversed for an instruction given which would be proper under any state of facts provable under the issues. *Abney v. Indiana Union Traction Co.*, 41 Ind. App. 53, 83 N. E. 387.

The person who keeps a vicious dog with knowledge of its vicious disposition is liable to any person injured by the animal without his fault; and, in an action to recover for such injury, it is not necessary to allege or prove any negligence or fault in the securing or taking care of the animal by the defendant. The failure to secure the animal known to be dangerous renders the keeper liable for injuries caused by the animal to one not at fault; the cause being treated as an action for negligence. *Cordon v. Kaufman*, 44 Ind. App. 603, 607, 89 N. E. 898; *Partlow v. Haggarty*, 85 Ind. 178; *Williams v. Moray*, 74 Ind. 26, 39 Am. Rep. 76.

It was competent to show that the appellant had actual knowledge of the dangerous propensities of his dog, and, in the absence of the evidence, it will be presumed that this was done. If the evidence showed that appellant had actual knowledge of the dangerous character of his dog, the instructions relating to constructive notice would have been harmless.

Judgment affirmed.

EFFINGER v. FT. WAYNE & W. V. TRACTION CO. (No. 6,873.)¹

(Appellate Court of Indiana, Division No. 1. Nov. 29, 1910.)

1. RAILROADS (§ 380*) — INJURIES — NEGLIGENCE.

A street car company was not liable for injuries caused by frightening a horse driven through a country district, if the car was not being operated in an unusual manner when the

horse was frightened, and it showed no disposition to go on the track.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. § 380.*]

2. RAILROADS (§ 380*) — DUTIES OF MOTORMAN — INTERURBAN CARS.

The motorman of an interurban car need not keep a lookout for horses or teams on adjacent highways or fields or stop or slack speed, upon observing that horses are frightened and unmanageable, unless persons are thereby placed in a perilous position which will be obviated by slackening or stopping the car, when the motorman must exercise every reasonable effort to stop the car to avert injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. § 380.*]

3. RAILROADS (§ 394*) — INJURIES — ACTION — SUFFICIENCY OF COMPLAINT — ALLEGATIONS OF DISCOVERED PERIL.

The complaint alleged that plaintiff and another were driving a horse and buggy along a public highway in the country, adjacent to defendant's street car line, and that, when the horse and buggy were "over 100 feet from said car as it was approaching," the horse became frightened at the car, and "began to jump and rear," and that plaintiff signaled the motorman to stop, and that the motorman was aware of its condition and its cause in time to have stopped the car and prevented the injuries; but that he negligently and unlawfully neglected to stop or check the speed of the car, and negligently ran at the rate of 20 miles an hour towards the horse, increasing its fright and causing it to jump into the ditch, injuring plaintiff. *Held*, that the complaint did not show that the horse was unmanageable, requiring the motorman to check the speed of the car, and not that the motorman could have stopped the car when the peril was discovered.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 394.*]

Appeal from Circuit Court, Wells County; C. E. Sturgis, Judge.

Action by Ferdinand Effinger against the Ft. Wayne & Wabash Valley Traction Company. From the judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Mock & Sons, for appellant. Elchhorn & Vaughn, Barrett & Morris, and Samuel L. Morris, for appellee.

HADLEY, P. J. This is a suit brought by appellant against appellee for damages for injuries sustained. The complaint avers: That appellee owns and operates an interurban railway with cars propelled by electricity, between Ft. Wayne and Bluffton. That for a mile north of the city of Bluffton said railway runs parallel with the public highway; the center of said railway track being 30 feet from the center of said highway throughout said distance. That there was a deep ditch on both sides of said highway. That for three-fourths of a mile south from the place of the accident there were no trees, hills, or obstructions of any kind between said highway and said railway. That on September 27, 1906, appellee was in a single top buggy, the top of which was up. That said buggy was drawn by a six year old

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep's Indexes

²Rehearing denied. Superseded by opinion in Supreme Court, 83 N. E. 355.

horse that had always been gentle, quiet, and safe to drive, and was owned and driven at said time by one Luther Brown. That appellant and Brown were driving said horse from the north towards said city of Bluffton, on and along said public highway. That at said time appellee was running one of its cars north from said city of Bluffton over its railway track at a rate of speed not less than 20 miles per hour. That at said time said Brown was driving said horse in a careful manner. That, when said horse and buggy were over 100 feet from said car as it was approaching said horse and buggy, said horse became frightened at said approaching car and appearance thereof and began to jump and rear. That said Brown threw up his hand and signaled the motorman in charge of said car to stop, and, while said horse was so frightened, jumping, and rearing at the approach of said car, appellee's agent and motorman saw and was fully aware of the frightened condition of said horse and the cause thereof in ample time to have stopped the speed of said car and the motion thereof, in time to have prevented the injuries to the appellant hereinafter complained of. That said motorman and agent of appellee in charge of said car, with full knowledge of the facts aforesaid, carelessly, negligently and unlawfully failed, refused, and neglected to stop or check the speed of said car though signaled and requested to do so by said Brown, and negligently and carelessly ran said car at said high rate of speed of 20 miles per hour towards and in the direction of said horse and buggy in close proximity to them, thus greatly increasing the fright of said horse by reason of which, and on account of the negligence of said motorman as aforesaid, it rendered it impossible for said Brown or this appellant to hold, manage, or control said horse. That on account of said negligence of said motorman said horse was caused to jump into said ditch on the east side of said highway opposite said buggy, thereby throwing appellant violently against the bank of said ditch and injuring him. That, had said motorman shut off the electricity from the motors of said car, the noise caused by said car would have been greatly lessened, and had said car been stopped, or the speed thereof slackened, said accident would have been averted, all of which could have been done without danger or damage to said car or any of the occupants thereof.

A demurrer to the complaint was sustained. This ruling is assigned as error. The complaint is not based upon the negligence of appellee in frightening the horse in the first instance. If so, it is clearly insufficient, as it does not appear that there was anything unusual in the manner of operating the car, or that the horse showed any disposition to go upon the track. Keeley Brewing Co. v. Farnin, 13 Ind. App. 592, 41 N. E. 471; Bal-

timore, etc., R. Co. v. Young, 146 Ind. 374, 45 N. E. 479. But liability is sought to be fixed on appellee under the doctrine of the last clear chance. That is, it seeks to show that the horse was frightened at the approach of the car; that appellant was thereby placed in a position of imminent peril from which it was apparent he could not extricate himself; that appellee had knowledge of this position in time, but did nothing to prevent the injury, when it might have done so without damage to itself and thereby prevented it. It surely must be conceded that, if the averments of the complaint sufficiently show these facts, it must be held to be good as against a demurrer, for certainly no one will contend that any person, or corporation can inflict an injury upon a person who is in a place where he has a right to be, and doing what he has a right to do, which such person or corporation, after full knowledge of all the facts, had time and opportunity to avoid without damage to itself.

The complaint is not specific. It says when the car was over 100 feet away the horse began to jump and rear. How much over 100 feet? Was it one inch or one mile? If it was only one inch, then it must be apparent from the other averments of the complaint that the car could not have been stopped or its speed slackened so as to have quieted the horse, since it is shown that the car was running at a speed of 20 miles an hour. This is about 80 feet a second. Then, again, it is not averred that the horse at that time was unmanageable, or that it appeared to be. It began to "jump and rear" is the language of the complaint. Did it continue in its manifestations of fright? Was its actions such as to indicate that it could not be managed by two men, and that their peril was imminent and one from which they could not extricate themselves?

The car was running on its own right of way, and this was located in a place that is recognized as a lawful place. It is not the legal duty of motormen of interurban cars, while running through the country in the usual manner, on their own right of way, to be on the lookout for horses or teams on nearby highways, or in adjoining fields, and to stop or slacken their speed or shut off their power every time they observe that such horses or teams are frightened. And it is only when it is apparent that such horses or teams are unmanageable and the occupants of the vehicles to which they are attached are in a perilous position from which they are unable to extricate themselves that the duty is imposed to use every reasonable agency to avert injury. Folz v. Evansville, etc., Co., 40 Ind. App. 307, 80 N. E. 868.

The complaint does not exhibit such conditions, and the demurrer thereto was properly sustained.

Judgment affirmed.

(48 Ind. App. 245)

WINONA & W. RY. CO. v. ROUSSEAU.
(No. 6,848.)¹(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1910.)**1. CARRIERS (§ 314*)—PASSENGERS—INJURIES—ALLEGATIONS—NEGLIGENCE.**

The obligations imposed upon the carrier are fixed by law where the relation of passenger and carrier is shown, so that, where the complaint showed such relation, a further allegation of the violent starting of the street car in a negligent manner sufficiently showed liability for resulting injuries.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273-1275½; Dec. Dig. § 314.*]

2. CARRIERS (§ 314*)—PLEADING—CONTRIBUTORY NEGLIGENCE.

If the facts alleged in the complaint in a passenger's action for injuries showed contributory negligence, the complaint was demurrable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1277, 1278; Dec. Dig. § 314.*]

3. CARRIERS (§ 333*)—PASSENGERS—INJURIES—CONTRIBUTORY NEGLIGENCE.

Though a street car passenger, upon hearing the bell ring, arose in her seat to alight when the car stopped, the fact that the place she was passing when she arose was not a proper place to alight would not affect her right to recover for injuries by suddenly starting the car, where she did not attempt to leave the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1386; Dec. Dig. § 333.*]

4. CARRIERS (§ 295*)—PASSENGERS—NEGLIGENCE.

If street car operatives knew that a passenger was standing it was their duty to operate the car so as not to throw her off irrespective of the reasons causing her to arise.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1191, 1197, 1199, 1213-1215, 1219; Dec. Dig. § 295.*]

5. CARRIERS (§ 347*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

It cannot be said as a matter of law that a street car passenger is guilty of contributory negligence by standing while the car is moving.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346-1397; Dec. Dig. § 347.*]

6. CARRIERS (§§ 280, 298*)—DUTY OF MOTORMAN—CARE REQUIRED.

The motorman must exercise that degree of care proportionate to the danger to passengers which would result from his negligence, which is a high degree of care, and cannot, suddenly and violently, start the car, though he was unaware that passengers were standing who might be injured thereby.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1106, 1192, 1205, 1206; Dec. Dig. §§ 280, 298.*]

7. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER—FAILURE TO ARGUE.

An assignment of error on appeal is waived by appellant's failure to argue it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Superior Court, Elkhart County; Vernon W. Van Fleet, Judge.

Action by Mary Rousseau against the Winona & Warsaw Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Frazer, Cook & Frazer and Widaman & Widaman, for appellant. Levi B. Stookey, Wayne T. Anglin, and John M. Van Fleet, for appellee.

WATSON, J. The complaint in this cause is in three paragraphs. The first alleges substantially as follows: That the Winona & Warsaw Railway Company was on August 15, 1906, a common carrier of passengers for hire; that it propelled its cars by means of electricity upon a street railway in the city of Warsaw in said county of Kosciusko; that on said day the plaintiff took passage upon one of said cars and paid to the defendant her fare as a passenger; that said car was an open, summer one, and was in charge of a motorman and conductor; that there was an unobstructed view from all parts of the car of the passengers; that she desired to alight from said car at the intersection of Center and Lake streets; that said car was proceeding west on Center street, and, without stopping at said intersection, proceeded south on said street; that, as it thus proceeded, she heard some of the passengers calling to the conductor to stop; also that she heard the conductor ring the bell for said motorman to stop the car; that the motorman heard said signal, and at once, in obedience thereto, began to slow down the speed of said car which was brought almost to a full stop; also that the plaintiff believed that said car was about to stop in obedience to said signal, and, acting upon that belief, she arose from her seat in order to alight as soon as it should stop; that the motorman, if he had looked around or had used reasonable care and diligence in the discharge of his duties, could have seen that the plaintiff was standing preparatory to alighting from the car, and at a place from which she might be jerked from the car; that said motorman, without giving any notice or warning, then and there carelessly and negligently so applied power to said car as to cause it to move forward with a sudden jerk, by means of which and on account of said negligence of said motorman, this plaintiff was thrown from said car and caused to fall upon the street, by reason of which she was greatly bruised, injured, etc. The second paragraph alleges, in addition to the averments of the first, that the bell was rung by some person unknown to the plaintiff; that she heard the bell and understood it to be a signal to stop said car, and supposed and believed that it had been given by the conductor; that the conductor heard said signal to stop said car and could have countermanded said signal if he had not wished to stop at said place; that he negligently failed to countermand said signal to stop, and thereby ratified and adopted the same as his own. The third paragraph alleged, in addition to the allegations of both the first and second, that, if the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexed

¹Rehearing denied, 93 N. E. 1028. Transfer to Supreme Court denied.

motorman had looked back of him through the car, he could have seen the appellee standing, but he negligently failed to so look to see her standing; that, without giving any notice or warning, he suddenly increased the speed of the car with a jerk, and caused the appellee to fall, etc. A demurrer was addressed to each paragraph, which demurrers were overruled and exceptions taken. Trial had, resulting in a verdict for appellee. Upon the overruling of the motion for a new trial, this cause was appealed to this court.

The first question arises on the assignment that the court erred in overruling appellant's separate demurrer to each paragraph of appellee's amended complaint. The pleadings above summarized contain much evidentiary matter, and indicate some confusion in the mind of the author as to the theory upon which he is basing his claim. It is not necessary, since the act of 1899, to negative contributory negligence in an action for personal injuries. The pleading avers the relation of passenger and carrier. This being so, the obligation imposed upon the carrier is fixed by law, and the violent starting of the car in a negligent manner furnishes the basis for legal liability. This is shown by each paragraph, and they were each therefore sufficient. Of course, if the facts pleaded establish contributory negligence, the demurrer should have been sustained. The passenger might be guilty of such negligence in leaving or attempting to leave the car at an improper place, but nothing of that kind is shown. It is shown that she arose from her seat in order to alight as soon as the car should stop, but it does not appear that she attempted to leave the car, so that whether the place was one at which she might properly have done so is immaterial. It is averred that the car was negligently operated. In view of facts known to the persons in charge of the same, one of such facts being that the appellee was standing, if those operating the car knew that she was on her feet, it was their duty not to operate it in such a manner as would likely result in her being thrown off, and this duty was not affected one way or the other by the reasons which may have prompted her to assume such position. She was quite as much a passenger as though she had been standing for lack of a place to sit, and it cannot be adjudged as a matter of law that a passenger is guilty of contributory negligence merely because he is standing while the car is in motion. *Harris v. Pittsburgh, etc., R. R. Co.*, 32 Ind. App. 600, 70 N. E. 407; *Pittsburgh, etc., R. R. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *Ft. Wayne Traction Co. v. Hardendorf*, 164 Ind. 403, 72 N. E. 593. Each paragraph shows the relationship of passenger and carrier to have existed, and avers that the car was negligently operated, and that the pas-

senger thereby was thrown off and injured. The demurrer was properly overruled.

It is urged that in support of the assignment of errors the court erred in overruling the motion for a new trial; that it is not the duty of the motorman to be looking back into his car to see what passengers may be doing, and that his failure to observe their positions cannot be made the basis of a charge of negligence. This is true, but it is likewise true that the motorman is not permitted to carelessly and negligently apply the power to the car so as to give it a sudden jerk, to the injury of a passenger, as is alleged in this cause. The law demands of the motorman the exercise of a degree of care and vigilance corresponding with the danger which may accrue to passengers from his negligence in any given particular. A high degree of care is exacted by law from the carrier toward the passengers, and the conduct of the employés in charge of the car must correspond therewith. Section 3475, *Thompson on Negligence*. His duty is to know that he may safely start the car, and he cannot justify a violent application of electricity by saying that he did not know that any of the passengers were in a position where they were likely to be thrown off. The jury were authorized in finding that the negligence charged was the proximate cause of the injury. *Chicago, etc., R. R. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591. The verdict was for \$2,000, and is not so excessive as to indicate that the jury acted from prejudice, partiality, or corruption, and it therefore will not be interfered with. *Pittsburgh, etc., R. R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033.

The assignment that the court erred in overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict is waived by failure to argue.

We find no error, and the judgment is affirmed.

(46 Ind. A. 525)

INDIANA UNION TRACTION CO. v.
SCHWINGE. (No. 7,088.)

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1910.)

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The instructions, in determining what they mean and how they must have been understood by the jury, must be considered as a whole, and when so considered, if they fairly present the case, they are sufficient.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action for the death of a person struck by a street car, there was evidence that decedent was guilty of contributory negligence in starting across the track in front of the car, and in failing to use due care to move

fast enough, a charge that the mere fact of decedent's attempt to cross the track while seeing the car approach did not establish contributory negligence, but to establish it the car must have been so close that, taking into account the speed of the car, a reasonably prudent man would not attempt to cross the track, followed by an instruction that a person in traveling on or approaching a track must exercise a degree of care proportionate to the danger involved, was not erroneous as eliminating the issue of contributory negligence in failing to cross the track with due care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

3. STREET RAILROADS (§ 98*)—COLLISIONS—OBLIGATION OF PEDESTRIANS.

Where a person who was struck by a car did not know, and the circumstances did not show, the speed of the approaching car, contributory negligence could not be attributed to him for failing to anticipate negligence of the street railway company in the operation of the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 98.*]

4. DAMAGES (§ 212*)—PERSONAL INJURIES—INSTRUCTIONS.

An instruction in an action for personal injuries that the jury, in estimating the damages, may use all the knowledge and experience which they are supposed to possess in common with the generality of mankind, in connection with the facts in evidence, merely directs the jury to use their common sense in applying the evidence in estimating the damages, and is proper.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 540; Dec. Dig. § 212.*]

Appeal from Superior Court, Marion County; Charles T. Hanna, Judge.

Action by August Schwinge, administrator, against the Indiana Union Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Van Osdol, W. A. Kittinger, J. R. Morgan, and Lewis B. Ewbank, for appellant. Pickens, Cox & Kahn and Earl R. Conder, for appellee.

RABB, J. The appellee sued appellant to recover damages for the death of his decedent, which was alleged to have been occasioned by the negligence of the appellant. The only questions raised in this court relate to three instructions given by the court to the jury over the objection and exception of appellant.

Appellee's intestate was killed by appellant's interurban car while he was attempting to cross Central avenue in the city of Indianapolis. This street runs north and south, and is traversed by two street car tracks, over which both appellant's and city street cars are operated; north-bound cars using the east track, and south-bound cars using the west track. The accident happened in the dusk of the evening. The deceased, and a companion, had alighted from a north-bound car, had passed behind the street car, and was attempting to cross the west track

when he was struck by appellant's south-bound car and killed.

There was evidence tending to show that after alighting from the street car, and before passing behind it, the deceased saw appellant's car that struck him some distance to the north, and could easily have seen it after he crossed the east track, and before going onto the track on which the car was approaching, and one of the material questions in dispute is whether or not the defendant acted with due care in going upon the track in the way of the approaching car, under the circumstances shown. There was also evidence from which the jury might have found that even though the circumstances were such that the deceased was not chargeable with negligence in starting to cross the track in front of the car, yet he failed to use due care in the celerity of his movements in crossing over the track, and that had he moved with such celerity as he could, and as the situation required, the accident would not have happened.

Under this state of the evidence, the court gave the jury the following instruction: "If the jury find from the evidence that plaintiff's intestate, Bertram H. Schwinge, did, on the 6th day of September, 1904, at the point in the city of Indianapolis where 29th street crosses Central avenue, attempt to cross the west track of the two street car tracks then laid on Central avenue, if you find they were so laid, in front of an approaching interurban car of the defendant company, and if you further find that prior to the time of said Schwinge's attempt to cross said west track, if he did so attempt to cross, said Schwinge saw said interurban car approaching on said track, then I instruct you that the mere fact that Schwinge at the time of his attempt to cross said track, if he did so attempt to cross, could see the said interurban car approaching on said west track, does not in itself establish his contributory negligence. In order to establish such contributory negligence, the said interurban car must not only have been approaching said Schwinge, but it must also have been in such close proximity that, taking into account the reasonable rate of speed for such places and under the then present conditions of the apparent rate of speed at which the said interurban car was traveling, a reasonably prudent man would not attempt to cross said track."

The giving of this instruction is complained of as error, and it is insisted here that the instruction entirely eliminates from the consideration of the jury all proof of negligence of the deceased, in so far as it related to the celerity of his movement while engaged in the act of crossing the track, and limited the consideration of the jury, in deciding the question of contributory negligence of the deceased, to the proximity and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

speed of the car, and the act of the deceased in stepping on the track under the circumstances, and assumes that after starting to cross said track the deceased exercised due care.

In addition to this instruction, the court properly instructed the jury, as follows: "A street railway track is a place of known danger, and if you find from the evidence in this case that on the occasion complained of Bertram H. Schwinge, was familiar with the railway track in controversy, and the manner in which cars were operated thereon, then I charge you that said Bertram H. Schwinge, in traveling upon or approaching in such close proximity to said track that he might be struck by a car, if he did so, was required by law to exercise, for his own safety, a degree of care proportionate to the danger involved, and if he failed to exercise such degree of care to be expected of a man of ordinary prudence, and by reason of such failure, if any, he approximately contributed to his injury and death, then his administrator cannot recover in this action, and in that event your verdict should be for the defendant."

Instructions given by the court to a jury are not to be taken piecemeal in determining what they mean, and how they must have been understood by the jury. They must be considered as a whole, and if so considered, they fairly present the case to the jury, they are not susceptible to just criticism. We think when these two instructions are considered together, the first will not admit of the construction placed upon it by appellant. The court in this instruction was calling the particular attention of the jury to a particular act of contributory negligence in controversy; that is, the act of the deceased in attempting to cross the railroad track in view of an approaching car, and the whole instruction must be considered as relating to that particular act. The phrase used in the instruction upon which stress is laid by appellant, "that in order to establish such contributory negligence," etc., we think must be understood to mean contributory negligence in attempting to cross the track in view of the approaching car. It was "such" contributory negligence the court was discussing, and not contributory negligence of some other character. Had appellant desired that the attention of the jury should be specifically called to the evidence tending to sustain its theory as to the alleged negligence of the deceased in failing to exercise due care, after he started to cross, in the promptness and celerity of his movement, a proper instruction should have been presented to the court, with a request that it be given to the jury. We think the general instruction given by the court to the effect that the deceased in traveling upon the railroad track was required by law to exercise for

his own safety a degree of care proportionate with the danger involved properly stated the law in general terms, with reference to the duty of the deceased in this respect, and we do not conceive that the jury understood the instruction given as eliminating from their consideration any act of negligence of the deceased while crossing the track, that would proximately contribute to the accident.

Objection was made to an instruction which, in effect, told the jury that if the deceased did not know, and the circumstances were such that he could not reasonably have known, the speed of the approaching car that struck him, that contributory negligence was not to be attributed to him for failing to anticipate negligence on the part of the appellant, if there was any. Our attention has not been directed to any valid objection to this instruction, and we see none.

The third instruction objected to relates to the question of damages, and is criticised because the jury are therein told that in estimating such damages they may "make use of their knowledge and experience, which they are supposed to possess in common with the generality of mankind, in connection with the facts properly in evidence." This was but another form of telling the jury to use their common sense in making application of the evidence in estimating damages. This instruction harmonizes with the view of the court with reference to this subject, as expressed in *Pittsburgh, etc., v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *Ohio, etc., v. Voight*, 122 Ind. 288, 23 N. E. 774; *Chicago, etc., v. Branyan*, 10 Ind. App. 570, 37 N. E. 190.

We think no reversible error intervened in giving this instruction. No other action of the court is complained of, nor is it maintained that the evidence fails to sustain the verdict of the jury.

Judgment of the court below affirmed.

(46 Ind. A. 531)

SOUTH BEND BRICK CO. v. GOLLER.
(No. 6,837.)

(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1910.)

1. NEGLIGENCE (§ 119*)—PLEADING—DIFFERENT ACTS OF NEGLIGENCE—PROOF.

In an action for personal injuries, plaintiff set out two distinct acts of negligence. *Held*, that he could recover on proof of only one of such acts, and the other material allegations of his complaint.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. NEGLIGENCE (§ 138*)—INSTRUCTIONS—FORM—MISLEADING.

Where a plaintiff relies upon two distinct acts of negligence, an instruction which tells the jury that he could win upon proof of one of these acts of negligence, and the other material allegations of his complaint, is not misleading as failing to make it plain to the jury that the

other material allegations of the complaint would have to be proven.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 138.*]

3. TRIAL (§ 296*) — INSTRUCTIONS — ERROR CURED BY LATER INSTRUCTION.

Where an instruction in a servant's action for personal injuries might be defective, because omitting the question of assumed risk, the error, if any, is cured by a later instruction, which fully covers that question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

4. MASTER AND SERVANT (§ 293*)—INJURY TO SERVANT—INSTRUCTIONS—APPLICABILITY.

In a servant's action for personal injuries received while working in defendant's shed, defendant maintained that a high wind, and not its negligence, caused the injury. An instruction was given that if the shed fell because of defendant's negligence, the mere fact that there was a high wind was no defense. *Held*, that this instruction was pertinent to the issues and properly given.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

5. APPEAL AND ERROR (§ 216*)—PRESERVATION OF GROUNDS—OBJECTION—SUFFICIENCY—INSTRUCTIONS.

In an action by a servant against a master for personal injuries, an instruction was given which declared that it was not the duty of the employé to inspect the place in which he worked, and that he is only bound to observe such defects as are obvious by the exercise of ordinary care. The instruction failed to declare that the employé was charged with defects of which he had knowledge. *Held*, that as the defendant did not request a more specific instruction, he could not complain.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.* Trial, Cent. Dig. §§ 627, 628, 630-641, 660, 662, 676.]

6. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTION CURED.

In a servant's action for personal injuries, an instruction was given which declared that plaintiff could recover unless defects in his place of work were obvious, and he realized their danger. The jury made findings that the defects causing the injury were in the construction, and that the plaintiff was not aware of them. *Held*, that the instruction was cured by these findings and was not prejudicial to the rights of defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

7. DAMAGES (§ 95*)—MEASURE—PERSONAL INJURIES—COMPARISON.

In an action for personal injuries, the fixing of damages, in the very nature of things, must rest, to some extent, upon comparison with known like injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. § 95.*]

8. DAMAGES (§ 24*) — PERSONAL INJURIES — SPECULATIVE DAMAGES.

In an action for personal injuries, damages based on plaintiff's inability to enjoy life are speculative and cannot be allowed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 65-67; Dec. Dig. § 24.*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by Albert Goller against the South Bend Brick Company. From a judgment

for plaintiff, defendant appeals. Reversed and remanded.

Frank H. Dunnahoo and Slick & Slick, for appellant. Chas. P. Drummond, for appellee.

MYERS, J. On November 21, 1906, appellant was engaged in manufacturing brick at the city of South Bend, Ind., and as a part of its plant were brick kilns, covered by sheds open on all sides; that on said day, while appellee was in appellant's employment, and engaged in casing one of said kilns of brick, as he was employed to do, the shed under which he was working fell and injured him. To recover damages for said injuries appellee brought this action, alleging two separate acts of negligence: (1) That the appellant negligently and carelessly constructed said sheds, and by reason of said negligent construction, the same were defective, weak, and insubstantial; (2) that appellant negligently and carelessly failed to maintain and keep said sheds in proper condition and repair, and allowed them to become weak, defective, and insecure. Appellant answered by general denial, and by an affirmative paragraph, averring in substance that said sheds were constructed by careful, skillful, and reliable persons, according to plans prepared by careful and skillful architects, that said sheds were strong, and not out of repair on the day of the alleged injury, that they fell solely by reason of an extraordinary and violent windstorm, which could not have been anticipated or guarded against by the exercise of reasonable care. Trial by a jury and verdict returned in favor of appellee, and over appellant's motion for a new trial, judgment on the verdict was rendered against the appellant. The only error relied on for a reversal of that judgment is the overruling of appellant's motion for a new trial. At the request of appellee, the court gave to the jury certain instructions, eight of which are claimed to be erroneous, and are assigned as reasons for a new trial.

The first instruction to which objection is made, in substance, told the jury that it was not necessary for the plaintiff to prove all the acts of negligence alleged in his complaint, but that if he proved any one of said alleged acts, and the other material allegations of his complaint, and did not contribute to his injury, he would be entitled to recover. This instruction is criticised on the ground that it is misleading, and that it omitted the question of assumption of risk. The complaint charged the appellant with more than one act of negligence, but it does not proceed upon the theory that both acts combined to procure the injury for which damages are asked. The instruction in that particular was not erroneous. New York, etc., R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Indianapolis Street Ry. Co. v.

Slifer, 35 Ind. App. 700, 74 N. E. 19; Chicago, etc., R. Co. v. Barnes, 164 Ind. 143, 73 N. E. 91. The instruction made it plain to the jury that the other material allegations of the complaint must be proven before a recovery could be had. It was not, therefore, misleading. Brinkman v. Pacholke, 41 Ind. App. 662, 84 N. E. 762. By another instruction the jury were fully informed as to the question of assumed risk, and the two instructions, when considered together, cover the point made against the first.

The next instruction claimed to be erroneous was to the effect that if the sheds fell and injured appellee, and the falling of the sheds was primarily due to the negligence of the appellant, the fact alone that the wind, although unusual, aided in causing the sheds to fall, would not constitute a defense to the action. It is claimed that this instruction is not pertinent to the issues, or relevant to the evidence properly admissible under the issues. The complaint proceeds upon the theory that the sheds fell because of appellant's negligence in constructing, or in maintaining, them, and testimony was introduced tending to support both charges of negligence. There was also evidence introduced showing that on the day of the accident the wind was unusually strong, and that some smaller buildings in the city of South Bend were blown over. The instruction was not subject to the objections urged against it.

Instruction 4, after informing the jury what the law requires of the employer, stated that: "It is not the duty of the employé to inspect the place furnished for him for dangers or defects, but he is only bound to observe and heed such defects and dangers as are obvious to him while in the exercise of ordinary care for his own safety," etc. This instruction is criticised on the ground that it did not include defects and dangers of which the appellee had actual knowledge. While the jury should have been told that appellee was bound to take notice of the dangers and defects of which he had actual knowledge, yet this omission did not amount to a misstatement of the law. In such cases a party desiring a mere specific instruction should ask it. New York, etc., R. Co. v. Flynn, 41 Ind. App. 501, 81 N. E. 741, 82 N. E. 1009.

Appellant has assailed instruction 5 because it told the jury "that the defendant was bound to know the construction of said buildings," and with reference to the plaintiff, that he was bound to know such defects as were obvious to one in the exercise of ordinary care, but that such defects would not preclude a recovery by plaintiff, unless they further found that plaintiff realized and appreciated the dangers, if any, to him, by reason of such defects. This instruction with reference to the appellant is not as clear as it might be, yet when it is considered with instruction 7, requested by appellant, and

given to the jury, we think the appellant had no just cause to complain of the action of the court in this respect. Appellant also insists that if the defects were obvious to appellee, he could not be heard to say that he did not appreciate the dangers arising therefrom. The plaintiff was 24 years of age and had worked in and about appellant's plant from May to the time of the accident. There is no claim of inexperience or other reasonable excuse offered why he should not be held to appreciate dangers from obvious defects, or from defects of which he had actual knowledge, but this question is taken out of the case by the answers of the jury to certain interrogatories showing that certain defects in the construction of the buildings caused them to fall, and that appellee did not know of these defects and could not have known of them by the exercise of ordinary care. With this showing the instruction was not prejudicial to the rights of the appellant. Nichols v. Central Trust Co., 43 Ind. App. 64, 86 N. E. 878; Roush v. Roush, 154 Ind. 562, 55 N. E. 1017; Ellis v. City of Hammond, 157 Ind. 287, 61 N. E. 565.

The objections urged to instructions 7, 8, and 9 are not of sufficient merit to require extended notice.

Instruction 11 was as follows: "If you find for the plaintiff it will be your duty to assess his damages. In assessing plaintiff's damages you should take into account his loss of time, if any, the nature and extent of his injuries, if any, his loss of health, if any, the lessening of his ability to labor, if any shown, his inability to enjoy life, if any shown, his pain and suffering, if any, and if you find that his injuries are permanent you may take into account his present age and the probable length of time he will live and assess such damages for his losses in the future as in your opinion the evidence may warrant you in believing he will sustain." The claim is made that this instruction authorized the jury to assess remote and purely speculative damages. It will be noticed that the jury were directed to consider as an element of damages plaintiff's "inability to enjoy life." In the class of cases to which the one at bar belongs, the fixing of damages in the very nature of things must rest, to some extent, upon known like injuries, which the courts have regarded as some basis for fixing reasonable compensation. Indianapolis St. R. Co. v. Ray, 167 Ind. 236, 78 N. E. 978. How the jury may have understood the phrase "inability to enjoy life," or the importance which the jury may have given it, we have no way of determining. They must have understood that it referred to an element other than those mentioned, viz., loss of time, nature and extent of his injuries, loss of health, ability to labor, and pain and suffering. Assuming that the instruction had reference to appellant's inability to enjoy life because of the injury inflicted, then the

question might arise as to what is meant by "to enjoy life," when considered in connection with all the other elements which the jury were instructed to consider in fixing the amount of compensation they should assess. This instruction in effect, is not unlike the one condemned by the court in the case of *City of Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 85. In the case last cited it was said if a "person for any cause has been deprived of 'personal enjoyment,' how are we to go about adjusting his loss on a money basis?" So here, what feature in life, other than those included in the instruction, was the jury to consider and adjust on a money basis? That which might appeal to one, might be unimportant and of no consequence to another. A verdict based upon such uncertainty in fixing compensation for a pecuniary loss suffered by reason of injuries received might largely be based upon pure speculation, which cannot be approved.

This court, in *American Strawboard Co. v. Foust*, 12 Ind. App. 421, 39 N. E. 891, and *Pittsburgh, etc., R. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534, approved an instruction which told the jury that in assessing damages "they might consider, if they found it to be a fact, 'that the plaintiff will be deprived of the pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and the free use of all of its members.'" A like construction was condemned by the court in *Pittsburgh, etc., R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969, and as to that point, the cases of *American Strawboard Co. v. Foust*, supra, and of *Pittsburgh, etc., R. Co. v. Cozatt*, supra, are now overruled. Other questions are presented not likely to arise in another trial; therefore we do not consider them.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(246 Ill. 809.)

HOUGLAND et al. v. AVERY COAL & MINING CO.

STEVENSON v. SAME.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the judgment will not be disturbed on review on the ground that the proof does not sustain the declaration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8935-8937; Dec. Dig. § 1002.*]

2. MASTER AND SERVANT (§ 118*)—OPERATION OF COAL MINES—PROTECTION OF SHOT FIRERS—STATUTORY PROVISIONS.

A shot firer in a coal mine is within the protection of the general acts concerning mines and miners.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 118.*]

3. MASTER AND SERVANT (§ 228*)—FAILURE TO PERFORM STATUTORY DUTY—INJURY TO MINER—EFFECT OF CONTRIBUTORY NEGLIGENCE.

If the explosion from a blast in a coal mine occurred from the willful failure of the master to provide proper air currents and keep the roadways clean and sprinkled, as required by statute, contributory negligence of a shot firer in firing a shot prepared in an unskillful manner would not defeat a recovery for his death caused by the explosion.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where defendant introduced in evidence a letter from plaintiff's counsel to a witness stating that counsel would personally stand good for the witness' expenses if he would attend the trial, and that, in case plaintiff won, counsel would see that the witness was well paid for his time and trouble, any error in allowing the writer of the letter to explain what he meant thereby was not prejudicial, where the witness to whom the letter was written was not called by plaintiff, but by defendant, and testified in defendant's behalf, since the letter accomplished no injury to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

5. LIMITATION OF ACTIONS (§ 124*)—COMMENCEMENT OF ACTION—AMENDMENT—NEW PARTY.

The first section of the act relating to amendments and Jeoffails (Hurd's Rev. St. 1909, c. 7) provides that the court may permit amendments of any pleading in form or substance in furtherance of justice on proper terms at any time before judgment. Practice Act (Hurd's Rev. St. 1909, c. 110) § 39, authorizes amendments at any time before final judgment, introducing any party necessary to be joined. Held, that after verdict in a death action brought within one year as required by statute the court could allow an amendment after expiration of the year, adding a necessary party plaintiff, and such addition would not be the commencement of a new suit or the statement of a new cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 541; Dec. Dig. § 124.*]

6. LIMITATION OF ACTIONS (§ 182*)—PLEADING—NECESSITY.

The defense of limitation in actions at law can only be availed of by plea.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 678; Dec. Dig. § 182.*]

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Perry County; Benjamin R. Burroughs, Judge.

Consolidated actions by Blanche Hougland and others and by Emma Stevenson against the Avery Coal & Mining Company. From judgments of the Appellate Court affirming judgment for plaintiffs in each case, defendant brings error. Affirmed.

Plaintiff in error was on and prior to February 11, 1907, possessed of and operating a coal mine in Perry county, Ill., containing numerous entries, rooms, crosscuts, and roadways, out of which it mined and hauled coal. William Stevenson and William Hougland were on said date in the em-

ploy of plaintiff in error as shot firers, and on the afternoon of said February 11th descended into the mine for the purpose of performing the duties of their employment. While so in the mine, at work in the entries and rooms thereof, a violent explosion occurred, causing a loud report, which was heard by persons out of the mine and in the vicinity of its top, and volumes of smoke were seen ascending from the mouth of the shaft. When an entrance into the mine was afterwards effected, it was discovered that the explosion had been of such violence as to knock down tools and trapdoors, disarrange air currents, blow open powder boxes, destroy powder cans, and black damp and dangerous gases had begun to accumulate. The dead bodies of Stevenson and Hougland were found, the former in room 3 of the first west entry off of the main south entry, about 40 feet from the door, and the latter in the first west entry, about 10 feet east of a crosscut between the entries. The widow of Stevenson brought suit to recover damages for the death of her husband, and the children of Hougland also brought an action for damages resulting from the death of their father. The declarations in the two cases are alike, except as to the description of the places where the two men were at the time of their deaths. The negligence charged in each declaration is the same. Originally there were seven counts in each declaration. Before the trial of the Stevenson Case, which was the first of the cases to be tried, plaintiff dismissed the fifth, sixth, and seventh counts of the declaration. That trial resulted in a verdict and judgment in favor of plaintiff, which, on appeal to the Appellate Court for the Fourth District, was reversed for errors committed by the trial court during the progress of the trial, and the cause was remanded to the circuit court for a new trial. *Stevenson v. Avery Coal & Mining Co.*, 143 Ill. App. 397. On the case being reinstated in that court, the first count of the declaration was also dismissed, and the first, fifth, sixth, and seventh counts of the declaration in the Hougland case were dismissed. The two cases were then consolidated and heard at the same time, as the evidence for both parties was the same in both cases. By agreement between the parties the testimony, so far as either party desired, heard at the first trial of the Stevenson Case was read from the bill of exceptions taken in that case, and no new witnesses were produced on either side. That trial resulted in a verdict in favor of plaintiffs in each case for \$3,000, upon which the court, after overruling motions for a new trial, rendered judgments. The defendant prayed and was allowed an appeal in each case to the Appellate Court for the Fourth District. That court affirmed the judgments in both cases,

and the records are brought before this court for further review by writ of certiorari.

As the questions involved in the two cases are precisely the same, they have been submitted as one case in this court, and separate opinions will not be written in each of the cases, as the decision of one case must control the other.

The second count of the declaration in the Stevenson Case, after describing, to some extent, the underground workings of the mine and setting out the duty of plaintiff in error to provide and maintain crosscuts not more than 60 feet apart and to not open rooms in advance of the air current, alleged that plaintiff in error willfully failed to comply with the requirement of the statute that crosscuts not more than 60 feet apart should be made; that it willfully opened the rooms in advance of the air current, and that by reason thereof standing powder smoke, gases, mine dust, and deleterious air accumulated and remained in said rooms and were liable to explode, of which plaintiff in error knew or by the exercise of due care could have known, whereby, while William Stevenson, then in the employ of plaintiff in error as a shot firer and who had lighted a shot in the face of a certain entry near certain rooms, was waiting in one of said rooms the said shot fired, and thereby caused an explosion of the standing powder smoke, gases, mine dust, and other deleterious air being in said rooms, and resulted in the death of said William Stevenson. The third count alleged that the entry and rooms mentioned and the roadways in the mine were on and prior to February 11, 1907, so dry and the air so charged with dust that explosions were liable to result therefrom; that the plaintiff in error knew, or by the exercise of due care could have known, of this condition, but willfully violated the provisions of the statute which required that, when the air becomes charged with dust, the operator must have the roadways regularly and thoroughly sprayed, sprinkled, or cleaned, by reason whereof the explosion occurred. The fourth count was substantially the same as the third, except that it charged the plaintiff in error with the willful failure to comply with the provisions of the statute requiring the hauling roads of the mine to be frequently and thoroughly sprinkled, by reason of which the explosion occurred.

B. W. Pope and Percy Werner, for plaintiff in error. Webb & Webb and A. R. Dry, for defendants in error.

FARMER, J. (after stating the facts as above). The theory of the defendants in error on the trial of the cases was that the explosion was caused by the shots fired igniting the dust and gases which had accumulated in the mine by reason of the fail-

ure of plaintiff in error to make the cross-cuts and keep the roadways sprinkled and cleaned as required by law. The evidence tended strongly to prove that the conditions existed in the mine as alleged in the declaration and the willful violation by plaintiff in error of the provisions of the statute as alleged. Plaintiff in error contends, and offered proof to support the contention, that a shot exploded in the face of the second west entry off the main south was not properly prepared, and was not a practical shot. It was prepared by a miner named Heppe, and was examined and approved by Hougland. On examination after the explosion, it was found this shot had not as thoroughly broken up the coal as it should have done. Plaintiff in error contends that the hole in which the powder was placed was drilled a foot deeper than the cutting in the face of the coal, and that this caused a "windy or blown-out shot," sending out sparks of fire and flame that ignited a quantity of powder in the mine in the vicinity of the shot, from which gases formed that suffocated the men. Defendants in error offered proof to the effect that the hole for the shot in the face of the second west entry was drilled only a few inches deeper than the cutting in the face, and that it was a practical shot. The proof offered by each of the parties tended to support their respective theories of the cause of the explosion and of the death of the two men. Plaintiff in error argues that the theory of defendants in error is contradicted by physical facts and known scientific laws, and in support of this argument says the proof shows the hair and clothing of the two men were not burned and no effects of fire appeared on the body of a dead mouse found near them. This, it is contended, could not have been the case if their deaths had resulted from an explosion of dust and gases. In addition to the presence of dust and gases accumulating and standing in the mine by reason of the failure of plaintiff in error to provide proper crosscuts and air currents and to sprinkle and clean the roadways and the liability of such conditions to cause an explosion of the character that occurred in the mine, there was also proof that the faces of the men appeared to be parched and baked, and a witness who shaved both of them after they were taken out of the mine testified that their faces appeared to be baked, and the skin on the face of Stevenson had a tendency to come off as the witness shaved him. Under this condition of the record, we could not disturb the judgments on the ground that the proof does not sustain the declarations.

The principal ground upon which plaintiff in error asks a reversal of these judgments is that a shot firer does not come within the protection of the general act concerning mines and miners. The shot firers act was originally passed in 1905 (Laws 1905, p. 328), and was amended by the addition

of three sections in 1907 (Laws 1907, p. 401). The amendments, however, do not affect the decision of the question raised by the plaintiff in error. The reason given by plaintiff in error for its contention that shot firers are not within the protection of the general act concerning mines and miners is that the shot firers act is a separate and independent legislative enactment in nowise amendatory of the general act; also, that shot firers are experts to whom the entire mine is turned over when they commence the discharge of their duties, and no inspection is required or can be made after the miners quit work and before the shot firers enter upon the discharge of their duties. In *Davis v. Illinois Collieries Co.*, 232 Ill. 284, 83 N. E. 836, a shot firer was held to be within the protection of the general act concerning mines and miners. This case was cited with approval in *Brennen v. Chicago & Carterville Coal Co.*, 241 Ill. 610, 89 N. E. 756, where it was said the provisions of the general act "are for the safety and protection of all who are employed in the mine, including engineers, firemen, pumpmen, shot firers, drivers and other workmen and employes."

Plaintiff in error insists that since those cases were decided this court has held in *Hollingsworth v. Chicago & Carterville Coal Co.*, 243 Ill. 98, 90 N. E. 276, that the shot firers act is an independent act, and not an amendment to the general mining act, and that the decisions in those cases are therefore no authority. We cannot agree to this position. In the *Hollingsworth* Case the coal company did not employ shot firers, and the shot fired by one of the miners caused an explosion, resulting in the death of another miner. The widow of the deceased brought an action against the coal company, and alleged as a ground of recovery that the mine was of such condition and character that the law required shot firers to be employed therein, and that the coal company willfully failed to employ shot firers, by reason whereof her husband was killed. We held the shot firers act being no part of the general mines and miners act but being an independent act, and containing no provision authorizing a widow to sue for damages for failure to comply with its provisions, as is the case with the general act, the suit could not be maintained. There is no intimation in the opinion in that case that shot firers are not within the protection of the general act, and that decision is in no wise inconsistent with the previous decisions of this court holding that they are within the protection of said act.

Complaint is made of the ruling of the trial court in permitting witnesses experienced in the business of mining and shot firing to testify, over the objection of plaintiff in error, that the shot in the second west entry was a workmanlike and practical shot. One of these witnesses prepared the shot, another saw it before it was fired, and the

others made their examinations afterwards. Some of them testified it split the coal so that it was easily mined afterwards, but did not knock it down, as is usually the case. Some of them called it a "standing shot." All testified that it was prepared in a workmanlike and practical manner. It is conceded by the plaintiff in error that the subject was one for expert testimony, and no complaint is made that the witnesses did not possess the proper qualifications. The contention is that they should not have expressed any opinions, but that they should have described the shot and left it to the jury to determine whether it was a workmanlike and practical shot. Without stopping to inquire whether the latitude allowed by the court is too broad, it is sufficient to say that whether it was or not could have no controlling force on our decision. If the explosion occurred from the willful failure of plaintiff in error to provide proper air currents and keep the roadways cleaned and sprinkled, as charged in the declaration, contributory negligence of the deceased in firing a shot prepared in an unskillful manner would not defeat a recovery. *Davis v. Illinois Collieries Co.*, supra.

A miner named True was working in plaintiff in error's mine at the time of the death of Stevenson and Hougland. Before the first trial in the Stevenson case True left Perry county and went to Randolph county. About a week before the Stevenson trial one of the counsel for defendants in error wrote True informing him of the date the case was set for trial and asking him to be present as a witness. In the letter he stated it would cost the parties quite a sum to have him subpoenaed, and the writer stated, as attorney for plaintiff, he would personally stand good for the witness' expenses if he would attend the trial, and, in case the plaintiff won, he would see that the witness was well paid for his time and trouble. This letter was introduced in evidence by plaintiff in error on the trial of these cases, and the attorney who wrote it was permitted to take the stand as a witness and testify that what he meant by what he said in the letter was that he would stand good for the necessary costs of the witness' attendance, and, if the plaintiff won the case, would see that he lost no time from work or wages for the time occupied in attending the trial as a witness. It is insisted that permitting the writer of the letter to explain what he meant by what was said in it is reversible error. Conceding that the ruling was erroneous, it worked no prejudice in this case to plaintiff in error, and offers no ground for reversing the judgments. The witness True was not called by defendants in error, but was called as a witness by plaintiff in error and testified in its behalf. The letter written to the witness by the attorney was admitted in evidence and read to the jury. Whatever the motives of counsel may have been in writing the letter, it is very certain that it accomplished no injury to

plaintiff in error, for it called True as its witness and his testimony was favorable to plaintiff in error. Under such circumstances, the error in allowing the witness to explain his motives and meaning in writing the letter affords no justification for a reversal of the judgments.

William Hougland, deceased, had been married, but he and his wife were divorced several years before his death, and the divorced wife had remarried. The suit for damages for his death was brought by his two minor children, Blanche and Thomas Hougland, by their next friend. The divorced wife of the deceased was a witness on the trial, and it developed from her testimony that there was another son Edward Hougland, 28 years old. At the conclusion of the testimony of the plaintiffs below in the Hougland case, the defendant moved the court to dismiss that case on the ground that the evidence showed the necessary parties plaintiff had not been joined in the action, were not before the court, and no recovery by the then plaintiffs could be had because the right of action is in all the lineal heirs of William Hougland, deceased, and not in a part of them only. At the conclusion of all the evidence defendant in the Hougland case moved the court to instruct the jury that under the pleadings and the evidence in that case the verdict should be for the defendant. The court denied the motion made at the conclusion of the plaintiffs' evidence, and also refused the instruction requested at the conclusion of all the testimony. Upon the jury returning a verdict in favor of plaintiffs in the Hougland case a motion for a new trial was made, and one of the grounds of the motion was that the court erred in refusing to dismiss the case for want of proper parties plaintiff. Leave was asked by and granted plaintiffs to join Edward Hougland as a party plaintiff, and leave was granted to make the necessary amendments for that purpose. The amendments were accordingly made, and the motion for new trial was overruled and judgments rendered on the verdict. It is now contended that on the death of William Hougland an action accrued to all his children, and that all must join in the action to recover within the period of the statute of limitations—one year. In this case the amendment was made more than two years after the death of William Hougland, and it is insisted it should be held that the amendment making Edward Hougland a party plaintiff was the same as the commencement of a new suit in a cause of action that was barred by the statute of limitations. The cause of action was the death of William Hougland under the circumstances alleged in the declaration and shown by the proofs, and the right to bring suit on the cause of action was given by the statute to his children. The suit was begun within one year from the time the cause of action accrued, and the addition of a necessary party plaintiff afterwards was not the commencement

of a new suit or the statement of a new cause of action. The first section of the act in relation to amendments and joinders provides that the court in which an action is pending "shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein." The thirty-ninth section of the practice act (Hurd's Rev. St. 1909, c. 110) authorizes amendments at any time before final judgment, "introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense." These sections of the statutes contain ample authority to sustain the ruling of the court in permitting the amendment. *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22; *Cogshall v. Beesley*, 76 Ill. 445; *McCall v. Lee*, 120 Ill. 261, 11 N. E. 522; *Kanawha Dispatch v. Fish*, 219 Ill. 236, 76 N. E. 352. Furthermore, the question of the statute of limitations was never raised in any proper manner in the case. No plea of the statute was filed or offered to be filed. The motion to dismiss for want of proper parties plaintiff did not interpose the defense of the statute of limitations. That defense in actions at law can only be availed of by plea. *Burnap v. Wight*, 14 Ill. 303; *Gebhart v. Adams*, 23 Ill. 397, 76 Am. Dec. 702; *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895.

Finding no reversible error in either of the records the judgments of the Appellate Court in both cases are affirmed.

Judgments affirmed.

(246 Ill. 620)

ILLINOIS CENT. R. CO. v. CHICAGO & G. W. RY. CO. et al.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)

1. COURTS (§ 219*)—SUPREME COURT—JURISDICTION—VALIDITY OF STATUTE.

To give the Supreme Court jurisdiction on the ground that the validity of a statute is involved, the statute must be the foundation of some right asserted or of some defense made; and in replevin by one railroad company against another to recover certain brass journals stamped with plaintiff's name, where plaintiff based its right to recover on its claim that it had bought the journals from a certain manufacturing company, and that they had in some way come into possession of a third person, who had delivered them for shipment to defendant railroad company, plaintiff's right did not depend upon the validity of Cr. Code (Hurd's Rev. St. 1909, c. 88) § 242, providing that, if any person shall purchase or receive for sale any article of brass, etc., manufactured for railroad purposes and stamped with the name of some

railroad company, without consent in writing, he shall be fined, etc., the Supreme Court does not have jurisdiction of an appeal from the trial court on the ground that the validity of the statute is involved.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 553; Dec. Dig. § 219.*]

2. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTION—NECESSITY.

The constitutionality of a statute will never be determined, when the cause in which its determination is sought may be finally disposed of without such determination.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

Error to Municipal Court of Chicago; Charles N. Goodnow, Judge.

Action by the Illinois Central Railroad Company against the Chicago & Great Western Railway Company and others. Judgment for plaintiff, and defendants bring error. Case transferred to Appellate Court.

Jesse Lowenhaupt, for plaintiffs in error. John G. Drennan (Vernon W. Foster and W. S. Horton, of counsel), for defendant in error.

VICKERS, C. J. The Illinois Central Railroad Company brought an action of replevin in the municipal court of Chicago against the Chicago & Great Western Railway Company and N. Deutsch & Co. to recover the possession of 100 brasses, marked "Illinois Central," "I. C. R. R.," or "I. C.," which were located in the freight yards of the Chicago & Great Western Railway Company in Chicago, in car C. G. W. 8690. The value of the goods claimed was \$100. Upon a trial by the court without a jury there was a finding that the plaintiff below was entitled to the possession of all the brasses described, except one which was not marked, and that brass was returned to Deutsch & Co. in open court. Judgment was entered upon this finding, awarding the possession of the property described in the writ to the plaintiff below, and assessing one cent damages against the defendants and the costs of suit. The defendants below have sued out a writ of error from this court to the municipal court to obtain a review of the judgment below.

To establish its right to the possession of the property described in the writ, defendant in error proved that for more than eight years last past it had purchased all of its brass journals from the Hewitt Manufacturing Company, and that during the same time it had sold all of its brasses which were not fit for refilling or further service to the Hewitt Company; that during said period the Hewitt Manufacturing Company caused to be stamped on the brasses manufactured for defendant in error the name or initials of the Illinois Central Railroad Company; and that such initials were not stamped on any brasses other than those manufactured for and delivered to the Illinois Central Rail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

road Company. It was also proven that none of the brasses so manufactured by the Hewitt Company for the Illinois Central Railroad Company had ever been sold to any other person or had passed out of the possession of the Hewitt Company to any one other than defendant in error; that the brasses in question were also stamped with the name of the Hewitt Manufacturing Company, and were identified in court as being the brasses manufactured by that company for and delivered to the defendant in error. It was shown, further, that all worn-out or unfit brasses on the various lines of the Illinois Central Railroad Company were shipped to Burnside and there loaded on cars and shipped to the Hewitt Manufacturing Company.

F. H. Smith, general manager of the Hewitt Manufacturing Company, testified that he had been employed by that company for 16 years as general superintendent and district manager; that his company manufactured brass journals, commonly called "brasses," and had been manufacturing these brasses for the defendant in error since 1893, and that these brasses are used exclusively for railroad purposes; that all of the brasses manufactured for defendant in error were specially marked either "Illinois Central" or "I. C. R. R.," together with the pattern number thereon and the name of the Hewitt Manufacturing Company; that brasses so marked never go to any other railroad company or person than the defendant in error. He testified that from the general appearance of the brasses in question they had been manufactured by his company and sold and delivered to defendant in error.

James S. Sheafe, mechanical inspector of the Illinois Central Railroad Company, testified that defendant in error purchased all of its brasses of the Hewitt Manufacturing Company, and sold all its scrap brasses, when no longer fit for use, to said company; that when brasses are in such condition that they can be refilled—that is, not too thin to be refilled—they are refilled by the defendant in error at its shops at Burnside, and when they are too thin to be refilled, or otherwise no longer useful, they are sold to the Hewitt Manufacturing Company as scrap. He testified that passenger brasses "form 503" are used exclusively in the suburban service in Chicago; that such brasses are made exclusively for use on suburban cars of defendant in error, and that he never knew of one of these brasses being out of the limits of the suburban service; that among the brasses found in the possession of plaintiffs in error was one marked "Passenger 503."

The evidence shows that plaintiff in error the Chicago & Great Western Railway Company had no interest or claim in the brasses in question, except that of a carrier for plaintiff in error Deutsch & Co., who had delivered the brasses to the Chicago & Great Western Railway Company to be shipped to St. Paul for the Great Northern Railroad

Company. Nathan Deutsch testified on behalf of the defendant in error that he was president of N. Deutsch & Co., and had been ever since its incorporation. He admitted that the brasses in question were hauled from the warehouses of N. Deutsch & Co. and delivered to the Chicago & Great Western Railway Company; but he could not tell of whom he purchased the brasses nor how long they had been in the possession of his company. Several witnesses testified on behalf of plaintiffs in error as to the general course of business among smelters and dealers in metals, which testimony tended to show that railroad brasses were frequently bought and sold as scrap in much the same way that other scrap brass is dealt in.

We have thus set out the substance of the evidence, not because there is any question of fact presented for review, but for a different purpose, which will presently appear.

At the request of defendant in error the court below held that section 242 of the Criminal Code (Hurd's Rev. St. 1909, c. 38) is a valid constitutional enactment, and refused to hold that said section was unconstitutional, at the request of plaintiffs in error. The section of the statute above referred to, and which was held to be constitutional by the trial court, is as follows: "If any person shall purchase or receive for sale from any other person any link, pin, bearing, journal or other article of iron, brass or other metal which has been manufactured and is used exclusively for railroad purposes, and which shall have stamped thereon the name of some railroad company, or the initial letter thereof, without the consent in writing of the president, general manager or general superintendent of such railroad company, such person shall be fined in a sum not less than \$100 nor more than \$500, and be imprisoned not less than ten days nor more than ninety." It is the ruling of the court in holding this statute constitutional that is supposed to give this court jurisdiction of this case.

In our opinion the validity of the above statute is not involved in this suit. From the statement of the evidence before set out it appears that defendant in error based its right to recover on its claim that it had bought the brasses in question from the Hewitt Company, and that they had in some way come into the possession of Deutsch & Co. without the knowledge or consent of defendant in error. It is apparent that the case might well be disposed of without reference to the statute. The right of defendant in error to recover the possession of its property did not depend upon the validity of the statute in question. In order to give this court jurisdiction of a cause on the ground that the validity of a statute is involved, such statute must be the foundation of some right asserted or of some defense made, and the validity of the statute must necessarily be involved in the determination

of the issue presented. Where the issues can fairly be determined without reference to the statute, the constitutionality of the statute cannot be said to be involved, and this court is without jurisdiction. In *City of Cairo v. Bross*, 99 Ill. 521, this court held that the statute giving the Supreme Court jurisdiction, by direct appeal, where the validity of a statute was involved, was intended to apply only where the validity of a statute as originally passed is the primary inquiry. The rule is established by many authorities that the constitutionality of a statute will never be determined when the cause in which its determination is sought may be finally disposed of without such determination. *Smith v. Speed*, 50 Ala. 276; *Shehane v. Bailey*, 110 Ala. 308, 20 South. 359; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Martin v. State*, 143 Ind. 545, 42 N. E. 911; *Upton v. Kennedy*, 38 Mich. 215.

The validity of a statute not being necessarily involved in this case, this court is without jurisdiction, and the cause will be transferred to the Appellate Court for the First District.

Cause transferred.

(246 Ill. 625.)

COBE et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)

1. COURTS (§ 163*)—JURISDICTION—ILLINOIS COUNTY COURTS—LAND TITLES.

County courts have no jurisdiction under the Constitution or the county court act (Hurd's Rev. St. 1909, c. 37, §§ 89-215) to try a case involving a freehold or render any judgment binding as to land title, though the Legislature could confer it.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 163.*]

2. MUNICIPAL CORPORATIONS (§ 510*)—JURISDICTION—COUNTY COURTS—LAND TITLES.

Local Improvement Act June 14, 1897 (Hurd's Rev. St. 1909, c. 24, § 559) § 53, providing that no special assessment shall be levied for any local improvement until the necessary land has been acquired, except in certain cases, does not give the county court, on objections to confirmation of an assessment, jurisdiction to determine the question of the title to the land on which an improvement is constructed for purposes other than of the pending proceeding, and does not make the determination a final adjudication of title so as to vest an absolute estate of freehold; and hence an order of that court sustaining objections to confirmation of a sidewalk assessment on the ground that the way covered was not a public street is not res adjudicata against the city in a suit to enjoin it from interfering with claimants of the land.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1180; Dec. Dig. § 510.*]

3. MUNICIPAL CORPORATIONS (§ 447*)—LOCAL IMPROVEMENTS—STATUTORY PROVISION—EFFECT.

Local Improvement Act June 14, 1897 (Hurd's Rev. St. 1909, c. 24, § 559) § 53, providing that no special assessment shall be levied

for any local improvement until the land necessary therefor has been acquired, except in certain cases, is designed to prevent assessment for improvements on private land not yet acquired by the city, but proposed to be acquired by condemnation.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 447.*]

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill by Ira M. Cobe and others against the City of Chicago. From a decree for complainants, the city appeals. Reversed and remanded.

Edward J. Brundage, Corp. Counsel (Clarence N. Boord and J. O. Hoover, of counsel), for appellant. Felsenthal, Foreman & Beckwith and Richberg & Richberg, for appellees.

COOKE, J. This is a bill filed by Ira M. Cobe, William C. Niesen, and the Gunther Baseball Company, a corporation, in the circuit court of Cook county, against the city of Chicago, praying that the city of Chicago, its agents, employes, servants, and attorneys, be enjoined and restrained from interfering with the rights of complainants in and to a strip of land referred to in the bill of complaint and designated as "Hill's Court," or from in any manner asserting any rights in and to said Hill's Court adversely to the ownership therein of complainants and their right of possession.

The bill alleges that Ira M. Cobe is seised in fee simple of certain lots in Simon's addition to Ravenswood and certain lots in J. L. Stark's addition to Ravenswood, in the city of Chicago, and also a strip of land about 35 feet in width and 510 feet in length extending east and west along and adjoining said lots on the south; that the Gunther Baseball Company is the lessee, under a lease from Daniel R. Cameron, of certain lots therein described in said J. L. Stark's addition and also a strip of land about 15 feet in width and 510 feet in length extending east and west and adjoining said lots on the north; that on May 28, 1893, a plat of Simon's addition to Ravenswood was filed for record, in and by which the owners of said addition ceded and dedicated said strip of land 35 feet in width, and on the same day the then owners of the block containing the lots now leased to the Gunther Baseball Company in the said J. L. Stark's addition to Ravenswood ceded and dedicated said strip of land 15 feet in width, the two said strips being contiguous and constituting a strip 50 feet in width from North Ashland avenue to North Clark street (two public thoroughfares in the north addition to the city of Chicago), and being named and designated in said plat of Simon's addition as "Hill's Court"; that William C. Niesen owned said 35-foot strip in June, 1908; that on March 30, 1907, an

ordinance was adopted by the city council of Chicago to lay 6-foot cement sidewalks on both sides of the strip called Hill's Court, and was afterwards made the basis for spreading an assessment for the payment of said improvement, and that the assessment roll for said improvement was brought into the county court of Cook county for confirmation; that William C. Niesen and Daniel R. Cameron filed objections in the county court to the confirmation of such assessment roll, one of the objections being that the assessment was illegal for the reason that said Hill's Court was not a public street and had theretofore been legally vacated. There were 17 other objections filed, among them being one that the ordinance was unreasonable. The bill further alleges that evidence was heard by the county court upon said objections, tending to show that said strip had been legally vacated before any acceptance on the part of the city of Chicago and also tending to show that Hill's Court had never been legally laid out or dedicated; that the county court, in June, 1908, sustained all the objections and dismissed the petition; that more than a year after the date of the judgment of the county court sustaining all the objections to the petition for confirmation of the assessment roll and dismissing the petition the city of Chicago served notice on the Gunther Baseball Company and William C. Niesen to remove the fence surrounding the Gunther Baseball Park, and the grandstands of the same, from Hill's Court, or that the city of Chicago would forcibly remove and tear the same down immediately, because said structures were on public property, and that, unless restrained, the city of Chicago will tear down the fence surrounding said ball park, and will prevent the complainant company from using its ball park as a place of amusement; that the business of the Gunther Baseball Company will be entirely destroyed and irreparable injury done it. Complainant Cobé alleged and represented that the threatened action on the part of the city of Chicago, unless restrained, would result in the city attempting to seize his property under the guise that said strip was a public street, and would involve him in long and expensive litigation with the city and deprive him of his rights of possession.

The city answered the bill, and the cause was referred to the master in chancery to report his conclusions of law, the only matter referred to the master to be determined being whether the order entered in the application for a confirmation of the assessment roll in the county court is *res judicata* in this case. The master reported, finding that the county court is a court of limited jurisdiction and cannot consider and dispose of questions of title, and recommended that on the issue as presented the complainants' bill be dismissed for want of equity. The complainants objected and excepted to the

report of the master, and upon a hearing the circuit court sustained the exceptions to the report and entered a decree finding that the decision and judgment in the special assessment proceedings in the county court are a former adjudication as to the title to said strip of land which is conclusive and binding on the city of Chicago in this cause. The decree also found that that was the only issue raised by the pleadings and relied on by the parties, and ordered and decreed that an injunction issue, without bond, perpetually restraining the city of Chicago from interfering with the rights of the complainants in Hill's Court or from asserting any right in and to the said strip of land adversely to the ownership of complainants. The city has appealed from this decree, and the only question raised is whether or not the order or judgment of the county court dismissing the application for confirmation of the assessment roll upon the objections made thereto is a former adjudication as to the title to Hill's Court which is conclusive and binding upon the city in this cause.

We recently had occasion in the case of *Boyd v. Kimmel*, 244 Ill. 545, 91 N. E. 710, to discuss the question of the jurisdiction of the county court, in general, to determine questions of title, and we there held that the county court did not have jurisdiction to try a case involving a freehold and render a judgment binding as to the title, although it did have jurisdiction to hear an action for damages, not exceeding \$1,000, for injury to real estate where a freehold was incidentally involved. It will not be necessary here to review the authorities there cited and quoted from, but it will suffice to state that under the holding in that case county courts do not have jurisdiction, under the Constitution or under the county court act (Hurd's Rev. St. 1909, c. 37, §§ 89-215), to try a case involving a freehold or render any judgment binding as to the title of real estate. The Legislature has the undoubted right to confer such jurisdiction upon the county court. It has not done so by the provisions of the county court act, and, if jurisdiction has been conferred upon the county court to conclusively determine questions of title in this class of cases, we must look to the act concerning local improvements, approved June 14, 1897 (Hurd's Rev. St. 1909, c. 24), for that authority.

Appellees rely upon the various sections in the local improvement and sidewalk acts which provide that local improvements shall be constructed upon the streets of the various municipalities, as conferring jurisdiction upon the county court to determine the question of the title to the streets, but they particularly rely upon section 53 of the local improvement act, which is as follows: "No special assessment or special tax shall be levied for any local improvement until the land necessary therefor shall be acquired

and in possession of the municipality, except in cases where proceedings to acquire such land shall have been begun, and proceeded to judgment." They urge that where objection is made, as was in the application here involved, to the confirmation of the assessment that the city has not acquired or does not own the land upon which the local improvement is proposed to be made, it becomes necessary for the county court to then determine the question of title, and that, that question being a necessary one for determination, the judgment of the county court is final and conclusive, and is binding upon the parties thereafter as an absolute adjudication of the question of the title to the land involved.

We are of the opinion that, inasmuch as the main issue to be determined in the proceedings is whether the assessment shall be approved and the question of title is merely incidental, it was not intended by the Legislature to confer upon the county court more than jurisdiction to determine the question of title merely for the purpose of that one proceeding, and that such determination was not intended to be a final and complete adjudication of the title, so as to vest in the municipality or any person an absolute estate of freehold. An examination of the other provisions of this act discloses clearly that it was not the intention of the Legislature to confer such power upon the county court. All of that portion of the act following section 36 relates to cases where the ordinance creating the improvement contains no provision for the condemnation of private property and where the improvement is proposed to be made on the property of the municipality. Section 41 provides that the assessment roll shall contain a list of all the lots, blocks, tracts, and parcels of land assessed for the proposed improvement and the amount assessed against each, the name of the person who paid the taxes on each such parcel during the last preceding calendar year, the residence of such person, if the same can be found, and the amount of each installment of assessment, and provides, further, that notice shall be given of the nature of the improvement, of the pendency of the proceedings, of the time and place of filing petition therefor, and of the filing of the assessment roll, and of the time and place at which application will be made for confirmation of the assessment, and that such notices shall be sent by mail, postage paid, to each of said persons paying the taxes on the said respective parcels during the last preceding year taxes were paid, at his residence, as shown in the assessment roll, or, if not shown, then to such person paying the taxes, directed generally to the city, village, or town in which the improvement is proposed to be made. The remainder of the section contains other matter which is directed to be contained in the notice. Section 44 pro-

vides that the petitioner shall, in addition to other notices thereinbefore provided for, cause notices to be posted in public places and published in a daily or weekly newspaper of the final hearing to be had upon the application for the confirmation of the assessment roll. Section 46 provides: "Any person interested in any real estate to be affected by such assessment, may appear and file objections to such report, by the time mentioned in said notice, * * * or within such further time as the court may allow," etc.

Thus it will be seen that notice is only provided to be given to the owners of lots benefited by the proposed improvement, and by section 46 it is only persons interested in any real estate to be affected by the assessment who may appear and file objections. As no assessment can be made against any property taken for the proposed improvement, this clearly excludes any one claiming title adversely to the municipality in the property upon which the proposed improvement is to be made, and such person, if any exist, will not only receive no notice of the proceedings, but will be precluded from filing any objections unless he also be the owner of a lot or lots which are claimed to be benefited and proposed to be assessed. If it were meant by section 53 to confer jurisdiction upon the county court, in proceedings of this kind, to conclusively determine the question of title to the lands proposed to be used for public improvements, it is done upon the assumption that in each case where a dispute should arise as to the title it would be between the municipality and some one or more of the owners of lots benefited. That, however, would not necessarily be true. It would be quite possible, for instance, in the case now under consideration, that some one other than any one or more of the owners of lots claimed to be benefited and proposed to be assessed should claim to own title in fee simple to the strip of land known as Hill's Court. In such case the person so claiming to own the title would receive no notice whatever of the proposed improvement, and would not be entitled to file objections to the report of the officer or person making the assessment. It is true that, if such were the case, the question of *res judicata* here urged could not arise for the reason that the parties to the action would not be identical, but it is also true that in such a case the judgment of the county court, should that be one overruling all objections, including one that the municipality had not acquired the property, would in no wise be binding upon the person claiming to own the land involved.

It cannot be successfully contended that the Legislature meant that under certain conditions arising in cases under the local improvement act the county court should have jurisdiction to conclusively and finally determine all questions of title, and that, un-

der other conditions in such cases, it should not have such jurisdiction. The act is meant to apply generally, and the county court has the same jurisdiction in one case under the local improvement act as it has in another. In the absence of general jurisdiction to determine questions of title, it cannot be contended that the county court was by this act given jurisdiction of the subject-matter in such cases as it should by, accident, as it were, secure jurisdiction of the persons of all the parties interested. If it were meant that the county court should have jurisdiction in this class of cases to settle questions of title, provision would have been made for service upon every person claiming to be interested in each instance. As the Legislature did not give the county court jurisdiction of all the persons interested in every instance, it must necessarily follow that jurisdiction was not given of the subject-matter to conclusively adjudicate questions of title. Section 53 empowers the county court simply to determine the question of title as it may arise incidentally to the determination of the main question of the confirmation of the assessment, and the judgment of the court has no force and effect upon that question except in that particular proceeding. The jurisdiction of the county court in this regard is analogous to the jurisdiction of a justice of the peace to determine the question of title when it arises incidentally in suits brought to recover for injury to real estate. Section 53 was not designed to enable the city to contest conclusively the question of title with any one, but was meant to prevent municipalities from levying assessments and collecting the same for public improvements to be made upon private land not yet acquired by the municipality, and which the municipality was willing to concede had not been acquired, but which was proposed to be acquired thereafter by condemnation proceedings.

Appellees rely upon the cases of *People v. Talmadge*, 194 Ill. 67, 61 N. E. 1049; *Watts v. Village of River Forest*, 227 Ill. 31, 81 N. E. 12; *City of Chicago v. Green*, 238 Ill. 258, 87 N. E. 417, and *City of Chicago v. Green*, 239 Ill. 304, 87 N. E. 1021, as supporting their contention. There is nothing in the decision of any of those cases which in any wise conflicts with the views herein expressed.

The order and judgment of the county court dismissing the petition for confirmation of the assessment roll was not a former adjudication as to the title to Hill's Court, which is conclusive and binding upon the appellant in this cause. The decree of the circuit court is reversed and the cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MUNDT v. GLOS.

(Supreme Court of Illinois. Oct. 28, 1910.)

Rehearing Denied Dec. 7, 1910.)

1. RECORDS (§ 9*)—REGISTRATION OF TITLES—RIGHT OF REVIEW—PARTY AGGRIEVED.

Where, in proceedings to register title, one defendant answered that he was interested in the realty, but set out specifically a claim to only two of the lots involved, and a decree was rendered as to the other lots, but as to such two the cause was continued, and no costs adjudged against such defendant, he was not entitled to prosecute a writ of error to review the decree.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

2. RECORDS (§ 9*)—REGISTRATION OF TITLE TO LANDS—REFERENCE TO EXAMINER—DUTY TO REPORT EVIDENCE.

The Torrens law (Act May 1, 1897; Laws 1897, p. 139) provides (section 18) that the examiner of title, to whom application to register title is referred, shall not be required to report the evidence submitted to him, except upon request of some party to the proceedings or by the direction of the court. *Held*, that where no order directed the examiner to report the evidence, and defendant made no application for a rule on the examiner to file certain exhibits with the evidence in court, he cannot complain that such exhibits were not returned.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

3. RECORDS (§ 9*)—REGISTRATION OF TITLE TO LAND—EXAMINATION OF TITLE—EVIDENCE—TRANSCRIPT IN OTHER PROCEEDINGS.

Where evidence in proceedings before an examiner of title in proceedings to have title to land registered under the Torrens law (Laws 1897, p. 139) had not been certified by the examiner, nor included in nor attached to any report to the court, the transcript thereof was inadmissible in a subsequent proceeding before another examiner relating to the same title.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

4. RECORDS (§ 9*)—REGISTRATION OF TITLE—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The only matter shown by such transcript which was not covered by other evidence introduced before the second examiner being a tender made by applicant's solicitor to defendant, which was entirely immaterial to any issues in the case, the erroneous admission of the evidence was not prejudicial.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

5. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER—FAILURE TO ARGUE.

Assignments of error, not argued by plaintiff in error, are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Error to Circuit Court, Cook County; John Gibbons, Judge.

Application by Henry Mundt to have title to land registered. From a decree for applicant, Jacob Glos, a defendant, brings error. Affirmed.

John R. O'Connor, for plaintiff in error.
F. William Kraft, for defendant in error.

COOKE, J. On October 20, 1904, Henry Mundt, the defendant in error, filed his ap-

plication in the circuit court of Cook county to have his title to 10 lots in Harlem, Cook county, registered under the act of 1897 concerning land titles, commonly known as the "Torrens law" (Laws 1897, p. 139). The application set forth, among other things, that the lots were vacant and unoccupied, that Mundt claimed an estate in fee simple therein, and that Henry L. Glos and Jacob Glos claimed some interest in the premises by virtue of certain sales for delinquent taxes and special assessments, which the applicant claimed were invalid, but the applicant offered to pay them such sums as they were equitably entitled to or could legally claim. Jacob Glos filed an answer, denying that his claim and interest in the premises, or the sales referred to in the application, were invalid, denying that Mundt was the owner of the premises, and alleging that on August 13, 1902, Henry L. Glos purchased lots 6 and 7, of the 10 lots described in the application, at a sale for delinquent taxes for the year 1901, and paid \$6 therefor; that Henry L. Glos assigned the tax certificate to him, Jacob Glos, and that he was, at the time of filing the answer, the legal owner and holder thereof; that Henry L. Glos paid \$5.28 general taxes for the year 1903, and he (Jacob Glos) paid a special assessment in 1904 amounting to \$28.44. Henry L. Glos afterwards released his interest in the premises to Mundt, and the application was dismissed as to him. On November 3, 1904, the application was referred to Theodore Sheldon, one of the examiners of title in Cook county. Sheldon died before making report, and on June 23, 1905, upon motion by the applicant and upon proof of notice to Jacob Glos that such motion would be made at that time, the court entered an order directing Charles G. Little, one of the examiners of title, to report to the court as to the lots described in the application in which the defendant Jacob Glos claimed no interest in his answer, and that as to the other lots in which he claimed an interest the report of the examiner be reserved until the evidence of all parties should be completed. On August 17, 1905, Little filed his report, in which he found that at the time of filing the application Mundt was the owner in fee simple of all of said lots, except said lots 6 and 7, and that no other person had any estate, interest or claim therein. As to said lots 6 and 7 the report stated the cause was to be continued until the further order of court. Glos filed objections to the report, which were overruled, and were renewed as exceptions in the circuit court. On the same day the report was filed, August 17, 1905, the court entered a decree overruling the exceptions, approving the report, adopting the findings of the examiner, and directing the registrar to forthwith register the fee-simple title in Mundt to all the lots described in the application, except said lots 6 and 7. Thereafter, on April 7, 1906, the court en-

tered an order vacating the order of reference to Theodore Sheldon on account of his death, and referring that part of the cause remaining undisposed of, and relating to said lots 6 and 7, to Charles T. Farson, one of the examiners of title in Cook county. This order of reference to Farson directed him to report to the court, in writing, the substance of the proof submitted to him and his conclusions therefrom, and also directed him to admit in evidence and consider as a part of the record of the cause a transcript of the proceedings had before Theodore Sheldon.

While the cause was pending before Farson, Jacob Glos sued out a writ of error from this court to obtain a reversal of the decree entered August 17, 1905. Before the transcript of the record was certified to this court upon that writ of error, Farson filed his report, and the circuit court, on August 29, 1907, entered a decree based thereon, finding that Mundt was the owner in fee simple of said lots 6 and 7, subject to an equity in favor of Jacob Glos on account of moneys paid for the tax certificate and for subsequent taxes and special assessments and interest thereon, all amounting to \$48.55, ordering the applicant to pay said sum to the clerk of the court for the benefit of Glos, in full discharge of all his right, title, and claim in and to said real estate, and finding that said sum had been paid by the applicant to the clerk of the court as required by the decree; also finding that no person, other than as therein stated, had or claimed any estate or interest in said land, and ordering that the fee-simple title be confirmed in said Mundt, that the applicant pay the costs of the proceeding, and that the registrar forthwith register such title in the manner provided by said act of 1897 concerning land titles. This report and decree were included in the transcript of record certified by the clerk of the circuit court to this court upon the former writ of error, and Glos sought to have us review the proceedings had subsequent, as well as those had prior, to the entry of the decree of August 17, 1905. We dismissed that writ of error, however, on the ground that the decree last entered in the cause was not before us for review, because it had not been entered at the time the writ of error was sued out, and that Glos was not in a position to complain of the decree entered August 17, 1905, because he claimed no interest in any of the lots affected by that decree, and could not be prejudiced by the registration of the fee-simple title to those lots in the applicant. *Mundt v. Glos*, 231 Ill. 158, 83 N. E. 135. Subsequently Glos sued out the present writ of error, and seeks thereby to obtain a reversal of both decrees entered by the circuit court in the cause.

The former writ of error brought before this court the proceedings in the cause up to and including the entry of the decree of August 17, 1905, and the reasons stated in

Mundt v. Glos, *supra*, for dismissing that writ of error, are sufficient to prevent Glos from obtaining a review of such proceedings and decree in this case. Only proceedings had in the cause subsequent to the entry of the decree of August 17, 1905, can be considered at this time.

The principal objection urged to the proceedings had subsequent to August 17, 1905, is that certain exhibits received in evidence by Charles T. Farson, examiner of titles, were not filed with his report or otherwise brought to the attention of the circuit court when the matter came on for hearing before the court on that report and the exceptions filed by Glos thereto; and it is urged that by reason thereof plaintiff in error was denied the right to have the circuit court pass on the question whether the evidence sustained the findings of the examiner, and is likewise denied the right to have this court pass on that question.

Section 18 of the act concerning land titles provides that the examiner "shall not be required to report the evidence submitted to him except upon the request of some party to the proceeding or by the direction of the court." Upon such request being made it becomes the duty of the examiner to report the evidence submitted to him, and, if he fails or refuses to do so, the party desiring the evidence to be so reported should thereupon apply to the court for a rule upon the examiner to report the same. Neither the order of court referring the application to Farson, nor any other order entered in the cause, directed the examiner to report the evidence submitted to him. Glos requested the examiner to certify and return into court, with his report, all the testimony heard and taken by him; but the record fails to show any application to the court to require the examiner to comply with the request. The record does show that on August 27, 1907, Glos moved the court to require the solicitor for the applicant to place on file in the cause the report of the examiner now in his possession, together with the evidence and exhibits in his possession upon which the same is based, and that the court sustained the motion in part and denied it in part, and ordered that applicant's solicitor file the report and that he retain the exhibits in his possession. It further appears that on August 29, 1907, on motion of the applicant, leave was granted to his solicitor by the court to withdraw the exhibits filed with the examiner, but to hold the same subject to the order of the court for their production from time to time, as may be necessary. The first of these orders indicates that the exhibits were in the

possession of the applicant's solicitor on August 27th, while the latter order indicates that they were in the possession of the examiner on the day the exceptions to the report were heard by the court and the decree entered.

In *McMahon v. Rowley*, 238 Ill. 81, 87 N. E. 66, where the objection was made that the examiner based his report on certain evidence that was not returned with his report, we said: "Moreover, plaintiffs in error are in no position to complain. It was their duty, under the statute, if the evidence was not returned, to ask the trial judge for a rule on the examiner to report the evidence and file the same. The statute requires this, and this court has said that was the proper procedure in similar matters with reference to masters in chancery." In the case at bar the plaintiff in error made no attempt to obtain a rule on the examiner to file the exhibits in court. He is, therefore, in no position to complain that such exhibits were not returned into court. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418. The subsequent order granting leave to the applicant's solicitor to withdraw the exhibits filed with the examiner indicates that the exhibits were in the possession or under the control of the examiner and that a rule on him to file them in court would have been effective.

It is also urged that the admission in evidence by Examiner Farson of a transcript of the proceedings in said cause before former Examiner Sheldon was error. While we agree with plaintiff in error in his contention in this regard, for the reason that such evidence had not been certified by Sheldon or included in or attached to any report to the court (*Coel v. Glos*, 232 Ill. 142, 83 N. E. 529), we do not regard such error as prejudicial. The only matter shown by that transcript which was not covered by other evidence introduced before Farson was a tender made by the solicitor for the applicant to Glos. The applicant was by the final decree ordered to pay all the costs of the proceeding, and the fact that a tender had been made was immaterial to any of the issues in the cause.

The assignment of errors refers to other alleged errors in the proceedings, but plaintiff in error has only argued those above considered. The others have therefore been waived.

Plaintiff in error having failed to point out any prejudicial error in the record of which he is in a position to complain, the decree of the circuit court will be affirmed.

Decree affirmed.

(247 Ill. 80)

TOBIAS v. KASPYK et al.(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)**1. RECORDS (§ 9*)—REGISTRATION OF TITLES—
PAYMENT OF TAXES — PAYMENT — SUFFICIENCY.**

On an application to register title, the testimony of a former possessor of the premises under color of title that he paid the taxes on the property is sufficient, when taken in connection with the tax receipts, to show the payment of taxes by him, though the receipts were made out in some instances to persons with other initials.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

**2. TAXATION (§ 529*)—PAYMENT OF TAXES—
EVIDENCE.**

Payment of taxes may be shown by any competent evidence, such as the testimony of a person having knowledge of their payment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 982-984; Dec. Dig. § 529.*]

**3. RECORDS (§ 9*)—REGISTRATION OF TITLE—
TITLES WHICH MAY BE REGISTERED—ADVERSE POSSESSION.**

A person, having had possession of improved and inclosed property under claim and color of title for seven years, and having paid all taxes legally assessed during that time, is entitled to have his title registered.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

**4. RECORDS (§ 9*)—REGISTRATION OF TITLE—
RECEPTION OF EVIDENCE—TIME.**

Where, on application to register title, defendants claimed to have a tax deed to the property, but failed to offer any testimony as to the amount of taxes paid, in order to recover the amount from plaintiff, when they had the opportunity of doing so, the court's refusal to permit the admission of such evidence after the case had been closed a second time was not an abuse of its discretion, and therefore the order permitting plaintiff to register his title without imposing any terms was proper.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

Error to Circuit Court, Cook County;
George A. Carpenter, Judge.

Application by Sadie B. Tobias to register title against Jan Kaspyk and others. Decree for petitioner, and defendants other than Kaspyk bring error. Affirmed.

John R. O'Connor, for plaintiffs in error.

VICKERS, C. J. Sadie B. Tobias filed her application in the circuit court of Cook county to register her title to lots 28, 29, and 30, in block 6, in Hegewisch subdivision of the S. W. ¼ of the N. E. ¼ of section 31, township 37 N., range 15 E., of the third principal meridian, in Cook county, Ill. The application alleged that the land was occupied by Jan Kaspyk as tenant from month to month of complainant, and that Jacob Glos and Emma Glos personally, and August A. Timke as trustee, claimed some interest by reason of an alleged tax deed or deeds held by Jacob Glos and a trust deed executed by him to August A. Timke to secure a note. The application was assented to by Kaspyk. The other defendants filed separate answers to

the application, denying that the complainant had stated a case which would entitle her to relief, admitting that they claimed an interest in the property, and denying their title was invalid for any reason. The application was referred to Charles G. Little, one of the examiners of titles, who heard the evidence and reported, finding that the complainant was the owner of the premises described in the application in fee simple, and that no other person had any interest therein. This report was confirmed, and a decree entered in conformity therewith. Defendants have sued out a writ of error to this court to obtain a review of the decree below, and assign errors calling in question the sufficiency of the proof to support the decree.

To establish title in herself defendant in error relied on possession and payment of taxes for seven successive years under claim and color of title made in good faith, under section 6 of chapter 83 of Hurd's Revised Statutes of 1909. She also introduced in evidence a quitclaim deed executed by Harold J. Le Cren to Thomas W. Forster, dated August 30, 1894, duly signed, acknowledged, and recorded, purporting to convey the premises in question for an expressed consideration of \$800; also a deed from Thomas W. Forster and wife to defendant in error, conveying the same premises, dated December 15, 1902, and recorded in the recorder's office of Cook county December 17, 1902. The three lots in question are contiguous, each being 25 feet by 175 feet, and are improved by a residence, and the entire property is inclosed with a fence, and used by the occupant of the dwelling for garden, cow pasture, etc. Thomas W. Forster, grantee in the Le Cren deed, testified that the property had been occupied by his tenants since he received his deed, and that he had received the rent for the property until he sold it to defendant in error. He also testified that he had paid the taxes on his property from the date of his deed, in 1894, until he sold it to defendant in error, and that she had paid all the taxes since that date. The evidence shows that all of the taxes were paid on this property from the time Forster obtained his deed, in 1894, to the time when defendant in error filed her application to register her title, in 1905. Tax receipts were introduced covering all of the years except one, and as to that year Forster testified that he paid the taxes, but had lost the receipt. One of the tax receipts was in the name of W. T. Forster, one in the name of F. W. Forster, and another in the name of T. N. Forster. The others were either Thomas W. or T. W. Forster.

Plaintiffs in error contend that the tax receipts show the payment of taxes by persons other than the holder of the color of title. If the tax receipts were the only evidence of the payment, there would be some force in

this contention; but the testimony of Thomas W. Forster shows that all of these payments were made by him and with his own money. This evidence, when taken in connection with the tax receipts, is sufficient to show a payment of taxes under the color of title. The payment of taxes may be shown by any competent evidence, and the testimony of a person having knowledge of their payment is competent evidence. There is no merit in the several objections pointed out by plaintiffs in error to the evidence showing the payment of taxes. Defendant in error, having shown a concurrence of possession under claim and color of title and the payment of all the taxes legally assessed for the full period of seven years, made out a case entitling her to have her title registered. Hurd's Rev. St. c. 83, § 6.

The plaintiffs in error offered a copy of a tax deed in evidence; but it was excluded as evidence of title, because there was no preliminary proof showing that the tax deed in fact conveyed the title. The tax deed was then offered as a basis for a reimbursement for the taxes paid by the plaintiffs in error, and was received in evidence for this purpose. No evidence, however, was subsequently offered showing what amount, if any, plaintiffs in error had paid on account of taxes. After the case had been closed before the examiner of titles, and had been adjourned for more than a month, the case was reopened, on motion of the plaintiffs in error, to permit them to offer further evidence. After the case was closed the second time, Mr. O'Connor, attorney for plaintiffs in error, asked permission to bring in evidence showing how much taxes had been paid at the tax sale. Counsel for defendant in error objected, on the ground that the case had already been closed: Mr. O'Connor stating that he was aware of the fact that he had not made any proof of the payment of any money that was for the tax deed, and did not know just how he was going to prove it—that it would cause a great deal of trouble in bringing in records and making proof. The examiner denied Mr. O'Connor's motion, and his action in that regard is complained of. In this there was no abuse of discretion. The plaintiffs in error had had ample opportunity to procure and introduce any evidence showing the amount paid at the tax sale, if they desired to do so. There was no error in the decree ordering the registration of this title without imposing any terms upon the defendant in error. There was no evidence upon which a decree for reimbursement could have been entered, and the absence of such proof, if it existed, was caused by the neglect of plaintiffs in error.

There is no merit in any of the contentions of plaintiffs in error. The decree will be affirmed.

Decree affirmed.

(247 Ill. 116)

VANDALIA LEVEE & DRAINAGE DIST.
v. VANDALIA R. CO. et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. DRAINS (§ 83*)—DRAINAGE DISTRICTS—ASSESSMENT OF BENEFITS BY JURY—METHOD OF IMPANELING.

Levee Act (Hurd's Rev. St. 1905, c. 42) § 37, as amended May 20, 1907 (Hurd's Rev. St. 1908, c. 42), providing for the construction of drainage districts, provides that upon a petition for an additional assessment the court may cause the assessment to be made by a jury; no procedure being prescribed for selecting or impaneling it. *Held*, that the procedure prescribed by law for organization of a common-law jury must be followed, and the parties to the proceedings allowed to be present when the jurors are selected, and to interpose any legal objection to any juror.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 83.*]

2. COURTS (§ 485*)—TRANSFER FROM COUNTY TO CIRCUIT COURT.

Administration Act (Hurd's Rev. St. 1908, c. 3) § 69, providing that in cases pending in the county court, where the judge shall be interested or a material witness, the case shall be transmitted to the circuit court of the proper county, applies only to the settlement of estates, and does not authorize the transfer of drainage matters to the circuit court on account of the interest of the county judge.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 485.*]

3. DRAINS (§ 83*)—DRAINAGE DISTRICTS—ASSESSMENT OF BENEFITS—ADDITIONAL ASSESSMENTS—PROCEDURE.

Levee Act (Hurd's Rev. St. 1905, c. 42) § 37, as amended May 20, 1907 (Hurd's Rev. St. 1908, c. 42), provides that upon hearing of a petition for an additional assessment the court may grant the prayer with like proceedings and notice as near as may be as in cases of original assessments of damages. *Held*, that proceedings for a second assessment and third assessment, and for an annual assessment for repairs of a drainage district, are separate and distinct proceedings, and must be had before separate juries, if the assessments are made by a jury.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 83.*]

4. DRAINS (§ 83*)—DRAINAGE DISTRICTS—ASSESSMENT OF BENEFITS.

Levee Act (Hurd's Rev. St. 1905, c. 42) § 18, as amended May 20, 1907 (Hurd's Rev. St. 1908, c. 42), provides for the assessment of damages and benefits by a jury, and that in assessing additional assessments the jury may consider any prior assessments against any land which are void and unpaid on account of irregularity not affecting the merits, and may include them or any part thereof, with such additional assessment, merely authorizes prior assessments to be included when they are void for some irregularity not affecting the merits, and confers no authority upon the jury to include a prior assessment, unpaid because levied for a purpose not authorized by law and spread by interested persons.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 83.*]

5. DRAINS (§ 70*)—DRAINAGE DISTRICTS—ASSESSMENT OF BENEFITS—CONSTITUTIONAL PROVISION.

Under Const. art. 4, § 31, which provides that the Legislature may vest the corporate authorities of drainage districts with power to

construct and maintain levees, drains, etc., by special assessment upon the property benefited thereby, such an assessment may be made against the town on account of benefits to township roads, as provided by the levee act (Hurd's Rev. St. 1905, c. 42), as amended May 20, 1907 (Hurd's Rev. St. 1908, c. 42), being enforceable against the town and not against the specific property benefited.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 70.*]

6. DRAINS (§ 70*)—DRAINAGE DISTRICTS—ASSESSMENT FOR BENEFITS—EXEMPTION OF PROPERTY.

Levee Act (Hurd's Rev. St. 1905, c. 42) § 55, as amended May 29, 1909 (Hurd's Rev. St. 1909, c. 42), providing that the drainage commissioners may contract with the corporate authorities of a town or with a railroad company, the property of which will be benefited by the improvement, with reference to the proportion of an assessment about to be made that shall be assessed against such town or railroad company, relates merely to an assessment about to be made, and gives the commissioners no more power to relieve railroad companies and towns from future assessments than they have to relieve other landowners from such assessment.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 70.*]

Error to Fayette County Court; Michael O'Donnell, Judge.

Action by the Vandalia Levee & Drainage District against the Vandalia Railroad Company and others. From a judgment confirming drainage assessments against defendants' land, they bring error. Reversed and remanded.

Brown & Burnside and W. P. Welker, for plaintiffs in error. Albert & Matheny, for defendant in error.

COOKE, J. This is a writ of error sued out to review a judgment of the county court of Fayette county confirming drainage assessments against lands of plaintiffs in error, the Vandalia Railroad Company, the Illinois Central Railroad Company, the town of Sefton, Moses Hutchins, Sarah J. Hutchins, Flora Dawdy, and Eva Webb, lying within the boundaries of the Vandalia Levee & Drainage District, in Fayette county.

The drainage district was organized in September, 1903, under the levee act (Hurd's Rev. St. 1905, c. 42), and an original assessment of benefits was confirmed by the county court against all the lands in the district. Moses Hutchins, one of the plaintiffs in error here, appealed from the judgment of confirmation to this court, and the judgment against his lands, amounting to \$611.88, was reversed, because it included an assessment against those portions of said lands required, and in that proceeding sought to be taken, by the district for its levee, and the cause was remanded to the county court. *Hutchins v. Vandalia Drainage District*, 217 Ill. 561, 75 N. E. 354. No remanding order was ever filed in the county court, and no further action was taken in the original proceedings to obtain a valid assessment against the

lands owned by Hutchins. Thereafter an additional assessment in the sum of \$25,000 was spread against the lands in the district by the commissioners under an order of the county court, and as so spread was confirmed by the county court. The plaintiffs in error Moses Hutchins, Sarah J. Hutchins, Flora Dawdy, and Eva Webb sued out a writ of error from this court to review the proceedings under the petition for the second assessment, and the judgments against their lands were reversed, and the cause remanded to the county court, because the commissioners who spread the assessment owned land in the district, and because the assessment was in part levied to pay indebtedness already incurred. *Vandalia Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715.

On July 21, 1908, the remanding order of this court in the last-mentioned cause was filed in the county court, the cause was re-docketed, the petition was amended, and proceedings were had which resulted in an order of the county court on August 22, 1908, directing an assessment of benefits, under the amended petition, against the lands of the four plaintiffs in error last above named, on the basis of a total assessment of \$21,000 against all the lands in the district, instead of on the basis of a total assessment of \$25,000, as originally ordered. This order did not specify whether the assessment should be spread by the commissioners or by a jury, and the court, on November 14, 1908, upon the petition of the commissioners of the district, entered a supplemental order directing that such assessment be made by a jury of 12 qualified persons impaneled and duly sworn as by the statute in such case made and provided. In the meanwhile, on September 30, 1908, the commissioners had presented a petition to the county court for a third assessment of benefits, in the sum of \$4,732.75, to repair certain breaks in the levee, to pay certain incidental expenses of the district, and to pay the amount awarded Moses Hutchins in a condemnation proceeding for land taken by the district for levee purposes, and also for an annual assessment of \$2,400 for the purpose of making repairs and paying the incidental annual expenses of the district; and the court had, on November 5, 1908, granted the prayer of the petition and ordered that the assessments be made by a jury of 12 men, to be impaneled and selected according to law, and that any prior assessments of benefits against any lands in the district, which had not been confirmed because of illegality or irregularity in the making thereof, might be added to the amounts assessed against such lands in spreading the third assessment.

On November 14, 1908, the same day on which the court ordered that the second assessment against the lands of Moses Hutchins, Sarah J. Hutchins, Flora Dawdy, and

Eva Webb be spread by a jury, the court, without notice to any of the landowners of the district, ordered a venire to issue for a jury, returnable November 17, 1908. The jury was, in obedience to the venire, summoned from the body of the county, was impaneled and sworn by the court without notice to and in the absence of plaintiffs in error, and proceeded to spread the second assessment against the lands of Moses Hutchins, Sarah J. Hutchins, Flora Dawdy, and Eva Webb in accordance with the order of August 22, 1908, and to spread the third assessment of \$4,732.75 and the annual assessment of \$2,400 against all the lands in the district in accordance with the order of November 5, 1908, and added to the assessments so spread against the lands of Moses Hutchins the first assessment of \$611.38, judgment for which had been reversed by this court in *Hutchins v. Vandalia Drainage District*, supra. Plaintiffs in error filed their several objections to the assessments against their lands and to the assessment roll made and returned by the jury. The Vandalia Railroad Company and the Illinois Central Railroad Company filed their joint motion to transfer the proceedings to the circuit court, on the ground that the county judge of Fayette county was the owner of lands in the district. This motion was denied, but the county judge of Effingham county was called in to hear the cause. Upon the hearing the court overruled all legal objections, and the jury modified the assessment roll by striking out the assessments made against the lands of the Vandalia Railroad Company and the Illinois Central Railroad Company in spreading the third assessment of \$4,732.75. The assessment roll as modified was confirmed by the court, and the plaintiffs in error by this writ of error seek to reverse the judgment of confirmation.

The proceedings now before us were had under the levee act as amended May 20, 1907 (Hurd's Rev. St. 1908, c. 42). Section 37 of the amended act provided that upon the hearing of a petition for an additional assessment the court might grant the prayer of the same, "and with like proceedings and notice as near as may be as in cases of original assessments of damages and benefits under this act," and that "when the right of way of the proposed ditches, drains, levees or other work within any district, has been released by the owners of the lands, or has been condemned according to law, over which said work or works are about to be located or when the owners of the lands in such district about to be assessed, agree thereto, the court may cause the assessment to be made by a jury, or may order the commissioners of said district to make the assessment of benefit or benefits and damages, in lieu of a jury." Acting under the authority conferred by this section of the act, the county court ordered that the assessments mentioned in the orders of August 22d and November 5th

be made by a jury of 12 men, to be impaneled and selected according to law. Thereafter, on November 14th, a venire was issued, without notice to any of the landowners of the district, commanding the sheriff to summon 12 persons from the body of the county to appear before the court on November 17th to serve as jurors in drainage assessment. At the time specified in the venire for the appearance of the jurors, the court, without notice to and in the absence of plaintiffs in error, impaneled the jury, which proceeded to spread the assessments under the orders of August 22d and November 5th, and returned an assessment roll into court on November 27, 1908. Notice was then given to the landowners that the jury would attend before the county court on December 28th for the correction of their assessment roll. Plaintiffs in error appeared at the time stated in the notice and interposed objections, one of which was that the jury had not been impaneled according to law, and the action of the court in overruling this objection is one of the grounds relied upon for a reversal of the judgment of confirmation.

The only provision of the levee act, as amended in 1907, relating to the assessment of benefits by a jury was that contained in section 37, supra. No procedure was prescribed by the act for selecting or impaneling the jury, and it necessarily follows that the procedure prescribed by law for the organization of a common-law jury in this state should have been followed. An indispensable requirement of that procedure is that the parties to the proceedings in which the jury is to be impaneled be given an opportunity to be present when the jurors are selected, and to interpose any legal objection to the impaneling of any person as a juror that would disqualify such person from sitting as a juror in the cause. *Wabash Railroad Co. v. Drainage District*, 194 Ill. 310, 62 N. E. 679. This requirement was not observed in the case at bar. The jury impaneled by the court was therefore not such a jury as was authorized by the statute to make the assessments. Plaintiffs in error did not waive their right to be present and to participate in the selection of the jury, but interposed their objection at the earliest opportunity, and the objection should have been sustained. The judgment must, on account of this error, be reversed, and the cause remanded to the county court, where the assessments may be made against the lands of plaintiffs in error in accordance with the provisions of the levee act as amended May 29, 1909 (Hurd's Rev. St. 1909, c. 42), which is now in force.

Other questions are presented which may again arise upon further proceedings in this cause in the county court, and which it is proper should be settled upon this writ of error for the guidance of that court.

It is contended that the county court erred in refusing to transfer the cause to the cir

cuit court, and section 69 of the administration act (Hurd's Rev. St. 1908, c. 3) is relied upon in support of this contention. That section applies only to the settlement of estates, and does not authorize the transfer of drainage matters to the circuit court on account of the interest of the county judge. By the action of the county judge of Fayette county in calling in the county judge of another county, who had no interest in the proceedings, plaintiffs in error obtained all the relief in this regard to which they were entitled. *Chicago & Alton Railroad Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622.

The same jury spread the second assessment, under the amended petition, against the lands of Moses Hutchins, Sarah J. Hutchins, Flora Dawdy, and Eva Webb, that spread the third assessment and the annual assessments for repairs against all the lands in the district. This was error. The proceedings under the amended petition for a second assessment and the proceedings under the petition for a third assessment and for an annual assessment for repairs are separate and distinct proceedings, and must be prosecuted as such. The fact that an additional assessment is ordered before a prior assessment has been spread, and that the costs will be reduced by combining them as one proceeding, is no justification for the procedure. The statute, and not expediency, must govern. Neither did section 18 of the levee act confer any authority upon the jury to make the second assessment against the lands of the four plaintiffs in error last mentioned when they were spreading the third assessment and the annual assessment for repairs. That section only authorized prior assessments to be included with subsequent assessments when such prior assessments were void and unpaid on account of some irregularity in the proceedings in which they were attempted to be levied, not affecting the merits of such assessments.

The second assessment against these lands was unpaid because it was in part levied for a purpose not authorized by law and was spread by interested persons. These were not mere irregularities in the proceedings, but affected the merits of the second assessment, and the only method by which the second assessment can be made against the lands of the four plaintiffs in error last named is by further proceedings under the petition for the second assessment in accordance with the mandate of this court in *Vandalia Drainage District v. Hutchins*, supra.

The first assessment against the lands of Moses Hutchins is in the same condition. It is not unpaid because of a mere irregularity in the proceedings, but because the amount assessed against those lands included an assessment of benefits against about 14 acres of land which the district has tak-

en for right of way purposes. What portion of the first assessment was for benefits to the land taken for right of way, and what portion was for benefits to the balance of the land, cannot be determined. The only method by which the lands of Moses Hutchins can be assessed for their just proportion of the first assessment is by proceeding under the mandate of this court in *Hutchins v. Vandalia Drainage District*, supra.

The town of Seston contends that the levee act, in so far as it authorizes an assessment against a town on account of benefits to the township roads, contravenes sections 9 and 10 of article 9 of the Constitution of this state, and relies upon *Morgan v. Schusselle*, 228 Ill. 106, 81 N. E. 814, and the authorities there cited, which hold that the Legislature is by those sections of the Constitution prohibited from delegating the right of corporate or local taxation to any other than the corporate or local authorities of the district to be taxed, and from creating a debt against a municipal corporation for merely local purposes and subjecting property in such municipality to a tax for its payment without the consent of the taxpayers to be affected. The question here presented was not before the court for consideration in *Morgan v. Schusselle*, supra. Section 81 of article 4 of the Constitution, which was adopted as an amendment to the Constitution in 1878, expressly provides that the Legislature may vest the corporate authorities of drainage districts with power to construct and maintain levees, drains, and ditches by special assessment upon the property benefited thereby. The only limitation upon the property that may be assessed is that it must be property benefited by the improvement. If the highways of a town are benefited by the improvement, they fall within the class of property that may be assessed therefor; such assessments, however, being enforceable against the town, and not against the specific property benefited. *Commissioners of Highways v. Drainage Com'rs*, 127 Ill. 581, 21 N. E. 206.

After the original assessment of benefits had been made the commissioners of the drainage district entered into contracts with plaintiff in error railroad companies, whereby, in consideration of the payment of certain sums of money paid by the railroad companies to the drainage district and the release by the Vandalia Railroad Company of a right of way over its lands for levee purposes, the commissioners agreed to release the railroad companies from any further liability to pay to the district any further sums of money or other thing of value on account of any benefits which might accrue to the railroad companies by reason of the construction and completion of the improvements then in process of construction by the district, or on account of any litigation to which the district might be a

party, or on account of any compensation for lands taken or damages to lands not taken in the construction of the improvements. A similar contract was made between the commissioners and the town of Sefton. The railroad companies and the town of Sefton contend that these contracts constitute a bar to any further assessments against their property, including annual assessments for repairs. This contention is without merit. Section 55 of the levee act, upon which said plaintiffs in error rely, only confers authority upon the commissioners of drainage districts to contract with the corporate authorities of a town, or with a railroad company, with reference to the proportion of an assessment about to be made that shall be assessed against such town or railroad company. The commissioners have no more power to relieve railroad companies and towns from future assessments than they have to relieve other landowners from such assessments. The contracts under consideration can therefore be given no other effect than to fix the amount of the first assessment against the plaintiff in error railroad companies and the town of Sefton, and are no bar to an additional assessment or to an annual assessment for repairs against them.

The judgment of the county court will be reversed, and the cause remanded to that court for further proceedings in conformity with the views expressed in this opinion.

Reversed and remanded.

(199 N. Y. 446)

PEOPLE v. AUSTIN.

(Court of Appeals of New York. Nov. 15, 1910.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—ADMISSIBILITY.

Where accused, to show irrational acts, to form a basis for a hypothetical question to be put to an expert alienist, called a witness who testified as to statements and acts of accused at a particular time, and who stated that accused at that time took a revolver and money, it was proper for the prosecution to show, on cross-examination of the witness, whether the revolver and money were taken without permission, to ascertain the nature of the act which it was claimed, among others, established accused's irresponsibility for the crime charged though it might show another crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. WITNESSES (§ 208*)—PRIVILEGED COMMUNICATIONS—PHYSICIANS.

The testimony of physicians was not privileged at common law, and is privileged only by Code Civ. Proc. § 834, when the information of the physician is required in attending a patient in a professional capacity, and where the information is necessary to enable him to act in that capacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768-770; Dec. Dig. § 208.*]

3. WITNESSES (§ 222*)—PRIVILEGED COMMUNICATIONS—PHYSICIANS.

A party who seeks to exclude the testimony of a physician on the ground that it is privileged, has the burden of proving a case within Code Civ. Proc. § 834, defining privileged communications between physician and patient.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 786; Dec. Dig. § 222.*]

4. WITNESSES (§ 209*)—PRIVILEGED COMMUNICATIONS—PHYSICIANS.

A physician who never attended a party in a professional capacity, and who never obtained information from him to enable him to prescribe in such capacity, may testify the same as any other witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771; Dec. Dig. § 209.*]

5. WITNESSES (§ 209*)—PRIVILEGED COMMUNICATIONS—PHYSICIANS.

Where a physician was sent to a jail by the district attorney to examine the mental and physical condition of a prisoner, the relation of patient and physician within Code Civ. Proc. § 834, did not exist, and the physician was competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 771; Dec. Dig. § 209.*]

6. CRIMINAL LAW (§ 393*)—COMPELLING ACCUSED TO FURNISH EVIDENCE AGAINST HIMSELF.

Where a physician is sent to a jail by the district attorney to examine a prisoner's mental and physical condition, the prisoner is not thereby compelled to furnish evidence against himself, and the physician may testify as to the prisoner's condition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 393.*]

7. WITNESSES (§ 211*)—PRIVILEGED COMMUNICATIONS.

Where the court, at the request of accused, relying on insanity, appointed a physician to examine him as to his sanity to obtain testimony for the trial, the act of the prosecution in calling the physician to testify to preliminary questions was not erroneous where it did not appear that a full disclosure by the physician of what he learned while examining accused was objectionable on the ground that the testimony of the physician was privileged under Code Civ. Proc. § 834.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 768, 773; Dec. Dig. § 211.*]

Appeal from Supreme Court, Trial Term, Westchester County.

Samuel D. Austin was convicted of murder in the first degree, and he appeals. Affirmed.

Edward A. Scott, for appellant. Francis A. Winslow, Dist. Atty., for respondent.

CHASE, J. The defendant shot and killed his wife September 4, 1909. He was indicted for the crime of murder in the first degree, and charged with committing the crime from a deliberate and premeditated design to effect death. On being arraigned he pleaded "Not guilty on the grounds of insanity." Upon the trial the jury found him guilty. After a careful examination of the record, we are not only satisfied that there is evidence to sustain the verdict of the jury, but that their verdict was right, and that the defendant killed his wife from a deliberate and

premeditated design to effect her death, and that at the time of such killing he knew the nature and quality of the act he was doing and that it was wrong. The defendant was represented on the trial by able counsel. The charge of the court to the jury was impartial, and to it no objection or exception was taken by the defendant. The judgment of conviction must stand, unless some ruling was made by the court during the trial that was erroneous, and by which the substantial rights of the defendant were prejudiced. We will refer briefly to the rulings of the court of which the defendant's counsel seriously complains.

The counsel for the defendant called a witness by whom he attempted to show that the defendant prior to the time of the homicide did acts and made statements that were irrational. At the time referred to by the witness she was living with the defendant's father as his wife, and she testified that at one time the defendant visited them, and she related things that were said and done by the defendant at that time, and among other things that "He took a revolver and some money. I think it was \$75." Upon cross-examination of this witness the district attorney, after asking a question which was not answered, asked the witness the following question: "Q. Did he take money and a revolver from the trunk of Austin, his father?" No objection was made to this question, and the witness answered: "He took it out of his father's trunk." The witness was then asked: "Q. With his father's permission?" To this the defendant's counsel objected as incompetent, irrelevant and immaterial. The objection was overruled and the defendant's counsel excepted. No answer was made to such question, and the court then asked the witness the following questions, to which the answers appended thereto were given without objection, namely: "Q. Did he by his father's permission take it? A. No sir. Q. His father was not there at that time? A. No, sir. Q. Did he have your permission? A. No, sir." It is now claimed that such cross-examination violated the general rule that when a person is on trial for one crime evidence cannot be given of a separate and independent crime in no way connected with the crime for which he is being tried. The defendant's counsel, for the purpose of showing that certain acts and conversations of the defendant were irrational, and of forming a basis for a hypothetical question to an expert alienist, had ascertained from the witness that the defendant at the time of said visit to her house had taken a revolver and some money. In determining what influence, if any, the fact of taking the revolver and money should be given upon the question of the defendant's responsibility for his acts, it was material to ascertain whether the witness intended to assert that the taking was felonious or by permission. The district

attorney sought to ascertain whether the witness intended to assert that the revolver and money were taken without permission of the owner thereof, or of the person in whose custody they were left. It is doubtful whether the present claim of the defendant's counsel was fairly presented to the trial court, but that is immaterial, because in any event the cross-examination as stated was not a violation of the general rule mentioned, but related to a proper subject of inquiry to ascertain the nature of the act which it was claimed among others established the defendant's irresponsibility for the homicide.

Just prior to the trial the counsel for the defendant applied to the court, upon an affidavit setting forth that the defendant was without means with which to procure the services of a physician to examine the defendant as to his sanity, so that his testimony might be used at the trial of the action, and asked that a physician be appointed to examine into the condition of the defendant and attend upon the trial and testify, if the defendant, so elected, and that the charge for such services of the physician be made against the county of Westchester. The order was made and the physician so appointed examined the defendant, but he was not called on behalf of the defendant as a witness at the trial. After testimony as to the defendant's sanity was offered the district attorney called said physician in rebuttal, and he testified that at the request of the defendant's counsel he made an examination of the defendant in the county jail. The defendant's counsel then objected to the witness giving any testimony, and a discussion between the court and counsel followed, after which the following is a record of what occurred: "The Court: This is preliminary, and I will overrule the objection. [Exception taken by Mr. Scott.] Q. Did you, Doctor, after seeing Mr. Scott, make an examination in the county jail of this county of Samuel Austin, this defendant? A. I made several examinations. Q. How many examinations did you make? Mr. Scott: I make the same objection. [Objection overruled. Exception taken by Mr. Scott.] A. I saw him four times, but twice I couldn't get any examination. By the Court: Q. You couldn't talk with him, you mean? A. No, he would not talk to me. By Mr. Davis: On the first occasion did any one accompany you? A. Yes, Mr. Scott. Q. What examination did you make of the defendant in the presence of Mr. Scott on the first visit? Mr. Scott: Objected to as immaterial, irrelevant, and incompetent, particularly at this time, on the ground that this is a privileged communication; it was an examination made on the order of this court, and any examination he made of this defendant is entirely privileged. * * * The Court: I will sustain the objection. I am not entirely satisfied that my ruling is right, but I shall give the defendant the benefit of my doubt at this

time." No evidence whatever was given by the witness of any personal examination of the defendant or of any conversations had with him, and the witness was not asked and did not express any opinion as to the sanity or insanity of the defendant. The testimony of a physician was not excluded at common law. The confidences between a physician and patient were first protected from involuntary exposure in this state by the Revised Statutes, which provided: "No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon." 2 Rev. St. (1st Ed.) pt. 3, c. 7, tit. 3, art. 8, § 73.

The revisers in their notes, referring to the section quoted, say: "Unless such conversations are privileged men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of the truth, too strong for human resistance." The testimony of a physician was not privileged by the Revised Statutes, and is not privileged by the present statute (Code Civ. Proc. § 834), except when his information is "acquired in attending a patient, in a professional capacity," and where such information "was necessary to enable him to act in that capacity." This court has frequently held that the burden is upon the party seeking to exclude the testimony of a physician under section 834 of the Code of Civil Procedure to bring the case within its provisions. *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783; *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730; *Fisher v. Fisher*, 129 N. Y. 654, 29 N. E. 951; *Griffiths v. Metropolitan St. Ry. Co.*, 171 N. Y. 106, 63 N. E. 808.

It is clear from the statute itself and from the authorities that if the physician never attended the defendant in a professional capacity and never obtained information from him to enable him to prescribe in such professional capacity, he can testify the same as any other person. In such a case the seal of confidence existing by virtue of the statute between physician and patient and made necessary to obtain the fullest information in no way applies. It does not appear in

this case from anything before the court that the physician, by what he said to the defendant, led him to believe that he was there to prescribe for him, or that the defendant by what was said by the physician was led to accept him as a physician and consequently to disclose to him information that perhaps would not otherwise have been given, as in *People v. Stout*, 3 Parker, Cr. R. 670. Where a physician is sent to a jail by the district attorney to make an examination of the prisoner's mental and physical condition, the relation of patient and physician as contemplated by section 834 of the Code of Civil Procedure does not exist, and the prisoner is not thereby compelled to furnish evidence against himself. *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9; *People v. Silney*, 137 N. Y. 570, 580, 33 N. E. 150; *People v. Hoch*, 150 N. Y. 291, 303, 44 N. E. 976.

In *People v. Schuyler*, supra, a physician was called as a witness for the people, who was employed by the board of supervisors of the county as the jail physician, and as such had medical charge of all prisoners in the jail. The defendant was confined in the jail for six months and the physician examined the defendant at the request of both parties. It did not appear that the defendant was at any time sick during the six months, or that the witness was called to attend upon or prescribe for him as a physician. The physician testified, in answer to a hypothetical question as to the defendant's sanity and it was held that the evidence was competent even if the witness was influenced by seeing the defendant while in the jail.

There is nothing disclosed in the record in this case to show that the examination which the physician made of the defendant in the presence of his counsel was not competent or that it was privileged by reason of section 834 of the Code of Civil Procedure. The fact that the witness was not called and asked certain preliminary questions as disclosed, if objectionable for any reason, was clearly not objectionable so long as it did not appear that a full disclosure by him of what he saw and heard while examining the defendant under an order of the court was not of itself objectionable.

No error appears in the trial of the case to the prejudice of the defendant and the judgment of conviction should be affirmed.

OULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment of conviction affirmed.

(200 N. Y. 1)

**CARTHAGE TISSUE PAPER MILLS v.
VILLAGE OF CARTHAGE et al.**

(Court of Appeals of New York. Nov. 15, 1910.)

1. APPEAL AND ERROR (§ 1094*)—FINDINGS—CONCLUSIVENESS—FINDINGS OF APPELLATE DIVISION—UNANIMOUS AFFIRMANCE.

The unanimous affirmance of a judgment by the Appellate Division makes findings of fact conclusive on appeal to the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

2. VENDOR AND PURCHASER (§ 54*)—TITLE UNDER EXECUTORY CONTRACT—POSSESSION AND IMPROVEMENTS BY VENDEE.

Possession by the vendees under a contract to purchase, under which they made valuable improvements, constituted them the equitable owners of the property; the vendor holding the legal title in trust for them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

3. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASER—FACTS PUTTING ON INQUIRY.

The possession of land and exercise of acts of ownership by making improvements, etc., placed third persons upon inquiry as to the nature and extent of the possessors' rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540-562; Dec. Dig. § 232.*]

4. WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—CONSTRUCTION OF DEED—PRIORITIES.

A deed granted a mill site, "together with the right to the use of water sufficient to run a gristmill and a sawmill, the use, however, of said water to be subordinate to the rights of prior purchasers and owners of the mills and machinery, now erected below the above described premises." The original owner of the mill site and water powers had theretofore made a number of other grants of industrial sites and water powers, in each case, however, reserving to a blast furnace below the site conveyed by the deed in question a priority of water rights. The blast furnace was the most important industrial property on the river, while the site granted by such deed was conveyed for almost a nominal price, and for 11 years after the conveyance the grantees did not use it, and only a small quantity of water was utilized when it was used, and, until about the beginning of the action, the grantee had not asserted any priorities over the other water powers, and had ceased to use the water granted, and transferred its plant to another site, while the blast furnace site was in use at all times. *Held*, that the deed reserved a priority in the use of the water power in favor of the blast furnace.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 178; Dec. Dig. § 156.*]

5. WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—CONSTRUCTION.

In determining whether the grant of a sufficient quantity of water to propel a particular kind of machinery mentioned restricts the use of the water to the machinery specified, or merely refers to the kind of machinery to indicate the quantity of water granted, the latter construction is favored when the language of the grant permits it, both on the ground of public policy, and because such construction is most beneficial to the grantee without burdening the grantor, and the comparative value of the properties claiming, and resisting, the restricted use, are also im-

portant considerations in construing such a grant; the question being determined in view of the contemporaneous circumstances known to the parties, and not solely from the language of the grant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

6. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION BY PARTIES.

The practical construction of a contract by the parties thereto or their successors by their uniform and unquestioned acts continued for a long period is entitled to great weight.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

7. WATERS AND WATER COURSES (§ 156*)—CONVEYANCES—CONSTRUCTION.

The original owner of a water power, wishing to develop it to increase the value of his lands adjacent thereto and market them, constructed a dam, and granted a number of sites, together with water power, each grant containing a reservation to a blast furnace of a priority of water rights. One of the grants conveyed a site with the right to use "a sufficient quantity of water to carry one saw for a sawmill or three pair of grinding stones," provided that no water should be taken except for gristmill and sawmill purposes, and the lessee covenanted to operate a gristmill of a certain capacity. Another granted a sufficient quantity of water to carry on a machine shop to be built of stone, 34 by 44 feet, water to be taken only to drive the machinery. Another granted a sufficient quantity of water to carry on a pair of rollers to roll iron and 15 nail machines, with a covenant against using water for any other purpose, and against carrying on a distillery on the premises. Another granted a sufficient quantity for operating a cupola furnace, and another for operating a sawmill having two gates, certain wheels, etc., both of which contained a covenant not to use water for any other purpose. The site reserved for the blast furnace was much larger and more important than most of the others. *Held*, in accordance with the practical construction of the grant by the parties for a long period, that the limitation contained therein was upon the quantity of water used, and not upon the use of the site for a particular purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 156.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Carthage Tissue Paper Mills against the Village of Carthage and others to determine water rights, and for an injunction. From a judgment of the Appellate Division (127 App. Div. 945, 111 N. Y. Supp. 1112) affirming a judgment determining the rights of the parties, defendant Carthage Electric Light & Power Company appeals. Affirmed.

Early in the history of the state, Le Ray de Chaumont became the owner by letters patent of a large tract of land in the county of Jefferson, including the site where the village of Carthage now stands. At this point on the Black river there was an extensive water power which the owner wished to develop in order to increase the value of his lands and enable him to put them on the market. For this purpose, prior to 1830, he built a dam across the river at the place

in question, which was so situated just above two islands that the water could be used to run the machinery not only on the main bank, but also on the banks of the islands. Thus he was in a position to furnish sites and power for an unusual number of mills and factories which would attract workmen and aid in building up the place. About 1830 he began to sell mill sites with water rights attached thereto, and kept on until in the progress of years he and his grantees had created nine properties, each having the right to use water from the dam. He reserved, however, for his own use the largest and most valuable site, which was on the easterly bank of the river, and also reserved from the leases and conveyances subsequently made the first right to use water for the benefit of that site. There he erected a blast furnace which was the first manufactory of any kind established at the locality and which is the first of the nine properties mentioned.

The second in the order of time was created by a perpetual lease dated May 28, 1830, which covered a mill site with the right to use "a sufficient quantity of water to carry one saw for a sawmill or three pair of grinding stones." The lessee covenanted "that no water shall be taken from the pond by virtue of this lease when not used for the purpose of driving the machinery in the said gristmill and sawmill." He also agreed "that in the course of the year 1831 he will have erected and running on the premises a gristmill equal in every respect" to one located at Great Bend, a place on the river some miles away. The reservation by the lessor for the benefit of his furnace property was as follows: "Reserving to the said party of the first part, his heirs and assigns forever, such part and quantity of the water as will or may be necessary to carry the furnace now erected or that may be erected hereafter," etc.

Other leases and finally regular conveyances followed, the earlier from Le Ray de Chaumont and the later from his grantees of the balance unsold, covering mill sites with power, and, except as stated hereafter, all with the same reservation in favor of the furnace property, but with varying descriptions of the water rights, of which the following are typical specimens:

"A sufficient quantity of water to carry on a machine shop * * * to be built of stone in a workmanlike manner in the year 1833 * * * 34 by 44 feet," with a covenant that "no water shall be taken from the pond by virtue of this lease when not used for the purpose of driving the machinery in said shop."

"A sufficient quantity of water to carry on a pair of rollers to roll iron and fifteen machines to make nails," with a covenant that no water should be taken "when not used for the purpose of driving the machinery in said mill factory," and also a covenant against carrying on any distillery on the premises.

"A sufficient quantity of water for carrying on the said business of one cupola furnace," with a covenant not to use any water "for any other uses and purposes than that hereinbefore mentioned."

Water enough "for the purpose of running or carrying on a common double sawmill hereinafter mentioned, having two gates, two flutter wheels, two spur wheels and one bulk wheel, or a sufficient quantity * * * to run or carry other machinery * * * not to exceed in quantity the amount required for the sawmill above described," with a covenant not to use any water except when needed "for such purposes."

In all cases there was the usual right to declare a forfeiture if there was any breach. In some cases the mill named in the deed was never erected, but the water was used for other purposes from the beginning, apparently with the consent of all concerned. In but one instance did the grant cover a definite quantity of water, and then only indirectly, but it could be spelled out.

When the seventh right was created in 1860, the lease covered a mill site and water "sufficient for to run an ordinary gristmill with four run of stones," subject to the rights of "the former grantees using the amount of water so secured to them, whether used for the specific purposes granted or for any other purpose." It contained the usual reservation in favor of the blast furnace, which was described as "now in a decaying state," or any furnace that might be erected in its place, or "any other machinery which may be built in place of said furnace."

All the deeds and leases, unless the deed creating the ninth property is an exception, reserved the water conveyed to prior grantees and protected their rights. The ninth right, now belonging to the Carthage Electric Light & Power Company, the sole appellant herein, was created by deed, dated September 21, 1869, which granted a mill site and the following water rights: "Together with the right to the use of water sufficient to run a gristmill and a sawmill, the use, however, of said water to be subordinate to the rights of prior purchasers and owners of the mills and machinery now erected below the above described premises." The consideration for the conveyance was the sum of \$100, and no gristmill or sawmill was ever erected upon the premises, which were not used at all until 1881, nor from 1884 until 1890. This water right did not exist when the old dam was built, but was created by a new dam erected by the state in 1854 for the benefit of the Black River Canal, and so located as to leave a small place, formerly covered almost entirely by the old dam, which had not before been available for a site.

This action was brought by the plaintiff, owning the first and eighth properties, against the owners of all the others to define and limit the water rights of the various parties, and to enjoin the defendants

from using more water than they are severally entitled to. The defendants by their answers united in the prayer that the water rights of the respective parties should be admeasured as to quantity and settled as to priority, and that all owners, except the answering defendant, should be restrained from using more than their share of the water. The action was referred to Milton H. Merwin as referee, who admeasured in cubic inches the water that each owner was entitled to, founding his judgment in that regard upon the description of the water rights in the respective deeds and the use made thereof, especially the early use, by the respective owners. He determined the questions raised as to priority of rights in accordance with the order in which the rights were created, with no restrictions as to place or purpose. The Carthage Electric Light & Power Company appealed to the Appellate Division, and from its judgment of affirmance to this court.

Wilbur A. Porter, for appellant. Elon R. Brown, for respondent Carthage Tissue Paper Mills. W. B. Van Allen and Kilby & Norris, for other respondents.

VANN, J. (after stating the facts as above). No question is raised as to the admeasurement of the water by the learned referee, who discharged that difficult duty with such industry and skill as to make his judgment in that regard, at least, of lasting value to the parties and their successors in interest for all time to come.

The Carthage Electric Light & Power Company, the appellant, however, is not satisfied with the judgment of the referee upon the questions raised as to priority in the right to use water and as to the alleged restrictions of the use to particular purposes. It claims that the first or blast furnace property was superior in right to the next grants, seven in number, made by the patentee and his successors, and that through the deed to itself, although the last in the order of time, it became superior to the blast furnace and hence to all the others. It also claims that the covenants in the earlier grants alleged to restrict the use of water to the purposes specified inure to its benefit and justify it in demanding that the restrictions be observed. These questions are important, because in low water there is not enough to furnish all the parties their respective shares. The opinion of the referee upon these subjects is so full and satisfactory that only a brief expression of our views is required, for in the main we adopt his conclusions as well as the reasons given in their support.

The first question is founded on a single sentence in the Stevens deed, so called, dated September 21, 1869, which created the property now belonging to the appellant. That sentence is as follows: "Together with the right to the use of water sufficient to run a gristmill and a sawmill, the use, however, of

said water to be subordinate to the rights of prior purchasers and owners of the mills and machinery now erected below the above described premises." The plaintiff, which now owns the blast furnace property, claims that by the terms of this deed there was reserved for the use of the blast furnace so much water as was necessary to operate it. The appellant claims that there was no reservation for the use of the blast furnace in that deed, and that, therefore, it is "entitled to the first use of the waters of the river to the extent of the quantity reserved in the former grants for the use of the blast furnace." In other words, as the appellant insists, the owner of the blast furnace property sold to the appellant's grantors all its rights to the use of water to the extent of a quantity sufficient to run a gristmill and a sawmill.

The referee found as facts that "at the time of the deed to Stevens above referred to there was an outstanding contract for the sale of the blast furnace property, originally given to Budd & Bones and by them transferred to Cole & Allen, and the furnace had been put in running order by the said vendees or their assigns and it was below the property conveyed to Stevens. It was the intention of the parties to said Stevens deed that the use of water given by that deed should be subordinate to the rights appurtenant to said blast furnace property."

By certain facts and circumstances, duly proved, but too numerous to mention, the question of the intention of the parties to the Stevens deed became one of fact, and the unanimous affirmance by the Appellate Division makes the finding above quoted conclusive upon that subject as well as upon the question whether the grantors of the plaintiff were "purchasers and owners" prior to the deed creating the appellant's property. The same is true as to the fact found that the plaintiff's property is below the property conveyed to Stevens, which, indeed, was not disputed. The existence of the outstanding contract, possession by the vendees and improvements made by them, made them "purchasers and owners," as held by the referee. They were the equitable owners, and the vendors held the legal title in trust for them. After the contract matured they received a deed, which related back to the date of the contract and conveyed what it called for. Their possession and the exercise of acts of ownership by them placed the grantors of the appellant upon inquiry as to the nature and extent of their rights.

The blast furnace was the most important property on the river in location, size, and value, while the site of the appellant was a small accretion, created by a change in the location of the dam, and granted for a consideration almost nominal. For 11 years after the conveyance to the appellant's grantors in 1869, the grantees did not use it at all and prior to 1890 it had been utilized for only four years, using but a small quantity of

water. The blast furnace was used almost continuously for purposes requiring much power and the language of the conveyances creating the water powers was full and clear in describing the reservation in its favor. Until about the time this action was commenced the appellant and its grantors had neither exercised nor asserted any claim of prior right over the other water powers. For some time prior to the trial the appellant had ceased to use its water right and had transferred its plant to another site, while the blast furnace property was in use all the time, but of late years not for a blast furnace. As the referee said in his opinion: "There had been, however, by the reservations in the deeds up to that time (1869) a practical severance of the water right appurtenant to the blast furnace and a priority given it over all the grants. * * * The construction claimed for the clause in question might in case of low water make entirely inefficient the prior reservations to the furnace. It seems to me to be very clear that no such result was intended by the grantors, and that there was no design to give the Stevens right a preference to the furnace. * * * The blast furnace was below the premises conveyed to Stevens, and it had been placed in running order a short time before the Stevens deed. It was within the description 'the mills and machinery now erected below,' and I think was what was intended to be preferred. The surrounding circumstances clearly point to that result, and the deed should I think be so construed."

The remaining question is whether the covenants relating to the use of water in the earlier grants were intended to limit the quantity rather than to restrict the use. If the grantor meant to part with only so much water as the grantee might use for the sawmill, machine, shop, or other factory named, it inures to the benefit of the appellant, not on the theory that it can avail itself of the covenant, to which it is a stranger, but because that was all that was granted prior to its grant, and therefore its right is determined by that fact. If, however, the grantor intended that the grantee should use the water for the purpose designated, because it would help him market a great tract of land, the covenant would not limit the extent at all. The leases did not describe the water by measurement, and such description as there is could hardly be more indefinite. For instance, a machine shop, 34 by 44 feet, to be built of stone, might be so built as to require all the water there was, which manifestly was not the intention. A "machine shop," a "sawmill," or a "grismill" do not define with enough precision to be of much aid, and something more was needed to limit the quantity. Not one of the water powers is now used for the purpose named in the original grant. The appellant's power was never used "to run a gristmill and a sawmill," in

accordance with the provision in the Stevens deed.

On the face of the grants, when each is read as an entirety, doubt arises as to the meaning. To illustrate, why was the elaborate covenant "forever" against distilleries inserted, if the primary covenant had already limited the use to the machine shop named therein? Why should the size of the building be fixed, if purpose and not quantity was in the minds of the parties? Why should there be covenants to build if use rather than development was the object aimed at? Why should the grantor place a restriction by covenant upon use, from which, except in the case of a distillery, he could get no benefit, instead of upon quantity, from which the benefit is obvious? Why should the form of the restriction be to the mill, instead of against the carrying on of some obnoxious business in the mill? These and other questions of like character raise doubts in the mind of one who reads the deed in order to gather the intention therefrom without resorting to other considerations.

As was said in an important case: "Was that prior use to be limited to the particular kinds of machinery specified in the reservation, or were the terms employed as a mode of determining the quantity of water the prior use of which the grantor reserved to himself? In other words, was it intended that the grantor should be restricted, in the use of the water, to the machinery to which it was then applied, or might he, at his pleasure, apply the same quantity of water to any other machinery? It is a general rule of construction, applicable to grants of water powers, that when the question arises whether, by a grant of a sufficient quantity of water to propel a particular kind of machinery, the terms employed are used merely to indicate the quantity of water intended to be granted, or to restrict the use of the water to the machinery specified, the former construction is to be favored, when the language of the grant will admit of such construction. The grounds upon which this rule rests are twofold: First, it is more beneficial to the grantee, without being more onerous to the grantor, that he should be permitted to apply the water granted to any machinery he pleases, not requiring a greater amount of power than that specified in the grant; secondly, it is supported by public policy. The interests of the community will generally be best promoted by allowing an unrestricted application of the power to such machinery as will be most profitable to the owner." *Cromwell v. Selden*, 3 N. Y. 253, 255.

This case was followed and made the basis of judgment in *Olmsted v. Loomis*, 9 N. Y. 423, 428, where it was also held that "long acquiescence may be properly regarded as a practical construction of the conveyance settled between the parties themselves, by

which the right of the complainants to use the water for the purpose of driving the paper mill is established."

All the cases were carefully reviewed in *Hall v. Sterling Iron & Railway Co.*, 148 N. Y. 432, 439, 42 N. E. 1056, 1058, where the rule announced in *Cromwell v. Selden* was adhered to. Among other things Judge Haight, writing for the court, said: "It is a question of intention to be determined from the language of the grant and under the rulings of our courts if the meaning is doubtful that construction shall be given which shall best subserve the interests of the public by permitting the use of water for any legitimate purpose which the owner may desire." Such covenants are regarded by the courts as contrary to public policy, because they tend to so shackle business as to retard development and lessen the value of property. They usually appear in ancient grants made when water power was of slight value, and could be used with profit, but for few purposes as compared with the present time. The grants ordinarily ran to purchasers who intended to erect or operate a particular kind of mill, so that the name of the mill afforded a convenient method of describing the quantity of water to be conveyed, but it was so loose that a covenant was desirable to aid in measuring the quantity. Many mills of the kind named in the grants before us, such as sawmills, gristmills, and the like, can no longer be operated to any advantage owing to changed conditions, and restriction to a particular use might so incumber a valuable property as to render it almost worthless. Hence the courts in the construction of such contracts, when the language is ambiguous, should be liberal to the covenantor and strict toward the covenantee. The consideration paid for the property claiming the right to restrict the use, and its value when compared with that of the property against which the alleged restriction operates, are important, for it is against reason that in making a grant for a very small consideration the grantor intended to cripple a large, valuable, and important enterprise. In the effort to discover the intention the words of the grant should not be followed blindly, but force should be given to collateral facts and circumstances known to the parties and in the light of which they made their contract. As was said by Judge Earl in a case resembling the one now before us in some respects: "Construing the reservation in the light of all the circumstances existing at the time of the

grant, to wit, the quantity of machinery and of water needed for its operation, the size, value, and importance of the factory as compared with the gristmill, the fluctuating quantity of water in the river, which was certain to decrease as the country was cleared up, there can be no inference favorable to the contention of the defendant." *Groat v. Moak*, 94 N. Y. 115, 127.

Practical construction by uniform and unquestioned acts from the outset, especially when continued for a long period of time, is entitled to great, if not controlling, weight, for it shows how the parties who made the contract understood it. If they do not know what they meant, who can know? Such a construction is presumed to be right, because it was made by the parties themselves when under the influence of conflicting interests. This is true whether the construction is by contemporaries or their successors, for it is self-interest that makes the construction valuable and safe. As we recently said: "When the parties to a contract of doubtful meaning, guided by self-interest, enforce it for a long time by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one." *City of New York v. New York City Ry. Co.*, 193 N. Y. 543, 548, 86 N. E. 565, 567.

While the grants may permit, they do not require, the construction contended for by the appellant, as they are by no means free from doubt when all the provisions are read together. The practical construction of the parties for more than one generation in most cases, more than two in some and for a long period in all, is directly the reverse of that contention. The surrounding circumstances, the consideration for the grants, the comparative size, value, and importance of the respective properties alleged to be superior or inferior in right, the environment and the apparent object of the grantor in creating the properties to aid in building up the locality, all point in another direction. We construe the grants as placing a limit upon quantity and not upon purpose.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment affirmed.

(174 Ind. 731)

CENTRAL FUEL CO. v. WALLACE.

(No. 21,716.)

(Supreme Court of Indiana. Nov. 29, 1910.)

**MINES AND MINERALS (§ 73*)—OIL AND GAS
WELLS—RIGHTS ACQUIRED.**

An owner of 200 acres of land leased the right to the oil and gas under the land, with the privilege of removing the same within 10 years by two wells, in consideration of furnishing gas for use in the dwelling house on the premises. The owner subsequently sold 80 acres, including the land on which the dwelling house stood, and assigned the lease to the purchaser. The purchaser and the lessee agreed that the gas to be supplied under the lease should be supplied for use in another building. *Held*, that the owner during the term of the lease had no reserved gas or oil rights in any of the land, and a subsequent lease by him to the original lessee before the expiration of the period of the oil and gas under the land retained was ineffectual as against the provisions of the outstanding lease, and the purchaser's rights in the land leased, and the purchaser could recover from the lessee damages for breach of the lease, and obtain an injunction restraining threatened acts of the lessee in violation of his rights.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 73.*]

Appeal from Circuit Court, Hancock County; Mark E. Forkner, Special Judge.

Action by John C. Wallace against the Central Fuel Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, and it (92 N. E. 183) transferred the case to the Supreme Court under Burns' Ann. St. 1903, § 1399. Affirmed.

Cook & Cook and Smith, Cambern & Smith, for appellant. Jackson & Sample and Douglass Morris, for appellee.

MONTGOMERY, J. Appellee brought this suit to recover damages for the breach of a contract to furnish natural gas, and to enjoin appellant from drilling gas wells on his land. The court made a special finding of facts, upon which conclusions of law were stated, and it is charged on appeal that the court erred in his conclusions of law.

The special finding was, in substance, as follows: That on August 28, 1902, Josiah C. Alger and wife owned in fee simple a tract of land, particularly described, containing 200 acres, and on that day leased the same to appellant by a written instrument, made a part of the finding, by the terms of which appellant was granted the exclusive right to drill gas and oil wells on said premises for a term of ten years and to lay pipes for the purpose of marketing the product, but not more than two wells could be drilled. In consideration of the grant, the Alger were to receive gas from the nearest pipe line for three fires and seven lights, to be used in the dwelling house situated on said premises or at the Alger residence in the city of Rushville. This lease was duly recorded October 17, 1902, in the office of the recorder of Rush

county, Ind., in which county the lands were situated. That on February 10, 1903, the Alger, by warranty deed, conveyed to appellee 80 acres of the 200-acre tract, and in said deed as part of the consideration thereof agreed to assign to appellee the gas and oil lease above mentioned affecting said lands with all the rights and privileges thereunto belonging. Said deed was duly recorded in the office of the recorder of Rush county on February 12, 1903, since which time appellee has been in possession of the lands therein described. That the Alger refused to assign said lease to appellee, and in October, 1903, he filed suit in the circuit court of Rush county against the Alger, alleging that they had wholly failed to assign said lease to him in accordance with their agreement in said deed, and prayed for a specific performance of said agreement. That the cause was put at issue and tried by said court at its November term, 1903, and said court therein adjudged and decreed that appellee was the owner in fee of all rights and privileges in said lease contained which had been owned by the Alger at the time of the execution of said deed, and appointed a commissioner to execute a proper assignment of such lease to appellee. That in pursuance of the order of the court the commissioner named did on December 21, 1903, execute on the margin of the record of said lease an assignment thereof to appellee. That the officers and agents of appellant knew of the rendition of said judgment and of the assignment of said lease at the dates on which the same were rendered and assigned. That in October, 1903, appellee owned and resided upon a tract of ground adjoining the 80-acre piece above mentioned, and, while said suit was pending, it was orally agreed between appellant and appellee that the house in which he resided should be piped for the use of natural gas and connected with the pipe line running along the adjoining highway through which appellant was, and is, delivering natural gas to its patrons, and from which appellee should take gas for three fires for heating and cooking purposes and for seven lights, and during the pendency of said suit should pay therefor at the rate of 15 cents per thousand cubic feet, and, if it should be decreed that he was entitled to an assignment of the said lease from the Alger, gas for said fires and lights should thereafter be furnished free to appellee at his residence, instead of the residence on the lands conveyed by Alger to appellee. That, in pursuance of said agreement, appellee piped his house for gas at an expense of \$125, and appellant connected the same with its pipe line and furnished appellee gas for said fires and lights until October 28, 1905. That appellee paid appellant for

gas at the rate of 15 cents per thousand cubic feet until December 21, 1903, and thereafter such gas was furnished to him free. That on June 1, 1904, the Algers executed to appellant another lease on that part of the land not conveyed to appellee, by the terms of which appellant was authorized to sink on said lands three gas wells, and thereafter, in the fall of 1904, pursuant to said second lease, did drill three gas wells on said land, and connect the same with the mains by which gas was supplied to its customers. That no well had been drilled on appellee's 80-acre tract, or on the residue of the Alger lands prior to the execution of said second lease. That on October 26, 1905, appellant notified appellee that it intended to drill two gas wells on his 80-acre tract, and at the same time expressed its willingness to continue furnishing gas to his residence for three fires and seven lights free of charge provided it was permitted to drill the two wells on his land, but appellee refused and still refuses to permit appellant to enter upon his land for said purpose. That on October 28, 1905, appellant shut off the connection between its pipe lines and appellee's residence, and ever since has refused to deliver any gas to said residence. That appellant is a corporation engaged in the business of mining, distributing, and selling natural gas in Rush county, and has a pipe line running along the highway near appellee's residence, and no other person or corporation is engaged in distributing natural gas for sale to customers within $1\frac{1}{2}$ miles of appellee's said residence. That the value of natural gas for three fires and seven lights delivered at appellee's residence is \$55 per year. That the rock pressure of gas in said field has decreased and is gradually decreasing, and natural gas is of a fugitive nature. The court found from the foregoing facts that the law is with appellee, and that he was entitled to the sum of \$120.68 as damages.

The contention of appellant is that the conveyance of a part of the leased land to appellee and the transfer of the lease to him released the residue of the Alger tract from the obligations of the lease. This insistence seems to us manifestly untenable. The Algers granted to appellant the exclusive right to the gas and oil under a body of land containing 200 acres, with the privilege of removing the same within a period of 10 years by means of 2 wells. This instrument or lease was duly executed, acknowledged, and recorded. The subsequent sale of 80 acres of the tract was necessarily made subject to the provisions of the outstanding lease. The gas for fires and lights stipulated for in the lease was to be furnished either for the house on the leased lands or for the Alger residence in the city of Rushville, but not for both. In the conveyance of the 80 acres to appellee it

was agreed that he should also have all the rights, privileges, and benefits of the lease which rested upon the entire Alger farm. It was agreed in the deed that the lease should be, and in pursuance of a judicial decree it was, assigned to appellee. These transfers did not purport to change the terms of the lease, or to release the 120 acres still owned by the Algers from its binding force, and manifestly did not and could not affect to any extent the property rights granted to appellant by the lease. Appellant still owned the gas and oil under the entire tract and the right to remove the same within the leased term by means of two wells to be located at such places as it deemed best for that purpose. The Algers during the period covered by the lease had no reserved gas or oil rights in the land. Appellee, by his purchase, became the owner of the dwelling house on the Alger farm, and by the assignment of the lease became entitled to have the same supplied by appellant with gas for three fires and seven lights. By an amicable arrangement between appellant and appellee, the stipulated quantity of gas was furnished for a house in the vicinity then occupied by appellee, instead of the residence on the leased premises. This arrangement in no wise affected the rights granted to appellant under the lease, and, the wells not having been yet located, it might have drilled both of them on appellee's 80 acres or on the Algers' 120 acres, or one on each tract, at its pleasure. The location of the wells could not discharge any part of the leased lands from the obligations of the lease. It follows that, when the second lease was executed, the Algers had no gas or oil rights to convey and such lease was ineffectual as against the provisions of the outstanding lease, and appellee's rights therein. If the Algers could then have made a valid gas and oil grant to appellant, they could by the same right have conveyed to a stranger, and thereby have drained the gas reservoir under said lands to the damage of appellant and forced it, willing or unwilling, to locate its two wells upon appellee's land. It is clear that such a second lease could not be made to the damage of appellant, and it is equally clear that such a grant to appellant to the prejudice of appellee's rights cannot be sustained. When appellant, although assuming to act under the second lease, sunk two wells upon the Alger land, its drilling rights under the lease affecting appellee's tract were exhausted, and it was bound to render the compensation promised by the lease, as modified by subsequent agreement. It follows that appellee was entitled to recover damages for the breach of contract, and to an injunction restraining the threatened acts of appellant in violation of his property rights. *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed.

304; Westmoreland, etc., Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; Indianapolis Nat. Gas Co. v. Kibbey, 135 Ind. 367, 35 N. E. 392; Allison & Evans' Appeal, 77 Pa. 221; Funk v. Haldeman, 53 Pa. 229. The conclusions of law stated are in accord with the facts found, and are not erroneous. The judgment is affirmed.

(174 Ind. 724)

SCHONDEL v. STATE. (No. 21,550.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. INTOXICATING LIQUORS (§ 222*)—SUFFICIENCY—EXCEPTIONS.

An indictment charging a sale of intoxicating liquors without a license in violation of Burns' Ann. St. 1908, § 8351, need not negative the exceptions in the provisos of the section that the provisions shall not apply to those engaged as wholesalers or licensed druggists.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240-248; Dec. Dig. § 222.*]

2. CRIMINAL LAW (§ 1163*)—REVIEW.

Where the record on appeal did not show that accused was compelled to accept a jury and go to trial with some juror whom he would have peremptorily challenged but was prevented from doing by the ruling of the court of which he complained, or that he was deprived of an opportunity to interpose any peremptory challenge, there was no reversible error in the ruling.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

3. JURY (§ 113*)—RULINGS—REVIEW.

The court may in its discretion, after the jury have been passed back by the state to accused for his further consideration, require accused either to exercise his right to further challenge or to accept the jury as then composed, subject to his right to subsequently challenge any juror thereafter called to replace one challenged or excused by the prosecuting attorney.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 113.*]

4. CRIMINAL LAW (§ 1171*)—IMPROPER ARGUMENT OF COUNSEL—IMMATERIAL ERROR.

Where, on a trial for selling intoxicating liquors without a license, the evidence showed that the accused was the agent of a brewing company, the argument of the prosecuting attorney that the case might have been entitled the state against the brewing company by accused, its next friend, was so far justified by the evidence that it was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

5. CRIMINAL LAW (§ 1178*)—APPEAL—RECORD.

An instruction cannot be considered on appeal, where no reference is made to it by the accused in the points made in his brief as required by Supreme Court Rule 22, subd. 5 (55 N. E. vi).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

6. CRIMINAL LAW (§ 1178*)—APPEAL—QUESTIONS REVIEWABLE.

Rulings on the admission and rejection of evidence will not be considered, where they are outside of the points contained in the brief of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

7. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

It is the province of the jury to make all reasonable inferences properly adduced from the facts proven, and, to justify the court on appeal in disturbing a judgment on the evidence alone, the evidence must be of such a character as to present a question of law and not one of fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

8. CRIMINAL LAW (§ 1159*)—VERDICT—CONCLUSIVENESS.

The Supreme Court, in reviewing the sufficiency of the evidence to sustain conviction, will only give consideration to that which is most favorable to the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

9. INTOXICATING LIQUORS (§ 236*)—EVIDENCE—SUFFICIENCY.

Evidence held to justify a verdict that accused sold intoxicating liquors without a license in violation of Burns' Ann. St. 1908, § 8351.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 800-822; Dec. Dig. § 236.*]

10. INTOXICATING LIQUORS (§ 169*)—OFFENSES—PARTIES LIABLE.

One consummating a sale of liquor in the state as the agent of a foreign brewing company by actually delivering the liquor to the prosecuting witness in the state is guilty of selling intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 187-188; Dec. Dig. § 169.*]

Appeal from Circuit Court, De Kalb County; E. A. Bratton, Judge.

George Schondel was convicted of selling intoxicating liquors without a license, and he appeals. Affirmed.

W. W. Sharpless, Edgar W. Atkinson, and B. F. Enos, for appellant. James Bingham, Alexander G. Cavins, Edward M. White, and William H. Thompson, for the State.

JORDAN, J. Appellant was indicted by a grand jury of De Kalb county, upon the charge of having violated section 1 of an act of the Legislature of this state entitled "An act to better regulate the sale of intoxicating liquors," etc. Acts 1907, p. 689; section 8351, Burns' Ann. St. 1908. The offense as charged in the indictment is that he, on March 6, 1909, at the county of De Kalb in the state of Indiana, did unlawfully sell to Herman Newman, for the price of \$1, 12 quarts of intoxicating liquor, to wit, beer; he not then and there being licensed so to do. The exceptions made by the provisos of the section in question, namely: "That none of the provisions of this act shall apply to any person, firm or corporation engaged as a wholesale dealer who does not sell in less quantities than five gallons at a time, and provided that none of the provisions of this section shall apply to any druggist or pharmacist who is licensed as such by the state board of pharmacy"—were negatived by the indictment. Appellant unsuccessfully moved to quash the indictment, and upon his plea

of not guilty he was tried by a jury and a verdict returned finding him guilty as charged, and assessing against him a fine of \$50. His motion for a new trial was denied, and judgment was rendered on the verdict. The alleged errors in this appeal upon which he predicates his demand for a reversal of the judgment below arise out of overruling of the motion to quash the indictment and overruling the motion for a new trial.

It is first urged that the indictment should have been quashed because it does not sufficiently negative the exceptions embraced in the provisos to which we have referred. It was not necessary to negative any of the exceptions made by the provisos. This identical question was presented in *Yazel v. State*, 170 Ind. 535, 84 N. E. 972, and decided adversely to appellant's contention.

When the jury was being impaneled in this cause, and after the defendant had examined all of the 12 jurors composing the panel, and having excused 1, he thereupon passed the jury over to the prosecuting attorney. After the latter had fully examined the jurors, he excused one and thereupon passed the jury back to the defendant. The latter then excused one of the jurors, who was a member of the regular panel, and examined others who had been called by the sheriff to sit upon the jury in the place of those excused. He, by his counsel, then announced to the court that he would pass the jury for the present. The court thereupon required him to pass the jury definitely as to all the jurors then composing the panel, and to determine definitely whether the jury as then composed was satisfactory to him before he repassed it again to the state. This the defendant refused to do, but claimed the right to further challenge after the prosecuting attorney had repassed the jury to him. Thereupon the court ruled that it would permit the defendant to exercise peremptory challenges, or for cause as to persons who might be called to sit upon the jury to replace any juror or jurors who might thereafter be challenged or excused by the prosecuting attorney. To this ruling of the court requiring the defendant to make all the peremptory challenges before the jury was repassed and turned over to the state's attorney, the defendant excepted and urges it in this appeal as error. On this point the record presents no reversible error, as it is not disclosed that he was compelled to accept the jury and go to trial before it with some juror thereon whom he would have peremptorily challenged but was prevented from doing so by the ruling of the court of which he complains. It does not appear by the record that he was in any manner deprived of an opportunity to interpose any peremptory challenge in respect to some member of the jury. Under the circumstances, there was no error in the ruling in question. *McDonald v. State*, 172 Ind. 393, 88 N. E. 673. Again, upon another view of the question,

and it may be said that the court had the right, in the exercise of its discretion, after the jury had been passed back by the state to the defendant for his further consideration, to require appellant either to exercise his right to further challenge or to accept the jury as it was then composed, subject, however, to his right to thereafter challenge any juror who might be called by the sheriff to replace one who had been challenged or excused by the prosecuting attorney. *McDonald v. State*, supra.

During the argument to the jury by the prosecuting attorney, that official said: "This case is entitled 'The State of Indiana v. George Schondel'; but it might as well be entitled 'The State of Indiana v. Diehl Brewing Co., by George Schondel, its next friend'" —and that the Diehl Brewing Company was at the back of the defendant in this prosecution. To these statements made by the prosecuting attorney to the jury appellant objected, but his objection was overruled. Upon this ruling he seeks to predicate reversible error. Possibly it may be said that these statements of the state's attorney related merely to a collateral matter which did not have any bearing upon the guilt of the defendant. Nevertheless there is evidence in the case to show that the beer which appellant is charged with having unlawfully sold was brewed by the Diehl Brewing Company and shipped by the latter to the town of Garrett in De Kalb county, Ind. The brewery is situated at the city of Defiance, Ohio, at which place the company conducts its business. As shown by the evidence, appellant had been the agent of this company in delivering its beer to persons at said town of Garrett before De Kalb county became anti-saloon territory by virtue of remonstrances filed against the liquor traffic under the Moore law. After De Kalb county became dry territory, he still continued to act and serve, as he stated at the trial upon the witness stand, as the agent of the company in gathering up and returning its empty bottles which had contained beer shipped by the company to consumers in the town of Garrett and other points in said county. He appears to have solicited orders from persons for beer to be shipped to them by said brewing company. The brewing company at the trial had present one of its principal officers who testified in behalf of defendant. Under the evidence, it was the theory of the state upon the trial that appellant, in delivering the beer in question to the prosecuting witness and in collecting from him the money therefor, was acting as the agent of the Diehl Brewing Company. There is evidence tending to sustain this theory. The state was warranted in placing a construction upon the evidence and circumstances and thereunder claiming that the Diehl Brewing Company was interested in the case and was standing by appellant, its agent, or back of him in this prosecution.

Were it conceded that the state's attorney in making the statements of which appellant complains transgressed the bounds of legal argument, still the statements cannot be said to be of such weight or importance as to afford appellant ground for reversible error, for, as said in *Combs v. State*, 75 Ind. 215: "If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. A common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel during their argument may have made some general statements not supported by the evidence. Of course, there may be cases where the matters stated are so weighty and important as to do the accused injury, and, whenever this is so, the appellate court should not hesitate to adjudge a reversal." And, as again asserted in *Morrison v. State*, 76 Ind. 335: "If, for every transgression of the prosecuting attorney beyond the bounds of logical or strictly legal argument, the defendant could claim a new trial, few verdicts could stand, and the administration of criminal justice would become impracticable." It follows, under the circumstances, that the court did not err in overruling appellant's objections to the argument in question.

The trial court appears to have given a series of instructions to the jury. Counsel for appellant claim that charge or instruction No. 9 given by the court on its own motion is erroneous; but this charge cannot be considered for the reason that no reference whatever is made to it by appellant in the points made in his brief, as required by the fifth subdivision of rule 22 (55 N. E. vi) of this court. See, also, *Pittsburgh, etc., R. Co. v. Lighthelser*, 168 Ind. 438, 78 N. E. 1033; *Knapp v. State*, 168 Ind. 153, 79 N. E. 1076; *Baltimore, etc., R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773; *Town of Windfall City v. First National Bank*, 172 Ind. 679, 87 N. E. 984, 89 N. E. 311.

Other questions argued by appellant's counsel, which relate to objections sustained to questions propounded to witness or witnesses, must be dismissed without consideration for the same reason that they are outside of the points contained in the brief.

It is next and finally insisted that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. The proposition is well settled that on the trial of a cause it is the province of the jury or the court acting in the place of a jury to make all reasonable and fair inference which may be properly deduced from facts proven. In order to warrant us in disturbing a judgment of the trial court upon the evidence alone, the latter must be of such a character as to raise or present a question of law and not merely one of fact. *Mead v. Burk*, 156 Ind.

577, 60 N. E. 338, and cases there cited; *Williams v. State*, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248, and cases there cited; *Diamond Block Coal Co. v. Cuthbertson*, 186 Ind. 290, 300, 78 N. E. 1060.

In reviewing the evidence in a case on appeal, this court only regards or gives consideration to that which is most favorable to the party prevailing in the lower court.

There is evidence going to show that appellant, before De Kalb county became "dry territory," served at the town of Garrett as the agent of said Diehl Brewing Company. The brewery of this company is situated at Defiance, Ohio, at which place the business of the company is conducted. Before the country became "dry," the company sold and shipped beer to persons operating saloons at Garrett and other points in De Kalb county. Appellant admitted at the trial, while testifying as a witness on his own behalf, that, after the county became "dry," he still continued to act as the agent of the brewing company, only, as he claimed, for the purposes of gathering up its empty beer bottles and shipping them back to the company at Defiance, Ohio, for which services, as he stated, the company paid him \$60 per month.

On January 23, 1909, he appears to have gone to the home of Mr. Herman Newman, the prosecuting witness, who resided in the town of Garrett, and solicited from Mrs. Newman, wife of Herman, an order to the Diehl Brewing Company for a certain number of cases of beer. He had with him at the time blank orders for beer, with which it appears he had been supplied by the Diehl Brewing Company. He requested Mrs. Newman to sign the order. After she signed it, he placed it in an envelope and mailed it at the post office at Garrett, Ind., addressed to the Diehl Brewing Company at Defiance, Ohio. This order read as follows: "No. 815. Jan. 23, 1909. To the Christ Diehl Brewing Co., Defiance, Ohio—Gentlemen: You will please enter my order for and deliver to me as needed the following goods: (Here the number of cases of beer is set out.) Yours very truly, Mrs. H. Newman." Beneath her name on the order appears the following: "Order taken by George Schondel, salesman." There were 6 cases of the beer shipped to Newman and about 250 cases in all shipped by the company in the same car load to other persons. The beer was all consigned by the brewing company to itself at Garrett, Ind.; but the cases intended for the different persons were labeled in their names. The orders sent to the brewing company, after being approved by it, were sent to appellant, and he kept them on file until the beer shipped to various persons was consumed.

Herman Newman testified that he received some beer from the Diehl Brewing Company on the last day of March; that he had not made out the order for the beer, but it was made out by his wife; that prior to March 6, 1909, he had not signed any order or di-

rected appellant to deliver to him any beer. He was to pay \$1 for 12 bottles of beer, and did pay appellant \$1 for the beer which he delivered to him on March 6th. Appellant testified that he did not know whether the brewing company had accepted or approved the order which he had sent in for Mrs. Newman until the company had shipped him, as he stated, the car load of beer; that he delivered 12 bottles of this beer to Herman Newman on or about March 6th; that Newman paid him for all his beer \$3 and \$4 at a time; and that after he collected the money he sent it to the Diehl Brewing Company. He claimed that he took possession of the beer after it had been shipped and consigned to the brewing company, and, at the request of Mr. Newman, he placed it in cold storage and delivered the beer to Newman in amounts and at times as requested.

Mrs. Newman testified that they telephoned an order to appellant whenever they wanted any beer, and that he would bring them the amount which they desired. Appellant testified that the order which he procured from Mrs. Newman was returned to him by the brewing company from three to four days after it had been sent in, and that he placed it on file in his office and kept a record of the order.

Appellant admitted that he had no order from Newman to take possession of the beer shipped over the railroad until after the 6th of March, 1909, and that he did not have any order from Newman to the railroad company for the beer which he delivered to him on the 6th of March. All shipments made by the Diehl Brewing Company to consumers came in cases marked to them, and all came together in a car load which had been shipped by the company to retailers and others.

In addition to what we have set out, there are other circumstances and evidence in the case tending to show that appellant sold and delivered the beer for the price stated to Herman Newman at the town of Garrett, De Kalb county, Ind., on or about the date charged in the indictment. It does not appear that any beer was shipped to Mrs. Newman by the brewing company in pursuance of the order which she sent. In fact, appellant upon cross-examination on the witness stand at the trial virtually admitted that the beer in question was not sold upon the order signed by Mrs. Newman; that it was not consigned to Mr. Newman; and that he neither had, nor was it necessary for him to have, any order from Mr. Newman to the railroad company to deliver the beer over to him (appellant). The order signed by Mrs. Newman, as shown, was dated the 23d day of January, 1909, but she claimed upon the witness stand that it was signed some time in March of that year. Mr. Newman stated that he had given an order to the railroad

company in respect to the beer after appellant had been indicted in this case.

Certainly the evidence in the case is sufficient to sustain the verdict of the jury. It is immaterial whether appellant made the sale at Garrett as the agent of the brewing company or on his own account. Upon either view he would be guilty of selling intoxicating liquors as an unlicensed dealer. If he consummated the sale of the beer at the town of Garrett in this state as the agent of the Diehl Brewing Company by actually delivering the beer in question to Herman Newman, the prosecuting witness, then, under the circumstances, he would be guilty of the offense charged against him by the indictment. *Berger v. State*, 50 Ark. 20, 6 S. W. 15.

Under the facts in this case, no question of interstate commerce is involved.

No available error being presented, the judgment is therefore affirmed.

(174 Ind. 684)

STATE ex rel. SEIFRET v. BRANNER.
(No. 21,674.)

(Supreme Court of Indiana. Nov. 29, 1910.)

1. CONTEMPT (§§ 56, 66*)—REFUSAL TO RE-
QUIRE BAIL—DISCRETION.

The refusal to require defendant in a contempt proceeding to give bail is in the sound discretion of the trial court, reviewable only for abuse of such discretion, which is not the case where it is held the affidavit for the proceeding is bad.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 167, 234; Dec. Dig. §§ 56, 66.*]

2. CONTEMPT (§ 56*)—APPEAL—RIGHT OF RE-
LATOR TO COMPLAIN—REFUSAL TO REQUIRE
BAIL.

Petitioner or relator in a contempt proceeding cannot complain of the refusal to require defendant to give bail; the affidavit for the proceeding having been insufficient to charge a contempt.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 56.*]

3. CONTEMPT (§ 54*)—AFFIDAVIT—REMAR-
RYING WITHIN TWO YEARS AFTER DIVORCE.

The affidavit for a contempt proceeding against K., charging that on a certain day she was granted a divorce by a court of the state, and prohibited from remarrying for two years, and that within that time she did remarry, is insufficient, as not charging her with the violation of a legal order of the court, or the violation of a statute imposing a penalty; *Burns' Ann. St. 1908, § 1065*, providing merely that a party against whom a judgment of divorce is rendered, "without other notice than publication in a newspaper," may not remarry within two years thereafter, and that this shall be stated in the judgment; the order in the judgment of divorce being but a statement of the statute, and its violation being but the violation of the statute, the proceeding being criminal, no civil rights being involved; and it therefore not being permissible to indulge any presumption that the divorce was granted without any other notice than publication in a newspaper.

[Ed. Note.—For other cases, see Contempt, Dec. Dig. § 54.*]

4. CRIMINAL LAW (§ 304*)—JUDICIAL NOTICE.

Judicial notice of the record in the divorce case cannot be taken in a contempt proceeding for remarrying within two years of the judgment of divorce, a collateral matter growing out of the original case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 711; Dec. Dig. § 304.*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Contempt proceedings on the relation of John Selfret against Ada J. Branner. Defendant was discharged, and relator and the state appeal. Affirmed.

Cyrus E. Pattee, Fred C. Gabriel, James Bingham, Alexander G. Cavins, William H. Thompson, and Edward M. White, for appellants. Joseph G. Orr and Charles Weidler, for appellee.

MYERS, C. J. Appellee was sought to be charged with an indirect contempt upon the filing of an affidavit charging that on the 13th day of April, 1908, Ada J. King was granted a divorce from Archillious King by the St. Joseph circuit court, given her maiden name of Ada J. Cripe, and prohibited from remarrying for a period of two years from said date; that the said Ada J. King, alias Ada J. Branner, did willfully, knowingly, and corruptly violate said order of court by marrying William Branner on the 16th day of May, 1908, in the city of St. Joseph, state of Michigan. That both parties to said marriage were, and had been for more than two years preceding, residents of the state of Indiana, St. Joseph county, and immediately after said marriage returned thereto, and lived and cohabited thereafter in said county and state until the 27th day of November, 1909. This affidavit was not filed in the original cause for a divorce, but was filed as an independent proceeding entitled, "In the matter of the charges against Ada J. Branner," and conducted by that style, up to this appeal. Upon the filing of this affidavit, a rule was entered against the appellee to show cause, if any, why she should not be punished as for contempt, to which she appeared. An affidavit was then filed charging that she was about to leave the jurisdiction, and remain absent to avoid hearing and punishment, and upon this affidavit a motion was made by the prosecuting attorney to require her to give bond for her continued appearance pending the determination of the cause. This motion was overruled, and the petitioner excepted, and her motion to discharge the rule for the reason that the information did not state facts sufficient to constitute a contempt was sustained, appellee discharged, and the relator and the state severally excepted.

The questions on these rulings are the only questions presented. As to the motion to require the appellee to give bail, whilst the facts stated in the affidavit standing

alone would undoubtedly have authorized the court to require a bail, the fact that it was not required, and that it was a matter in the sound discretion of the court, would only authorize our interference in case of its abuse. The court in passing upon the motion to require bail was required to look to the charge made, and in the form made, and as the affidavit was held bad, it is clear that the court was justified in not requiring bail; for to have required bail when appellee might not have been able to give it, and thereby be compelled to go to jail, and the court afterward conclude that no offense had been charged, would have been able to do a great wrong without accomplishing a right; besides, if the affidavit was insufficient to charge a contempt, the petitioner or relator cannot complain of the refusal to require bail, so that the only material inquiry here is as to the sufficiency of the affidavit upon the charge of contempt. The argument presented by the state is that of the inherent power of courts to punish contempt for their orders, in upholding their dignity, and to punish for violation of their decrees. That is not questioned by appellee, but she stands upon the proposition that she is not charged with the violation of a legal order of the court, or the violation of a statute imposing a penalty. This contention involves both the construction and the force of the statute against remarriages, where jurisdiction is obtained by publication alone, and the legal force of the affidavit itself.

The statute provides that: "Parties against whom a judgment of divorce has been or shall be rendered, without other notice than publication in a newspaper, may have the same opened at any time, so far as relates to the care, support, and custody of the children. Parties against whom a judgment of divorce shall hereafter be rendered, *without other notice than publication in a newspaper*, may, at any time within two years after the rendition of such judgment, have the same opened, and be allowed to defend as well on the granting of the divorce, as in relation to the allowance of alimony and the disposition of property; and until the expiration of said two years it shall not be lawful for the party obtaining such divorce to marry again; which shall be stated in decree of the court." Section 1065, Burns' Ann. St. 1908.

It is settled here as elsewhere, that proceedings of this character are in their nature criminal, and presumptions will not be indulged against a defendant, but in his favor. State v. Rockwood (1902) 159 Ind. 94, 64 N. E. 592; Whitten v. State (1871) 38 Ind. 196; Hawes v. State (1898) 46 Neb. 149, 64 N. W. 699; Phillips v. Welch (1876) 11 Nev. 187; 4 Encyc. Pl. & Pr. 769. The charge constituting the offense must be specifically made, and jurisdiction must affirmatively appear in the charge, and will not

be aided by presumptions. *State v. Rockwood*, supra; *Worland v. State* (1882) 82 Ind. 49; *McConnell v. State* (1874) 46 Ind. 208; *Hawthorne v. State* (1895) 45 Neb. 871, 64 N. W. 359; *Hawes v. State*, supra; *State v. Root* (1896) 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; *State v. Sweetland* (1893) 3 S. D. 503, 54 N. W. 415; *Young et al. v. Cannon et al.* (1880) 2 Utah, 560; *Wyatt v. People* (1892) 17 Colo. 252, 28 Pac. 961; *Herdman v. State* (1898) 54 Neb. 628, 74 N. W. 1097; 4 Encyc. Pl. & Pr. 770.

It is urged by relator that as there can be no judgment prohibiting remarriage except in case of jurisdiction of the person by publication, it being charged that appellee violated the order of the court by remarrying within two years, that the charge is sufficient, without alleging that service was without other notice than by publication in a newspaper, and that the presumption is in favor of the judgment being one in which the service was by publication alone, and an authorized order. Appellee insists that it must have been alleged that the proceeding was without other notice than by publication and that no presumption can be indulged in a collateral proceeding. Our statute marks the distinction between contempts of a purely criminal character, affecting the orderly conduct of the business of the courts, and their lawful process, and those "for the enforcement of civil rights and remedies." *Burns' Ann. St. 1908*, §§ 1040-1049; *Perry v. Pernet* (1905) 165 Ind. 67, 74 N. E. 609; *Thistlethwaite v. State* (1898) 149 Ind. 319, 49 N. E. 156; *Baldwin v. State* (1890) 126 Ind. 24, 25 N. E. 820.

In the case of civil rights and remedies, we do not doubt that in courts of general jurisdiction, the strictness is not required that obtains in common law, or criminal contempts, and that in such cases the charge is sufficient when it is charged that there was an order, or judgment, and its violation. In this class of cases the evidence may be heard, while in criminal or common-law contempts, the defendant is punished or discharged, upon the return. *Burns' Ann. St. 1908*, § 1048; *Stewart v. State* (1894) 140 Ind. 7, 39 N. E. 508; *Anderson v. Indianapolis Co.* (1904) 34 Ind. App. 100, 72 N. E. 277, and cases there cited; *Ex parte Ah Men* (1888) 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Ex parte Fong Yen You* (1888) 19 Pac. 500; *Silvers v. Traverse* (1891) 82 Iowa, 52, 47 N. W. 888, 11 L. R. A. 804; *Sweeny v. Traverse* (1891) 82 Iowa, 720, 47 N. W. 889; *King v. Carpenter* (1888) 48 Hun, 617, 2 N. Y. Supp. 121; *Andrew v. Andrew* (1889) 62 Vt. 495, 20 Atl. 817; *Curtis v. Gordon* (1890) 62 Vt. 340, 20 Atl. 820; *State v. Allen* (1896) 14 Wash. 684, 45 Pac. 644.

The statute making remarriage unlawful

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 77 Cal. xix.

within two years is grounded upon considerations of public policy, and the violation of the order is necessarily a violation of a declared public policy, but no penalty is attached, and we must presume from a public policy not to do so. The order of the court is simply the statement of the legislative fiat, without any penalty attached, and its violation is not the violation of the court's decree, but the violation of a statute for which no penalty is attached, nor has any been expressly provided by any other statute. Under this statute there is no right vested in the former spouse, or any individual, either of property, or of a personal character, which can be affected by the remarriage. It is significant that no penalty is imposed for the violation of this statute, and as all our offenses are statutory, it can hardly be insisted that general laws, or other statutes may be looked to, unless it be the statute of contempts. *Burns' Ann. St. 1908*, §§ 1042-1045.

From these considerations it must be quite clear that to reverse the order of the learned trial judge we would be compelled to indulge the presumption that the divorce in question was rendered "without other notice than publication in a newspaper," and this we may not do in this class of cases. The reason lies in the fact that the proceeding being criminal, no presumption can be indulged against the party charged, and he is punished or discharged on the return, and if he is bound by the record, no return he could make would purge him, because the presumption estops him to question the judgment, and he might be punished even though the order be void, so that the information must show the jurisdiction or authority for the order, in order that it may be demurred to, moved against, or answered. *Burns' Ann. St. 1908*, § 1048; *McConnell v. State*, supra; *Ex parte Wright* (1879) 65 Ind. 504; *State v. Ralph Snyder* (1890) 34 W. Va. 352, 12 S. E. 721; *Schwarz v. Superior Ct.* (1896) 111 Cal. 106, 43 Pac. 580; *Hutton v. Superior Ct.* (1905) 147 Cal. 156, 81 Pac. 409. We would also be required to take judicial notice of the record in the divorce case in a collateral matter growing out of the original case, and this we may not do. *Lester v. People*, 150 Ill. 408, 37 N. E. 1004, 41 Am. St. Rep. 375; *Nat. Bank v. Bryant*, 13 Bush (Ky.) 419; *State v. Elec. Co.*, 61 N. J. Law, 114, 38 Atl. 318; *Church v. Muscatine*, 2 Iowa, 69; *McDermott v. Clary*, 107 Mass. 501; *Matter of Dissosway*, 91 N. Y. 235; *Boon v. McGucken*, 67 Hun, 251, 22 N. Y. Supp. 424; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Baltimore Co. v. Wheeling*, 13 Grat. (Va.) 40; *Haight v. Lucia*, 36 Wis. 355; *U. S. v. Jacobi*, 1 Flap. 108, Fed. Cas. No. 15,400; *Durant v. Washington County*, 1 Wollw. 377, Fed. Cas. No. 4,191.

The court did not err, and the judgment is affirmed.

(175 Ind. 279)

SMITH et al. v. CITY OF NEW ALBANY.
(No. 21,536.)¹

(Supreme Court of Indiana. Nov. 29, 1910.)

1. CONSTITUTIONAL LAW (§ 42*)—RIGHT TO RAISE CONSTITUTIONAL QUESTIONS.

One removing from a city a dead animal belonging to another, and for which he paid nothing, may not question the validity of a municipal ordinance prohibiting any person other than a contractor of the city to remove dead animals, on the ground that it deprives the owner of his property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. § 42.*]

2. MUNICIPAL CORPORATIONS (§ 608*) — POLICE POWERS.

Subject to reservations as to the right of property in the owners of dead animals, a municipal corporation may confer on individuals the exclusive right to remove them, on the theory that in practical application the object can be better accomplished by those prepared for the work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1342; Dec. Dig. § 608.*]

3. MUNICIPAL CORPORATIONS (§ 597*) — POLICE POWERS.

A city has the inherent power to protect the health and lives of its citizens, and an ordinance under the power must be construed with reference to the objects of the creation of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 597.*]

4. MUNICIPAL CORPORATIONS (§ 605*) — NUISANCE—POWER TO CONTROL—ORDINANCE.

It is not necessary to a city's power to abate nuisance and to punish those responsible therefor that the obnoxious condition be expressly declared a nuisance by ordinance, but it is sufficient if it is apparent that the condition is such that it is obviously injurious to health or offensive to the senses, and the ordinance directed, as it follows the words of the express power conferred on the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1338; Dec. Dig. § 605.*]

5. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES—NUISANCES.

Where a thing may or may not be a nuisance, depending on a variety of circumstances requiring judgment and discretion on the part of municipal authorities in exercising their legislative functions under a general delegation of power, their action is conclusive, but that which is not in and of itself, by its nature or character or the manner of its use or disposition a nuisance cannot be made so by the mere fiat of municipal authorities, and the action of a city is then subject to judicial review as to the reasonableness of the regulation adopted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1878, 1879; Dec. Dig. § 63.*]

6. MUNICIPAL CORPORATIONS (§ 590*)—POWERS—STATUTES—REPEAL.

Acts 1875, c. 13 (Burns' Ann. St. 1901, § 4195), authorizing municipal corporations to pass laws to secure the removal of dead animals, and to contract for such removal, and provide penalties for a violation of the laws, etc., was not repealed by Acts 1905, c. 129 (Burns' Ann. St. 1908, § 8639 et seq.), authorizing the board of public works to remove all dead animals, and

empowering the council to prevent the deposit of any unwholesome substance on private or public property, and declaring that laws and ordinances not inconsistent with the act shall remain in force until altered or repealed, since the provision conferring power on the board of public works is merely the conferring of authority of a contractual and administrative character, and does not conflict with the right of the council to punish by ordinance violations of reasonable prohibitions, and a city ordinance adopted under the act of 1875, punishing any person other than the contractor with the city who removes any carcass of a dead animal, remains in force.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 590.*]

7. MUNICIPAL CORPORATIONS (§§ 111, 120*)—ORDINANCES—VALIDITY.

An ordinance must be so definite and certain as to leave no reasonable doubt as to what is intended, but its terms will not be so strictly construed as to defeat its purpose where it is sufficiently definite to be understood with a reasonable certainty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. §§ 111, 120.*]

8. MUNICIPAL CORPORATIONS (§ 608*)—ORDINANCES—VALIDITY.

An ordinance prohibiting any person but the contractor with the city from removing the carcass of any dead animal, enacted under Acts 1875, c. 13 (Burns' Ann. St. 1901, § 4195), authorizing municipal corporations to pass laws to secure the removal of the carcasses of dead animals, etc., is sufficiently definite as fixing the standard for the selection of dead animals, meaning such dead animals as in some way endanger public health only.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 608.*]

9. MUNICIPAL ORDINANCES (§ 120*)—ORDINANCES—CONSTRUCTION.

The court should so construe an ordinance as to render it valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120.*]

10. MUNICIPAL CORPORATIONS (§ 608*)—ORDINANCES—CONSTRUCTION.

An ordinance prohibiting any one but the city contractor from removing any carcass of a dead animal unless the contractor fails for six hours after notice to remove such carcass, in which case any person may lawfully remove it, refers only to such carcasses as are or are likely to become nuisances as detrimental to health or offensive to the senses, and, so construed, the ordinance is valid as protecting the public health.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1342; Dec. Dig. § 608.*]

11. MUNICIPAL CORPORATIONS (§ 597*) — POLICE POWERS.

The power of a city to protect the public health may be exercised, though some property rights may be curtailed or sacrificed thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1325; Dec. Dig. § 597.*]

12. MUNICIPAL CORPORATIONS (§ 639*)—VIOLATION OF ORDINANCES—COMPLAINT.

A complaint in the language of an ordinance defining an offense without a proviso or exception is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1406; Dec. Dig. § 639.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied.

13. MUNICIPAL CORPORATIONS (§ 639*)—VIOLATION OF ORDINANCES—COMPLAINT.

A complaint charging one with violating an ordinance prohibiting any one but the city contractor from removing any dead animals, which shows that the accused did not have a right to remove dead animals, is sufficient without showing whether another had the right of removal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1406; Dec. Dig. § 639.*]

14. MUNICIPAL CORPORATIONS (§ 635*)—VIOLATIONS OF ORDINANCE—CIVIL ACTION.

A prosecution for a violation of a municipal ordinance is a civil action, and the rules of pleading applicable in cases before justices of the peace govern.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1400; Dec. Dig. § 635.*]

15. JUSTICES OF THE PEACE (§ 91*)—PLEADINGS—SUFFICIENCY.

A complaint in a civil action before a justice of the peace which informs defendant of the nature of the claim, so that the judgment in the suit may be used as a bar to another action for the same cause, is sufficient.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-323; Dec. Dig. § 91.*]

16. JUSTICES OF THE PEACE (§ 95*)—PLEADINGS—SUFFICIENCY.

Where a complaint in a civil action before a justice of the peace avers a material fact in an indefinite or uncertain manner, the remedy is by motion to make more specific, but, where an essential fact is entirely omitted, the defect may be raised by demurrer.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 327; Dec. Dig. § 95.*]

17. MUNICIPAL CORPORATIONS (§ 639*)—VIOLATION OF ORDINANCES—COMPLAINT—SUFFICIENCY.

A complaint alleging that accused within the limits of a city removed the carcass of a horse, accused not having a license or contract with the city for the removal of dead animals, and the city having previously entered into a contract with a third person therefor, in violation of a municipal ordinance prohibiting any person other than the contractor from removing any dead animal, is sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 639.*]

Appeal from Circuit Court, Floyd County; William C. Utz, Judge.

Gus Smith and another were convicted of violating an ordinance of the city of New Albany, and they appeal. Affirmed.

Alexander Dowling, for appellants. Geo. H. Hester and C. W. Schindler, for appellee.

MYERS, C. J. Appellants were charged in the city court of the city of New Albany on May 14, 1907, by verified complaint with the violation of a city ordinance, in "that on the 13th day of May, 1907, the said defendants did, within the corporate limits of the city of New Albany, Ind., unlawfully remove the carcass of a dead animal, to wit, a horse, from the city of New Albany, the said Gus Smith and Rudolph Alles, nor either of them, then and there having a license or contract with said city for the re-

moval of dead animals, and the said city having theretofore entered into a contract with the firm of Parad & Buhler for the removal of carcasses of all dead animals, contrary to the provision of sections 1, 2, and 3 of an ordinance of said city, in such cases made and provided, passed on the 5th day of November, 1883." There was a trial, conviction, and appeal to the circuit court. There a motion to dismiss the action for want of sufficient facts to constitute a cause of action was renewed and overruled, exception reserved, a trial had, a special finding of facts made, and conclusions of law stated, and over motion for a new trial judgment was rendered against appellants.

The facts found were, in substance, as follows: On November 5, 1883, the common council of the city of New Albany passed an ordinance authorizing the mayor of the city to enter into a contract with some suitable and responsible person for the removal of the carcasses of all dead animals from the corporate limits of the city, and for the destruction or other disposition of such carcasses. This ordinance provided that "only such carcasses are to be removed as may be lawfully removed and disposed of by the city or its officers." The person contracting to remove the bodies of the dead animals was to execute a bond in a penalty of \$100 payable to the city, conditioned for the faithful performance of his contract, and for the protection of the city from loss, damage, or expenses on account of the acts and proceedings of such contractor. The person so contracting was to have the exclusive right to remove all such carcasses of dead animals from the city and dispose of them. Any person other than such contractor, his agents, or servants removing or attempting to remove any carcass of a dead animal was to forfeit and pay to the city not less than \$2, nor more than \$10, for every carcass removed, or attempted to be removed. If the contractor failed, neglected, or refused for six hours, after notice, to remove any such carcass, then any other person might lawfully remove it. This ordinance was duly published, and remained in force thereafter until the time of the trial and special finding.

On March 30, 1907, Louis Parad and William Buhler entered into a contract in writing with said city for the removal of the carcasses of all animals dying within the limits of the city of New Albany of which the city authorities had control. The contractors were to pay the city \$50 per year for a term of five years as the consideration for the privilege granted. Certain other provisions required by the ordinance were set out in the agreement. This agreement was approved and ratified by the board of public works and the common council. The contractors filed their bond agreeably to the requirements of the ordinance and contract,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and it was duly approved. Parad & Buhler paid to the city the sum of \$50, and thereafter were ready and willing to comply with the terms of their agreement, excepting as they were prevented from doing so by the defendants. On May 13, 1907, the defendants removed from the corporate limits of the city of New Albany the carcass of a dead horse, and transported the same through the streets of said city. The contractors, Parad & Buhler, had received no notice to remove the said carcass. At the time of the removal of said carcass by the defendant he had no contract with said city to receive or remove dead animals from the city limits, and through the streets of said city, or for the destruction or other disposition of such carcasses.

The sufficiency of the complaint is challenged upon the ground, first, that Acts 1905, p. 247 (Burns' Ann. St. 1908, § 8655), repealed Acts 1875, p. 28 (Burns' Ann. St. 1901, § 4195); second, that the provisions of the ordinance of 1883 are inconsistent with the act of 1905, and are not within the saving clause (section 8642, Burns' Ann. St. 1908) of the latter act; third, that the ordinance of 1883 is unconstitutional, as being in violation of the fourteenth amendment to the federal Constitution, in that the carcass of a dead animal is property, and its owner cannot be deprived of its possession and control without his consent, or due process of law (Burns' Ann. St. 1908, § 39), and in violation of article 1, § 21, State Const. (Burns' Ann. St. 1908, § 66), in that no man's property shall be taken by law without just compensation; fourth, that the ordinance is invalid because of its uncertainty, and that the statements in the complaint are not sufficient to bar another action for the same cause.

We may eliminate the question as to the constitutionality of the statute from the fact that the owner of the carcass is not here making any question, and appellee is not in a situation to raise the question as to rights of property in another, when he has no right of property, and, if the ordinance is valid as to him, he cannot complain that it may be invalid as to another on the constitutional grounds here urged. *Bedford, etc., Co. v. Bough* (1907) 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Pittsburgh Co. v. Montgomery* (1898) 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301; *Currier v. Elliott* (1895) 141 Ind. 394, 39 N. E. 554; *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, 24 L. R. A. 469; *Wagner v. Town* (1889) 118 Ind. 114, 20 N. E. 706. If it be urged that he acquired a property right by the bestowal of the carcass upon him by the request of the owner to remove it, it is properly answered that he was bound by the ordinance as to the exclusive right of removal in another, and, upon the waiver by the owner, the property right was by the ordinance vested in another. It appears from the evidence that the owner called the telephone ex-

change to give him the dead-animal man, without thinking of the city contractors, and without thinking who he was calling upon to remove the horse, though the city contractors seem also to have been called, but the horse was taken away before the contractor had time to reach it. Appellant had been an unsuccessful bidder for the removal of dead animals at the time the contract was awarded to another, and had actual knowledge of the existence of the contract. He paid nothing for the horse. We do not think it possible for him to raise the question of the constitutionality of the ordinance in this action.

The act of 1875, under which the ordinance was enacted, provided that "the common council of cities, and the trustees of incorporated towns of this state are empowered and authorized to pass by-laws to secure the removal of slops, garbage, the carcasses of dead animals, and other waste material from their corporate limits, and to appoint and contract for such removal, and provide that the person appointed or contracted with shall have the exclusive right to remove the same, and to provide penalties for the violation of by-laws in accordance with the general laws for the incorporation of cities and towns now in force, or which may hereafter be adopted." Acts 1875, p. 28; Burns' Ann. St. 1901, § 4195. The act of 1905 (subdivision 7, § 8655, Burns' Ann. St. 1908), in enumerating the powers of common councils, authorizes them "to declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing or suffering the same," etc., and by subdivision 53 "to carry out the objects of the corporation not hereinbefore particularly specified," and under the same clause it is provided that, "whenever any executive or administrative function shall be required to be performed by any ordinance or resolution of the common council, the same shall be performed by the proper executive department, and not by the common council." The act (section 8696) in enumerating the powers of the board of public works provides by the sixteenth subdivision that such boards shall have power "to remove all dead animals, garbage, filth, ashes, dirt, rubbish or other offal from such city either by contract, or otherwise, and to erect crematories, or other plants for the destruction, or disposal thereof." The same act (Burns' Ann. St. 1908, § 8655, cls. 13, 14) grants the power to common councils to prevent the deposit of unwholesome substance upon private or public property, and to compel its removal to designated points, and to require slops, garbage, ashes, and other waste material to be removed to designated points, and to require occupants of premises to place them conveniently for removal, etc.

Appellants' position is that the act of 1905

covers the whole subject-matter, and by necessary implication repeals the former statute, and that the only provision in the new act in regard to the removal of the carcasses of dead animals confers the power upon boards of public works to cause the removal by contract or otherwise, and cannot be exercised concurrently with common councils, and that the saving clause, Burns' Ann. St. 1908, § 8642, does not save the ordinance, for the reason that the act of 1905 does not authorize common councils to pass ordinances respecting the removal of dead animals, or affix penalties for their violation. The contention of appellee is that the act of 1905 makes no provision for boards of works enacting penal ordinances, but only confers the power to remove or contract for the removal of dead animals, and that the reserve and inherent power in cities to punish for the unauthorized removal of dead animals under clauses 7, 13, § 8655, Burns' Ann. St. 1908, is not interfered with, and is not inconsistent with the contractual power, and is specifically authorized under sections 8643, 8644, 8965, Burns' Ann. St. 1908. It may fairly be said to be settled with some reservations as to rights of property in the owners of dead animals that municipal corporations may confer upon individuals the exclusive right to remove them, as well as other offensive matter, upon the theory that in practical application the object can be better accomplished by those prepared for, and who are at call night and day, and are able from habit or experience to accomplish the work, and that it is within the discretion of the municipal authorities to contract for the accomplishment of the result under a general system, and that such legislation is reasonable in itself, and well calculated to preserve health, and be least offensive to the senses. Walker v. Jameson (1894) 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 28 L. R. A. 679, 683, 49 Am. St. Rep. 222, and cases cited; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676, and note; Smiley v. MacDonald (1894) 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. Rep. 684, and notes; Commonwealth v. Stodder (Mass. 1848) 2 Cush. 562, 48 Am. Dec. 679; Zylstra v. City of Charleston (S. C. 1794) 1 Bay, 382; City of Louisville v. Wible (1886) 84 Ky. 290, 1 S. W. 605; Well v. Ricord, 24 N. J. Eq. 169; State v. Orr (1896) 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279; City v. Caruthers, 103 Va. 774, 50 S. E. 265, 70 L. R. A. 1005; Rendering Co. v. Behr, 7 Mo. App. 345; Meyer v. Jones (Ky.) 49 S. W. 809; Morgan, etc., Co. v. Cincinnati (Ohio 1882) 12 Wkly. Law Bul. 41.

Under this state of the law, the question presents two distinct and independent branches. One is that, under the act of 1905, the sole power to enter into contracts for the removal of dead animals resides in the executive and administrative arm of the municipality, which has no power to enact penal ordinances; hence, with the restricted

right of entering into a contract or to act directly, it cannot punish for an infraction of the contract, though that infraction may effect the health, or be obnoxious to the senses, and, unless the council has the power to enact a punitive ordinance, none can be enacted. It seems quite clear that in so important a matter as one affecting the public health and the senses the city should not be powerless to remedy the evils which might arise from disregard of the contract by those who should take it upon themselves to do so. If there is no punitive power over the subject in the city, it is clear that relegating the contractor or city to civil actions for damages for infractions of the contract, or injunction to punish interferences, would fall far short of providing a remedy, the essential characteristic of which is speedy removal of objectionable matter; and the statute should not be given such a construction, if it can be avoided, in justice to the private rights of those who may seek to question the power, or the procedure. It is an inherent power of cities to protect the health and lives of their citizens, and impliedly necessary for the accomplishment of the purposes of their organization, and the power and the ordinance should be construed with reference to the objects of their creation, and this power may be delegated by express statute or by inference. Miller v. Syracuse, 168 Ind. 230, 80 N. E. 411, 8 L. R. A. (N. S.) 471, 120 Am. St. Rep. 366; Boyce v. Tulley (1904) 163 Ind. 202, 70 N. E. 531; Scott v. City of Laporte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Pittsburgh Co. v. Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Walker v. Jameson, supra; Champer v. Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 300; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; Mayor v. Gerspach, 33 La. Ann. 1011; Kennedy v. Phelps, 10 La. Ann. 227. Clause 7, § 8655, Burns' Ann. St. 1908, quoted above, seems to us to confer express power of punishment "of the person or persons causing, or suffering," a nuisance; while clause 53 seems to embrace all the objects of incorporation not enumerated. It is not necessary that a condition be by the ordinance declared a nuisance. It is sufficient if it follows the words of an express power, or is of such nature and character as to be apparent that it is injurious to health, or offensive to the senses, which is the statutory definition of a nuisance. Burns' Ann. St. 1908, § 291; Harris v. Hamilton (1879) 44 U. C. Q. B. 641; Miller v. Syracuse, supra; Carthage v. Buckner, 4 Ill. App. 317. "In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of

the question." *Walker v. Jameson*, supra; *Carthage v. Buckner*, supra; *Ogdensburgh v. Lyon*, 7 Lans. (N. Y.) 215. In *Harrison v. Baltimore* (Md. 1834) 1 Gill. 264, it was said under a statute vesting the city of Baltimore "with full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances," etc.: "The transfer of this statutory and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the General Assembly could have exercised. Of the degree of the necessity for such municipal legislation the mayor and city council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributing to the end) of exercising the power which they might deem requisite to accomplish the objects of which they were made the guardians."

It is not to be understood, of course, that that which is not in and of itself by reason of its nature or character or the manner of its use, location, or disposition a nuisance can be made so by the mere fiat of a city council, for unless the power is expressly conferred, or is essential to the accomplishment of the purpose of its creation or its continued existence, or is from its nature, character, or use a nuisance, it is the subject of review by the courts, both as to its reasonableness, and as to the thing inveighed against, being in fact a nuisance. *Indianapolis Abattoir Co. v. Neidlinger* (1910) 92 N. E. 169; *City of Delphi v. Hamling* (1909) 172 Ind. 645, 649, 89 N. E. 308. By section 8642, Burns' Ann. St. 1908, it is provided, "All by-laws, ordinances, and regulations, not inconsistent with this act shall remain in full force until altered, or repealed by common council of such city," and by section 9016, "All former laws within the purview of this act except laws not inconsistent herewith * * * are hereby repealed." We hold, therefore, that conferring power upon the board of public works "to remove all dead animals, etc., by contract or otherwise," is the conferring of exclusive authority of a contractual and administrative character as to those subjects, in so far as their disposition is concerned, and is not inconsistent with, or in conflict with, the right of councils under the express statute, and their general powers, to punish by ordinance for violations of a reasonable prohibition, by those unauthorized by the ordinance, not in vindication of any private rights, under the contract, but as a public regulation for the protection of society, and that the ordinance was not repealed by the act of 1905.

It is next urged that the ordinance is void for indefiniteness, in that it provides "for the removal of the carcasses of all dead ani-

mals, * * * provided further that only such carcasses are to be removed as may lawfully be removed, and disposed of by said city," the objection being that it may apply as well to nonoffensive, or the carcasses of animals slaughtered for food, as to any other, and provides no legal standard by which to determine or by whom it may be determined what carcasses may lawfully be removed. Ordinances must be so definite and certain as to leave no reasonable doubt as to what is intended, but their terms will not be so strictly construed as to defeat their purposes, if they are sufficiently definite to be understood with a reasonable certainty. The term, "dead animals," has a legal, recognized, and definite meaning, as such dead animals as in some way endanger the public health, and does not apply to all dead animals. *Underwood v. Green*, 42 N. Y. 140. It is held that an ordinance drawn in the language of an express statute is sufficiently definite. *Shea v. Muncie* (1896) 148 Ind. 14, 46 N. E. 138; *Nealls v. Hayward* (1874) 48 Ind. 19; *Harris v. Hamilton*, supra. As the statute provides for the removal of dead animals, and as dead animals are such as in some way endanger the public health, we must assume that, in the passage of the ordinance, the council had this definition in mind, which in and of itself excludes the idea of any other class of dead animals, so that the ordinance does provide the standard for the selection of the dead animals. And for the reason that there is property in dead animals in their owners until such time as they are or are likely to become a nuisance (28 Cyc. 720), it should give the ordinance that construction which would render it valid, and in that view the language, "only such carcasses are to be removed as may lawfully be removed," means such carcasses as are or are likely to become nuisances, as detrimental to health, or offensive to the senses, and this construction is a fair one, as defining the carcasses intended, in view of the rights of property which may not be interfered with, except upon the ground of protecting the public health, and cannot apply to such animals as are slaughtered for food, or are not unwholesome, or detrimental, or likely to become detrimental, to health, or offensive to the senses. It is an inherent power, long exercised by cities, and the fact that it may put some restrictions upon the disposition or use of property is not sufficient to deny the power, for it is undeniable that some property rights may be curtailed or even sacrificed, in the exercise of the police power, which is as unlimited and inalienable as the necessity for its exercise. *State v. Barrett*, post; *Adams Express Co. v. State*, 161 Ind. 328-346, 67 N. E. 1033, and cases cited; *Walker v. Jameson*, supra; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830, and cases cited; *Cleveland, etc., Co. v. Harrington* (1892) 131 Ind. 426, 30 N. E. 37; *Mayor v. Gerspach*, 33 La. Ann. 1011; *Boehm*

v. Mayor, 61 Md. 259; In re Vandine, 6 Pick. (Mass.) 187, 17 Am. Dec. 351; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; 15 Am. & Eng. Ency. 1173; 2 Beach, Pub. Corp. 695; Dillon's Munic. Corp. 598; Horr & Bemiss, Municipal Police Ordinances, § 212.

Finally, it is urged that the complaint is insufficient and indefinite, in that it is not sufficiently definite to bar another action for the same cause, that it does not disclose the name of the owner of the horse, and does not disclose the place from which the carcass was removed, and it does not appear how it was removed, or that it was hauled through the streets, nor that the city had an existing contract with a scavenger to remove the carcasses of dead animals.

As to the last proposition, it may be pointed out that in pleading an ordinance, as in case of a statute, if the offense is defined without the proviso or exception, it is sufficient, even in a criminal case. *State v. Barrett* (1909) 172 Ind. 169, 87 N. E. 7; *Horr & Bemiss*, § 175. The thing aimed at by this ordinance is the removal of dead animals, and the manner of removal. It is not material whether another had the right of removal or not, so long as appellant had not the right, and the offense was defined without reference to whether or not there was an existing contract for such removals with another. It is settled in this jurisdiction that this class of cases are civil actions, and that the same rules of pleading are applicable as in cases before justices of the peace. *Shea v. Muncie*, supra; *Berkey v. Elkhart*, 141 Ind. 408, 40 N. E. 1081; *City v. Corwin*, 58 Ind. 518; *City of Goshen v. Croxton*, 34 Ind. 239; *Whitson v. Franklin*, 34 Ind. 392. In civil actions before justices of the peace whilst a substantive cause of action must be stated, a large degree of liberality is allowable. A complaint is sufficient if it informs the defendant of the nature of the claim, and a judgment in the suit may be used as a bar to another action for the same cause. *Belneke v. Wurgler* (1881) 77 Ind. 468; *Powell v. De Hart* (1876) 55 Ind. 94; *Clark v. Benefiel*, 18 Ind. 405; *Millholland v. Pence*, 11 Ind. 203. While the questions which were or might have been litigated are determined by the pleadings, there is a distinction between what was or what might have been determined under the issues and a case where the subject-matter of the litigation is not disclosed by the record, owing to the fact that the allegations by reason of generality might apply to a substantive cause of action not actually involved, in which case extrinsic evidence may be given to identify the actual subject of litigation in a given case. *Felton v. Smith*, 88 Ind. 149, 45 Am. Rep. 454; *Bottom v. Wise*, 53 Ind. 32; *Bougher v. Scobey*, 21 Ind. 365. If a complaint avers a material fact in an indefinite

or uncertain manner, the remedy is by motion to make more specific, but, if an essential fact is entirely omitted, the defect may be raised by demurrer. *City of Goshen v. Kern* (1878) 63 Ind. 468, 30 Am. Rep. 234; *Reynolds v. State* (1878) 61 Ind. 392; *Grand Trunk Co. v. State* (1907) 40 Ind. App. 695, 82 N. E. 1017.

The material allegation of the complaint and the gravamen of the action in this case is that the defendants violated a specified ordinance by unlawfully removing the carcass of a dead animal, to wit, a horse from the city of New Albany. It can scarcely be questioned that the removal of each carcass might and under the ordinance does constitute a separate cause of action, if more than one carcass was removed, and in such case, or in case several causes were joined in the same complaint, there would be much reason in requiring by motion, if otherwise indefinite, such descriptive matter, as would distinguish an offense in each case, or in the several cases joined in the same action; but if a substantive cause of action is stated in any specific complaint of one or more paragraphs with reasonable certainty, if a defendant desires more definiteness, he must reach the question by a motion to make more specific.

We are not able to perceive that error was committed, and the judgment is affirmed.

(48 Ind. A. 359)

AMERICAN OAR & FOUNDRY CO. v. SMOCK. (No. 6,864.)¹

(Appellate Court of Indiana, Division No. 2. Nov. 29, 1910.)

PLEADING (§ 165*)—REPLY.

Where an employé, who has been injured, relies on a parol promise for recompense in consideration of a release entered into between him and the master's agent, he does not need to specially plead in a replication the agent's authority, where the master in his answer fails to deny the agent's authority, and relies on the release at trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 321, 327, 328; Dec. Dig. § 165.*]

On petition for rehearing. Petition overruled.

For former opinion, see, 91 N. E. 749.

Jos. W. Hutchinson, Wm. A. Ketcham, Ralph Miller Ketcham, and Howe Stone Landers, for appellant. Salem D. Clark and Brill & Harvey, for appellee.

ROBY, C. J. The appellant's counsel have reargued with force and ability their proposition that the consideration expressed in the release was thereby made contractual. This is in fact the pivotal proposition involved, and the conclusion announced was and is unanimous. The appellee was in the employment of the appellant company. He was injured while in such service, and liability

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

¹ Transfer denied.

or no liability for damages on account thereof was a matter between them. The complaint counts upon a parol promise, averred to have been made in consideration of a written release of liability. The appellant denied the claim so made. The issue was one of fact.

It being first averred, and then established, that appellee had surrendered his claim upon the consideration named, and it appearing that appellant had not only accepted the release so procured, but retained and asserted it at the trial, the doctrine that "he who derives the advantage ought to sustain the burden" is directly applicable. This is not a new doctrine. It is rather a principle than a doctrine. A contract for the sale of land, made by one who had no authority to act for the owner, who had taken and assigned notes therein provided for, was held to bind the owner. Judge Worden, in his opinion upon such facts, adopted the statement of a standard text-writer, which is as follows: "Generally, if the principal receive and hold the proceeds or beneficial results of the contract, he will be estopped from denying all original authority or ratification." *Moore v. Pendleton*, 18 Ind. 481; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

The appellant might have set up the special plea that the contract sued upon was made by persons who were not authorized to act for it in that behalf. Had it done so, a reply of the facts relied upon to overcome such lack of authority would have been proper. It did not plead such defense, but came into court holding and claiming under the contract, and thereby obviated the need of any further pleading by appellee.

The petition for rehearing is overruled.

(190 N. Y. 466.)

FROELICH v. CITY OF NEW YORK et al.
(Court of Appeals of New York. Nov. 15, 1910.)

1. MUNICIPAL CORPORATIONS (§ 751*)—INDEPENDENT CONTRACTORS—LIABILITY.

An independent contractor for the whole of an improvement for a city and a subcontractor doing a part of the work are not servants or agents of the city reserving the right to supervise and inspect the work, and it is not liable for the negligence where the plan for the work is reasonably safe, and there is no interference therewith by the city which results in injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1582; Dec. Dig. 751.*]

2. APPEAL AND ERROR (§ 927*)—EVIDENCE—REVIEW.

The court on appeal from a nonsuit must give plaintiff the benefit of every reasonable inference by which the verbal and circumstantial evidence in his favor may be supported.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4024; Dec. Dig. § 927.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—MUNICIPAL IMPROVEMENTS—NEGLIGENCE OF SUBCONTRACTOR—QUESTION FOR JURY.

Whether a subcontractor, to relay a water main, negligently failed to relay it in a workmanlike manner, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 845.*]

4. TRIAL (§ 140*)—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The credibility of a witness making inconsistent statements or making statements calculated to impeach the correctness of his observations testified to is for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. 334; Dec. Dig. § 140.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by John Froelich against the City of New York and another. From a judgment of the Appellate Division (129 App. Div. 909, 114 N. Y. Supp. 1127), affirming by divided court a judgment of nonsuit rendered at Trial Term, plaintiff appeals. Affirmed in part, reversed, and new trial ordered in part.

John M. Gardner, for appellant. Clarence L. Barber and S. B. Livingston, for respondents.

WERNER, J. On the 19th day of February, 1904, the plaintiff was the janitor of a building, in the basement of which he occupied an apartment, near the intersection of Broadway and West Ninety-Second street in the borough of Manhattan, New York City. Early in the morning of that day his domicile was flooded by the bursting of a water main belonging to the city, and his household goods were damaged. Thereafter he brought this action to recover his loss. At Trial Term there was a nonsuit, which was affirmed at the Appellate Division by a divided court.

The few precedent circumstances which bear upon the accident are such as to leave the real cause in some doubt. The break in the water main occurred at the intersection of Broadway and West Ninety-First street. It appears that in 1903, while the tunnel for one of the subways was in course of construction, it became necessary to change this water main so as to carry it around one of the subway stations. In relaying this main it was placed diagonally over a brick sewer, and that is the point at which the fracture was found which caused the flood. The plaintiff charges that both of the defendants were guilty of culpable negligence—the city in knowingly permitting the existence of a dangerous condition, and the contractor Bradley in creating it.

Since it clearly appears from the pleadings and from the uncontradicted evidence that the work of relaying this water main was done by the defendant Bradley as an independent subcontractor under one McDonald, who was an independent contractor for the

whole of the subway work, it is obvious that the nonsuit in favor of the city was properly granted. Such contractors and their subcontractors are not servants or agents of a municipality even when the latter reserves "the right to change, supervise and inspect to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers which results in injury." None of the elements essential to the city's liability was established at the trial, and the judgment of the Appellate Division in favor of the city must therefore be affirmed. *Uppington v. City of New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550.

The record presents a different case against the defendant Bradley. Under familiar principles as to which there can be no divergence of views, he should be held liable if the accident can be definitely shown to have been caused by his negligence. The evidence given at the trial was meager and, in some particulars, quite unsatisfactory to the judicial mind; but that is a question with which we have little concern. We have only to decide whether the evidence, viewed most favorably to the plaintiff, was of sufficient weight and probative force to make the issue of the defendant Bradley's alleged negligence a question of fact for the arbitrament of a jury. Upon that point we feel constrained to differ from the courts below. The trouble in the case consists, of course, in the dearth of proof as to the manner in which the water main was relaid before the accident. That is a circumstance regarding which it is probably much more difficult for the plaintiff to furnish evidence than it is for the defendant, although it should be added that the correctness of that surmise is of no importance except in so far as it discloses the justice of giving the plaintiff the benefit of every reasonable inference by which the verbal and circumstantial evidence in his favor may be supported. If there was any negligence on the part of the defendant Bradley, it must have consisted in his failure to relay the main in a proper and workmanlike manner. The learned courts below have thought that this feature of the case is so enshrouded in conjecture and doubt as to present no tangible fact upon which the defendant Bradley's alleged negligence could be predicated, and they have therefore decided as matter of law that no negligence was proved. We think the evidence was definite enough to raise an issue of fact which it was the duty of the court to send to the jury.

The testimony discloses that this water main was 36 inches in diameter. In changing its course so as to carry it around the subway station at Ninety-First street, it became necessary to cross a large trunk sewer. The section which crossed the sewer was 12 feet in length, and it broke at or near the crown

of the sewer. Expert witnesses testified that it would not be good construction to superimpose such a water main directly upon a sewer or other solid substance that does not extend along the whole length of the main; that it is the custom, under such conditions, to leave an intervening filling of earth by way of allowance for uneven settlement or sagging; that the degree of such allowance must depend upon the character of the earth and the extent to which it may have been disturbed in digging; that it would vary from two inches in virgin soil to six inches in earth that had been excavated but not thoroughly tamped; that the failure to observe these precautions would cause a sagging of the superimposed pipe or main where it rests upon the earth, thus creating a strain upon that portion resting upon an unyielding base, with a resulting tendency to fracture at the point where the main rests upon a solid bed. It was further shown that, when such a condition exists, it is usual to support the ends of the water main by means of wooden bed blocks which are designed to minimize the danger of uneven settlement of the earth.

There is testimony in this record from which a jury might draw the inference that this water main was relaid without the observance of any of the precautions which are usual in good construction under similar conditions. A witness named Bourci, who lived in the house adjoining the place where the break in the main was found, gave testimony from which the jury could have concluded that the bottom of the main was laid directly upon the top of the sewer. It is true that the cross-examination of this witness brought to light a number of circumstances which were well calculated to impeach the correctness of his observations or the credibility of his statements, but that was a matter for the jury. Another witness, Hoyne, testified that he was called to repair the break in the main; that in excavating for that purpose the broken part of the main was found resting on the top of the sewer; that the main on both sides of the sewer had sagged; and that it was necessary to pry off about two inches from the top of the sewer in order to make a proper resting place for the main. Although there is a manifest inconsistency between the statement of this witness to the effect that the main rested upon the sewer, and his other statement that there was a wooden wedge between the main and the sewer, that also presented a discrepancy for the consideration of the jury, since neither statement is distinctly antagonistic to the plaintiff's theory of the defendant Bradley's alleged negligence. Another witness, Keller, testified that he was a member of Hoyne's repair gang, and that the main was found resting on the crown of the sewer and broken at that point across the top. On Hoyne's cross-examination, he testified that he found a bed block under one end of the

main but did not examine the other end, and he also stated that the ground looked as though it had been filled in considerably.

Counsel for Bradley argued very forcefully that the discovery of the wedge between the sewer and the main is no more evidence of the defendant Bradley's negligence than the statement of witnesses tending to show that the main, when uncovered after the flood, was resting directly upon the crown of the sewer; and that none of the discoveries made after the accident can be regarded as reliable evidence of the conditions which antedated the accident. This very cogent argument will be proper and perhaps effective before a jury, but it cannot be permitted to influence our decision, for it deals wholly with questions of fact. The case is very near the border line between fact and law. Under the rule which entitles the plaintiff to all of the most favorable inferences which are fairly deducible from the testimony given in his behalf, we incline to the view that the plaintiff had the right to have his case against Bradley submitted to the jury.

For the foregoing reasons the judgment of the courts below is affirmed, with costs, in favor of the city against the plaintiff, reversed as between the defendant Bradley and the plaintiff, and a new trial ordered as against the defendant Bradley, with costs to abide the event.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Judgment accordingly.

(129 N. Y. 479.)

MOSLER SAFE CO. v. MAIDEN LANE SAFE DEPOSIT CO.

(Court of Appeals of New York. Nov. 15, 1910.)

1. APPEAL AND ERROR (§ 1094*)—UNANIMOUS AFFIRMANCE BY APPELLATE DIVISION—EFFECT—FINDINGS.

Where a judgment for plaintiff was unanimously affirmed by the Appellate Division, it will be conclusively presumed, on a further appeal to the Court of Appeals, that the finding of the jury was sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

2. DAMAGES (§ 85*)—LIQUIDATED DAMAGES—DELAY.

Since parties to a contract are entitled to insert any stipulations they may agree on, which are neither unconscionable nor contrary to public policy, they may agree that certain sums shall be paid by one to the other as liquidated damages for a failure to complete the contract within a specified time.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. § 85.*]

3. DAMAGES (§§ 79, 80*)—CONTRACT DAMAGES—LIQUIDATED DAMAGES OR PENALTIES.

Whenever damages flowing from a breach of contract can be easily ascertained, or the

damages fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty; but if the damages are uncertain or difficult if not incapable of ascertainment, then the agreement of the parties to liquidate them in anticipation of a breach will be enforced.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-175; Dec. Dig. §§ 79, 80.*]

4. DAMAGES (§ 79*)—LIQUIDATED DAMAGES—DELAY—NATURE OF CONTRACT.

Defendant safe deposit company contracted with plaintiff for the construction of a fireproof vault, for a fireproof and burglar proof safe, and for a fire and burglar proof vault; the work to be completed by a specified date. The contract provided that time should be of the essence thereof, and that the contractor should pay a specified sum as liquidated damages for each day's delay in the completion of the work. *Held*, that such contracts were within the class in which damages from a failure to complete the work contracted for by the date fixed would be uncertain, if at all capable of exact ascertainment, and the amounts specified, not being plainly disproportionate to the injury, were properly regarded as liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-169; Dec. Dig. § 79.*]

5. DAMAGES (§ 85*)—CONSTRUCTION CONTRACT—LIQUIDATED DAMAGES—DELAY—WAIVER OF PROVISIONS—RENEWAL.

A contract for the construction of certain vaults and safes provided that time should be of the essence of the contract, and that the contractor should pay certain sums as liquidated damages for delay. The specifications declared that, if the owner should desire any alterations or deviations, they should not annul the contract, and that in such event an allowance should be made therefor by the architect, etc. The contract contained no provision against forfeiture of the right to liquidated damages in case of delay caused by the owner, or agreement that the architect might certify an extension of time for completion if the contractor was so delayed, etc. *Held* that, where the contractor was delayed by the act of the owner or of the architect, the liquidated damage provision was waived and could not be renewed, under the rule that there can be no apportionment of damages for delays caused by mutual fault under such circumstances.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 184; Dec. Dig. § 85.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Mosler Safe Company against the Maiden Lane Safe Deposit Company. From a judgment for plaintiff, unanimously affirmed by the Appellate Division (123 N. Y. Supp. 1130), defendant appeals. Affirmed.

Alfred Wheat, for appellant. Benjamin N. Cardozo and Malcolm Sundheimer, for respondent.

GRAY, J. The plaintiff, in this action, has sought to recover the balance of the moneys due under three contracts with the defendant, which provided for the construction, in one, of a fireproof vault, in another, of a fireproof and burglar proof safe, and, in another of a fire and burglar proof vault. These contracts were, substantially, the same in their general provisions and each called for the completion of the work by a fixed date. Each contained an agreement for

liquidating the damages, in the event of non-completion by the time fixed; the several agreements differing only in the amount. The agreement in the first contract reads "that time is of the essence of this contract, and whereas failure to thus complete the work within the time mentioned will cause serious loss and damage to the second party (the defendant), the precise extent of which might be difficult of estimation in money, the first party (the plaintiff) agrees to pay the sum of \$25 per day to the second party as liquidated damages for each day's delay in the completion of said work." In the second and third contracts, the amount is fixed at \$25 and at \$150, respectively. The answer of the defendant to the three causes of action, founded upon these three contracts, admitted due performance by the plaintiff, except as to the time of completion, and set up counterclaims for the liquidated damages provided in each contract to be paid, upon the basis of the number of days, which had elapsed after the date fixed for completion. There was no dispute as to the number of days' delay, which ranged from 117 days, under the first contract, to 211 days, under the second contract, and to 193 days, under the third contract. At the trial of the action there was much evidence bearing upon the subjects of the preparation and approval of the various drawings, designs, and detail plans, and of the conduct of the parties and of the defendant's architect, with reference thereto. It was the contention of the plaintiff that it showed that the defendant delayed the progress of the work in deviation from the plans and in unreasonable omissions to pass upon the drawings, and that, in such, and in other ways, it was prevented from completing the work by the latter's default. The defendant contended that the evidence did not show it to be responsible for the delay, and that, so far as the acts of its architect were concerned, he was superintending the work, under the agreement, and had acted in good faith. As to the first cause of action for the fireproof vault, the plaintiff did not dispute its liability for the delay, and the jury was directed to allow the defendant its counterclaim in full. As to the other claims of the plaintiff, upon the second and third causes of action, the trial judge instructed the jury, in substance, that the defendant was entitled to recover damages, as stipulated in the contracts, for the delay in completing the work, unless they were satisfied that a substantial part of said delay was caused by its own acts, or those of its architect. The jury returned a verdict in the plaintiff's favor, and the judgment thereupon entered has been affirmed by the unanimous vote of the justices of the Appellate Division. Upon this appeal by the defendant, we must presume that the evidence was sufficient to sustain the finding of the jury that the defendant was respon-

sible for a substantial part of the delay in the completion of the contracts.

The correctness of the judgment below is attacked upon the ground that the court erred in its instructions to the jury upon the law, and the following rulings raise the question we are to consider: At the plaintiff's request, the trial judge charged as follows: "If any substantial part of the delay in the completion of said vault (or of the fireproof safe, in the other cause of action) was caused by the wrongful acts of the defendant or its architect, or by alterations or deviation from the plans and specifications, or by the failure to approve drawings within a reasonable time, or by arbitrary and capricious acts, the entire cause for liquidated damages was canceled and abrogated, and the defendant is not entitled to recover the same." The trial judge refused to charge, at the defendant's request, that it was "entitled to recoup the liquidated damages for each and every day that the contract time was exceeded by the time of the actual performance, which was not caused by any act, or fault, of the defendant, or the superintendent"; or that "if the jury believed that there was any delay occasioned by the arbitrary, or unreasonable, act of the defendant, through the action of the superintendent, or otherwise, then the jury must consider what would have been a reasonable time to complete, after allowing to the plaintiff the time in which it was delayed." To these rulings, and to others raising the same questions of law, the defendant excepted.

The appellant, preliminarily, contends that it was erroneous to submit to the consideration of the jury the acts of the architect, in passing upon the question of the responsibility for the delay; inasmuch as his acts were not impeachable except for fraud, or bad faith. It is argued that he was acting, throughout, under the provisions of the contract and in such a capacity, as between the parties, that his acts could not be questioned, unless so arbitrary and capricious as to indicate fraud or bad faith. Without discussing that point at any length, I think it will suffice to say that, while the contract did constitute the architect named therein the final arbiter in disputes "regarding the construction of the specifications" and "as to whether materials used and work done were according to their true intent and meaning," he was, in other respects, the agent of the appellant. It was provided that the work was to be done to his satisfaction and under his direction, and in determining upon the plans and drawings, or upon changes therein, or in the work, he was the representative of the appellant. It was not necessary, if the jury believed that through any acts of his, or through his omissions to act within a reasonable time, substantial delays in the completion of the work were caused, that his conduct should

indicate fraud or bad faith. The question was whether the appellant, through its architect, or otherwise, was responsible for materially delaying the respondent in the completion of the work within the time specified. The question of the architect's good, or bad, faith was not material.

It having been conclusively determined that the defendant was responsible for a substantial part of the delay in the completion of the work, the principal question arises upon the instruction of the trial court that thereby the right to counterclaim for the liquidated damages was abrogated. So far as I am aware, this court has not pronounced upon this precise question, and the courts below, in determining as they have, have followed (as I infer, in the absence of the expression of any opinion) the rule as it has been asserted in decisions of the courts in England and of the Appellate Division of the Supreme Court of this state. See *Holme v. Guppy*, 3 M. & W. 387; *Dodd v. Churton*, 1 Q. B. 562; *Willis v. Webster*, 1 App. Div. 301, 37 N. Y. Supp. 354.

That this was a valid provision of the contracts liquidating the damages to result from the contractor's delay, and not a penalty, I entertain no doubt, and, though a disputed question upon the trial, the respondent is not very seriously questioning it on this appeal. Parties to contracts have the right to insert any stipulations that may be agreed to; provided that they be neither unconscionable, nor contrary to public policy. No rule of law forbids them from agreeing between themselves with respect to the anticipatory damages, which shall be occasioned by the failure to complete the contract within the time specified. When they have done so, their declaration, in the event anticipated, that the sum fixed is a liquidation of the damages, or a penalty, is not conclusive, and its interpretation is for the court, having regard to the nature of the contract and the circumstances. It may be observed, generally, that whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are, plainly, disproportionate to the injury, the stipulated sum will be treated as a penalty. Where, however, the damages resulting from the breach would be uncertain, or difficult, if not incapable, of ascertainment, then the agreement of the parties liquidating them, in anticipation, will be enforced. In *Ward v. Hudson River Building Co.*, 125 N. Y. 230, 235, 26 N. E. 253, 257, this question was discussed upon the authorities, and we considered it difficult to lay down any general rule, applicable to all cases. It was said that, where parties "have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss, it

will be treated as liquidated damages." I think that these contracts come well within the class of cases, in which the presumable damage from the failure to complete the work contracted for by the date fixed would be uncertain, if at all capable of exact ascertainment. Time was considered to be of the essence of the contract, and it was so stated therein. It is inferable that, when making the contracts for the construction of these vaults and safes, the owner must have regarded it as most important that the investment of capital should be made productive at the earliest possible moment. It was in mind, presumably, that to agree to liquidated damages, covering each day's delay, would act as a spur upon the contractor and would save to the owner the delays and expense of an action at law to recover the actual damage he might be able to prove. But it is obvious, as I think, that the very reason for sustaining the validity of an agreement for liquidated damages, in such contracts as the present ones, as a reasonable and fair provision, also, suggests how essential it is that the owner shall be able to show strict compliance on his part, and that the contractor's obligation has not been released, nor affected, by his interference, or dilatory action. In requiring this agreement to pay liquidated damages, it is to be presumed that the appellant intended, when called upon to act, to co-operate with all possible diligence with the contractor, and that the latter's situation was such at the time and its arrangements were so ordered as to enable it to complete the work within the time fixed. While such an agreement has not the harshness of a penalty, it is, nevertheless, in its nature, such that its enforcement, where the party claiming the right to enforce has, in part, been the cause of delay, would be unjust. It is a reasonable view of the situation that denies, in such a case, the right to strict enforcement, and, where both parties are at fault with respect to the delay, remits the injured party to the remedy of an action at law, in which he can recover his actual loss from the contractor's failure to complete within what was a reasonable time. It was competent for the parties, anticipating mutations of mind and of conditions, to have provided against a forfeiture of the right to liquidated damages by further agreeing that the architect was empowered to certify an extension of the time for completion, if the contractor was delayed in his work in certain specified events, or by causes specified. With such a provision, the obligation to pay liquidated damages might be preserved and its commencement deferred to a substituted date. Without such a provision, where, by the mutual fault of the parties, the contractor's original obligation has been put at end to, how could he come under a new obligation to pay the liquidated damages from some subsequent date? Such an obligation could not be renewed except by some express

agreement. Its nature forbids inferring its renewal. An apportionment of the fault is impossible under such a contract. *Weeks v. Little*, 89 N. Y. 586; *Willis v. Webster*, supra. The rule that there can be no apportionment of the damages for delays caused by mutual default has, also, been asserted in the federal courts. See *Caldwell & Drake v. Schmulbach* (C. C.) 175 Fed. 429.

In *Willis v. Webster*, a well-considered case, and one in which the question arose upon a substantially similar state of facts, it was forcibly said that, where "liquidated damages are to be sustained after a given day, the plaintiff (contractor) is entitled to know with precision when he is laboring under such an obligation, and not be required to leave it to the judgment of a jury as to what is a reasonable time. It is impossible under the contract to apportion liquidated damages. Either the liability for the liquidated damage exists, or it does not. It cannot half exist and half be waived. In the case at bar there was a definite contract, which was abrogated by the acts of both parties; and it requires equally concerted action to breathe life into it again." Page 305 of 1 App. Div., page 356 of 37 N. Y. Supp. In *Halsbury's Laws of England* (volume 3, p. 243), the doctrine of the English cases is summed up in the following language: "Where the liquidated damages are stipulated at so much per day or per week, there must be a definite date from which they are to run. If no such date is fixed by the contract, or if by the operation of intervening circumstances the date fixed by the contract has ceased to be operative, and there is no provision in the contract under which another date can be substituted, all right to recover the sum stipulated for as liquidated damages has been put an end to, because there is no date from which the penalties can run." In *Dodd v. Churton*, 1 Q. B. 562, which Lord Halsbury cites in support of the rule, the contract provided that the work should be completed by a certain day, and, in default of such completion, the contractor should be liable to pay liquidated damages. In construing the contract, Chitty, L. J., said: "The law on the subject is well settled. The case of *Holme v. Guppy*, 3 M. & W. 387, and the subsequent cases in which that decision has been followed, are merely examples of the well-known principle stated in *Comyns' Digest*, Condition L. (6) that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in *Russell v. Bandeira*, 13 C. B. (N. S.) 149. This principle is applicable, not to building contracts

only, but to all contracts. If a man agrees to do something by a particular day, or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time."

The appellant founds an argument upon the provision of the specifications that, if the defendant should require any alteration, or deviations, "the same could be made without annulling, or invalidating, the contract," and, in such event, that "an allowance shall be made for the same on one side or the other, as the case may be," by the architect, etc. I do not see that this affects the question differently. The provision operated to prevent the plaintiff from claiming that the contract was invalidated. It could not renew the obligation to pay liquidated damages, which had been put an end to by delays, for which the appellant was, in part, responsible. A provision of the contract in *Dodd v. Churton*, supra, was relied upon by the defendant, to the effect that any authority given by the architect for any alteration, or addition, in or to the work, was not to vitiate the contract. It was held "that this provision, however interpreted," did not reach the length contended for; that it did not "amount to a contract to do all the work, including any extras that may be ordered, within the time specified for the performance of the original work." "The provision," it was said, "is that the contract is not to be vitiated, i. e., that it is to stand; but that does not exclude the application of the principle stated in *Comyns' Digest*, to which I have referred."

The doctrine of the English cases, to which I have referred, and of the case of *Willis v. Webster*, supra, decided by the Supreme Court of this state, is salutary and just, and I think we should approve of it. Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and, in the absence of some provision under which another date can be substituted, it cannot be revived. If the respondent failed to complete within a reasonable time after crediting the appellant's delays, then the latter had a cause of action for the former's neglect, and the measure of damages would be the actual loss proved to have been sustained.

For these reasons, I advise the affirmance of the judgment.

HAIGHT, VANN, WERNER, and CHASE, JJ., concur; CULLEN, Q. J., not voting.

Judgment affirmed, with costs.

(247 Ill. 81.)

AMBLER v. GLOS et al.

(Supreme Court of Illinois. Oct. 28, 1910. Re-hearing Denied Dec. 9, 1910.)

1. TAXATION (§ 818*)—CANCELLATION OF TAX TITLE—COSTS.

A decree canceling a tax title as a cloud on title cannot adjudge the costs against the holder of the tax title, where the owner of the paramount title does not tender the taxes, costs, and interest before filing his bill and keep the tender good.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1618; Dec. Dig. § 818.*]

2. APPEAL AND ERROR (§ 1207*)—PROCEEDINGS IN LOWER COURT AFTER MANDATE—DECREE.

A decree canceling a certificate of purchase at a tax sale, which finds that a specified sum was brought into court and tendered to the holder of the certificate in payment of all moneys paid by him on account of the certificate and costs and expenses of the sale, and a subsequent order reciting that the deposit is held by the clerk, conform to the mandate of the Supreme Court directing a decree providing for the cancellation of the certificate on the holder thereof being reimbursed, though a colloquy in the record between attorneys refers to the offer of a check; there being nothing in the record to show there was not a legal tender, and the decree reciting that the money, after having been offered the holder in open court, was paid to the clerk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4699; Dec. Dig. § 1207.*]

3. APPEAL AND ERROR (§ 1207*)—PROCEEDINGS IN LOWER COURT AFTER MANDATE—DECREE.

A decree which conforms to the judgment of the Supreme Court on appeal and the mandate issued thereon is not erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4696-4699; Dec. Dig. § 1207.*]

4. APPEAL AND ERROR (§ 248*)—QUESTIONS REVIEWABLE—EXCEPTIONS.

A ruling of the trial court, to which no exception was taken, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. § 248.*]

Appeal from Circuit Court, Cook County; Adelor J. Petit, Judge.

Application by Mittie C. Ambler against Jacob Glos and others to register title to land. From a decree for the applicant, defendant August A. Timke appeals. Modified and affirmed.

John R. O'Connor, for appellant. Bulkley, Gray & More, for appellee.

COOKE, J. This is the second time this case has been before us. The opinion in the former appeal is found in *Ambler v. Glos*, 237 Ill. 637, 86 N. E. 1113, where the matters in issue are fully set out, and to which we refer. On that appeal the decree of the circuit court was reversed, because of the erroneous finding that a tender had been made to August A. Timke, and the cause was remanded, with directions to enter a decree in substance as that appealed from, except that it should provide for the cancellation of

the certificate only upon Timke's reimbursement, precisely as though no tender or payment had been made to Glos. Upon the filing of the remanding order in the circuit court, a decree was entered in conformity with that order, with the exception that it adjudged the costs against the defendant August A. Timke. From this decree Timke has prayed an appeal, and numerous assignments of error have been made, only four of which are relied upon here. The assignments relied upon are: That it was error to adjudge costs in the court below against appellant; that the court failed to require appellee to reimburse appellant, as directed by the mandate; that appellant is required by the decree to produce the certificate of sale within 10 days for cancellation; and that appellant was not allowed to offer proof that a deed had been issued on said certificate of sale.

The decree was reversed on the first appeal for the reason that the court erroneously found that a proper tender had been made to the appellant, and when the cause was remanded, with directions to enter a decree in substance the same as that appealed from, except that it should provide for the cancellation of the certificate only upon Timke's reimbursement, precisely as though no tender or payment had been made, it necessarily followed that the decree should have adjudged the costs against the applicant, who is the appellee here. The rule is, in cases of this character, that where the owner desires to place the holder of a tax title in the wrong, so as to relieve himself from the payment of costs, he should make a tender of the taxes, costs, and interest before filing his bill, and keep such tender good by bringing the money into court; and if he fails in that requirement it is error to decree costs against the defendant. *Kenealy v. Glos*, 241 Ill. 15, 89 N. E. 289, and cases there cited. No such tender had been made to Timke, and it was therefore error for the court to adjudge the costs against him.

In support of the second contention, appellant urges that reimbursement was not made as directed by the mandate, and that it was error for the court to decree the relief prayed until reimbursement was made. The decree of the court specifically finds that the sum of \$61 was brought into court and tendered to appellant in full payment of all moneys paid out by him on account of the certificate of sale, and in full of all costs and expenses in and about said sale, and a subsequent order of the court recites that the deposit of \$61 theretofore made under the decree be held by the clerk of the court. No question is made of the amount tendered; but appellant contends that this amount was not offered in legal tender, but was offered in the form of a check, and to substantiate this claim relies upon a colloquy, which appears

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the record, between his solicitor and the solicitor for the appellee, wherein his solicitor designated the offer as being in the form of a check. There is nothing in the record to show that this was not a legal tender; but, on the contrary, the decree of the court held it to have been such, and recites that the money, after having been offered appellant in open court, was paid to the clerk.

In support of his third contention, appellant asserts that it was error to require the surrender of the certificate in any event; and in support of the fourth assignment argued, relies upon a statement made by his solicitor in court, and which appears in the record, to the effect that since the entering of the first decree herein a deed had been issued on the certificate of sale, and an oral motion to file an amended answer instant and for leave to offer proof of that fact. The court refused to allow the amended answer to be filed; but no exception was taken to this action of the court, which is assigned here as error. The decree in respect to the surrendering of the certificate for cancellation is in accordance with the judgment in the former appeal and the mandate issued thereon, and the court committed no error in so decreeing.

The decree of the circuit court will be modified, by providing that appellee pay the costs in that court, and that appellant have execution therefor. In all other respects the decree is affirmed.

Decree modified and affirmed.

(247 Ill. 34)

GLADVILLE v. McDOLLE et al.

McDOLLE v. SMITH et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. WITNESSES (§ 150*)—COMPETENCY—PARTIES CLAIMING AS HEIRS.

A party and her husband are incompetent witnesses, where the adverse parties are prosecuting or defending the action as heirs.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 655; Dec. Dig. § 150.*]

2. SPECIFIC PERFORMANCE (§ 28*)—VERBAL CONTRACT FOR LAND—EVIDENCE OF CONTRACT.

A condition to specific performance of a verbal contract for sale of land is that it be proved by competent evidence, and be shown to be clear, definite, and unequivocal in its terms.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

3. SPECIFIC PERFORMANCE (§§ 44, 45*)—VERBAL CONTRACT FOR LAND—PAYMENT.

Payment of the purchase money alone, or the mere performance of personal services, which can be estimated in money, is not enough to take a verbal contract for sale of land out of the statute, so as to authorize its specific performance, there being a remedy at law, by recovery of the money or for the services.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 126, 127; Dec. Dig. §§ 44, 45.*]

4. SPECIFIC PERFORMANCE (§ 46*)—VERBAL CONTRACT FOR LAND—POSSESSION.

The mere fact of possession by the purchaser does not justify specific performance of a verbal contract for sale of land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 127; Dec. Dig. § 46.*]

5. SPECIFIC PERFORMANCE (§ 39*)—VERBAL CONTRACT FOR LAND—BASIS FOR RELIEF.

The basis for relief by specific performance of a verbal contract for sale of land, invalid at law, is the equitable fraud resulting from setting up the statute of frauds as a defense.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 114-119; Dec. Dig. § 39.*]

6. SPECIFIC PERFORMANCE (§ 45*)—VERBAL CONTRACT FOR SALE OF LAND.

Where it was verbally agreed that one should live with the owners of land and conform to their strict ideas as to her social conduct till she was married, and that on their death she should have the land, and she fully performed her part thereof, and there can be no recovery at law, because of the bar of limitations, for her labor, sacrifices, and deprivations during the 10 years she so lived with them, worth as much as the land was then worth, specific performance will be granted.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 127; Dec. Dig. § 45.*]

7. SPECIFIC PERFORMANCE (§ 41*)—VERBAL CONTRACT FOR SALE OF LAND—POSSESSION.

It is no reason for refusing specific performance to one of the verbal contract of the owners of land that she should have it on their death, in consideration of her living with them on certain conditions till she married, that prior to their dying she had no more than constructive possession; the contract not entitling her to more.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 41.*]

8. SPECIFIC PERFORMANCE (§§ 22, 24*)—PERSONS AGAINST WHOM PERFORMANCE MAY BE ENFORCED.

A contract by the owners of land that another should have it after they died may be specifically performed against their heirs and against the heirs of one to whom the land was conveyed without consideration and with knowledge of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 51-55; Dec. Dig. §§ 22, 24.*]

Farmer and Dunn, JJ., dissenting.

Appeal from Circuit Court, Moultrie County; W. G. Cochran, Judge.

Two suits, one by John McDole against Flora Smith and others, the other by Eva Gladville against John McDole and others, were consolidated, and from the decree said Gladville appeals. Reversed and remanded, with directions.

E. J. Miller, for appellant. John E. Jennings and W. K. Whitfield, for appellees.

CARTWRIGHT, J. John McDole, brother of Phebe Jester, deceased, and one of her heirs at law, filed his bill in the circuit court of Moultrie county against her nephews, nieces, and grandchildren for the partition of a tract of land containing 30 acres, of which she held the legal title at the time of her death. Eva Gladville, one of the nieces,

filed her bill in the same court against the other parties for the specific performance of an alleged verbal agreement with John P. Jester, deceased, when he held the legal title to the land, to which agreement Phebe Jester was also a party, by which said Eva Gladville was to have the property after their deaths in consideration of personal services rendered to them. The causes were consolidated, and the evidence was taken before the master in chancery. The consolidated cause was heard by the court on such evidence and the depositions of witnesses, and the court dismissed the bill of Eva Gladville without prejudice to her right to proceed to recover compensation for her services rendered under the contract, found in favor of a mortgagee who held a mortgage for \$300 on the land and who filed a cross-bill, and found in favor of the complainant, John McDole, on his bill for partition. By the decree partition was ordered, and Eva Gladville prosecuted her appeal to this court.

Eva Gladville, one of the defendants in the bill for partition and complainant in the bill for specific performance, and her husband, testified before the master, and objection was made to their testifying. On the hearing the court did not make any ruling as to their competency, and, so far as appears, considered their testimony; but they were disqualified by the fact that the other parties were prosecuting and defending as heirs at law of Phebe Jester. Eva Gladville and her husband were not competent witnesses, and their testimony will not be considered in this court. *Heintz v. Dennis*, 216 Ill. 487, 75 N. E. 192. There were some other minor objections to testimony which it will not be necessary to notice in detail.

The facts shown by competent evidence are as follows: When Eva Miller (now Eva Gladville) was 10 years old, her mother died and her father married again. She was a niece of Phebe Jester, wife of John P. Jester, and when she was 11 years old they took her to their home. They then had a son about two years younger than Eva, and she lived with them, working about the house and place, going to school a very little—enough to learn to read and write—and when she was 18 years old the son died. John P. Jester and his wife were very religious people and were exceedingly strict with Eva. They took her to church and Sunday school, but objected to her having any social pleasures or going in company with other young people. She was quite unhappy about the restrictions, especially when she was invited by neighbors, and on one occasion when she had assisted in getting up a social affair. That was in 1887, after the death of the son, and John P. Jester then proposed to her that, if she would stay with them and conform to their views about going out in company and to social gatherings until she should be married, she should have all their property after they died. She agreed to the proposition,

and Phebe Jester was a party to it equally with her husband. The agreement was clearly proved by disinterested witnesses about whose testimony there can be no suspicion whatever, and for the next 10 years, until Eva was 28 years old and was married, she conformed in every respect to the agreement. Mrs. Jester was a frail woman, in ill health, and confined to her bed frequently, and Mr. Jester was not in good health. The land was hilly clay land, with about 10 acres of river bottom subject to overflow, and it was not valuable land, although it has advanced considerably in value, and the improvements were poor. Eva did the housework, with no assistance except occasional help in emergencies, milked the cows, made the garden, carried in the wood and kindling and frequently chopped the wood, worked in the field, planted corn, hoed corn, shocked wheat, drove the harrow, worked in the hayfield, and filled the place of a regular hand on the farm. The doing of the housework was worth from \$3.50 to \$4 a week, and she had an opportunity to work out at housework at \$3.50 per week but did not do so because of her contract. Including the outside work and farm work, her services were worth from \$5 a week to \$1 a day for the 10 years, and it would have been practically impossible to secure for any price one who would do the same work and forego all social pleasures and the company of young people. John P. Jester did not like to have Eva have any company, and said he was afraid if she got to going with the boys she would get married and leave them, and they needed her help. She had some means of her own from her mother's estate, which was probably not very much; but she let Mr. Jester have it, and he paid her some interest, which she expended for clothes whenever she wanted anything extra in that line. She was married in 1897. Soon after her marriage she was sent for and stayed with the Jesters four weeks, and afterward assisted them in sickness at frequent intervals, staying there one or two weeks at a time. Neither Mr. Jester nor Mrs. Jester was in good health, and after the marriage the husband of Eva Gladville bought shingles, which he gave, and he with others put them on the house, donating the work. There was no objection to the marriage; but Mr. Gladville had a habit of drinking intoxicants, and whenever he got drunk Mr. Jester would worry and talk about fixing the land so that Eva and her children would have it and her husband could not "run through with it." Both Mr. and Mrs. Jester stated the contract to other people, and after children were born to Eva they sometimes said that she and her children were to have the land, or that they wanted her and her children to have it; but there is not a particle of doubt of the nature of the contract, or that she was to have the property if she performed it on her side. When the contract was made, she had no

children and did not contemplate marriage, and nothing was said about children or the possibility of children. She continued after her marriage to do everything for the Jesters that she could, although not specified in the contract, and when they were sick and she was wanted she went to their home and stayed there, doing the work at different times without any compensation, so long as they lived. John P. Jester undoubtedly entertained the belief that he could provide that the property should go to Eva and her children, and he made a number of wills and a codicil, which were either not executed or were revoked by cutting out his signature, the general effect of which was to devise the property to his wife for her life, with remainder to Eva Gladville and her children or in trust for her children. When the codicil was written, his direction was to have it so that the husband of Eva could not dispose of the land and so that it would go to her and her children, and he said that he had a contract with Eva before she was married to leave her the property and she had performed her part of the contract. On March 30, 1907, he executed a warranty deed to his wife, Phebe Jester, of the land, with provisions that he should have full control of it during his life, and if he survived his wife the land should revert to him. His wife did not join in the deed and it did not release his homestead. Ten days after making that deed he died, and a will made by him was admitted to probate by which he gave all the property to his wife for life and then to be disposed of by her in any way or manner she might see fit to dispose of it. The widow, Phebe Jester, occupied the premises something less than a year and died intestate on February 10, 1908. Phebe Jester frequently stated, both before she received the legal title and afterward, that Eva was to have the property, and a few days before her death she directed Eva to get a black bag on the big bureau and bring it to her. She then gave Eva the keys and told her to get the door key that was hanging up. Eva got the keys and put them in her pocket and kept them and after the death of Phebe Jester retained possession of the property. Eva cared for Mrs. Jester in her last illness and the relations between them were most intimate and affectionate. There were in evidence three papers with the signature of Phebe Jester, saying that she wanted all her real and personal property to go to Eva and her children. There was some difference of opinion among the witnesses as to the handwriting, but the writings have no legal effect. There was some testimony that she said she wanted the land divided among her heirs, which has no more effect than the papers just referred to. Neither would authorize any decree as to the title, and the rights of the parties depend upon the contract and the question whether it can be enforced.

The contract was verbal, and in such a case

it must be proved by competent evidence and be clear, definite, and unequivocal in its terms. *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553. The evidence fully satisfied that requirement. It was also proved, and not contradicted, that Eva Gladville fully performed the contract in accordance with its terms, and the only question to be determined is whether she is entitled to a specific performance of it, although it was within the statute of frauds and invalid at law. The invalidity consisted of the fact that it was not reduced to writing and signed, and no action at law will lie upon such a contract. The courts of equity, however, will not permit the statute of frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to accomplish a fraud, and where a verbal contract has been performed, either fully or in part, by the party seeking the remedy, and the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court of equity will not listen to that defense. If the defendant has knowingly permitted the complainant to do acts in performance of the verbal agreement and in reliance upon it, which change the relation of the parties and prevent a restoration to their former condition by a recovery at law of compensation for the acts performed, it would be a fraud on the complainant to permit the defense to be made, and the statute, which is intended to prevent fraud, would be made the means of fraud. In equity the rights and duties of the parties are the same as they would have been if the contract had been written and signed, and, unless the one who has performed the contract in good faith can be made whole in damages, he is left without any adequate remedy at law, and equity will compel the other party to do the thing which was agreed to be done. 3 Pomeroy's Eq. Jur. § 1409; 26 Am. & Eng. Ency. of Law (2d Ed.) 50. Payment of purchase money, alone, will not take the contract out of the statute, for the reason that it can be recovered back, with interest, in an action at law. *Temple v. Johnson*, 71 Ill. 13. The same is true of personal services, which can be estimated in money, for which a recovery can be had in law, because the law would in that case afford a sufficient remedy. In this case there could be no recovery at law for the labor, sacrifices, and deprivations of Eva Gladville during 10 years of service, which were worth as much as the land was then worth, for the reason that any claim for them was outlawed by the statute of limitations long ago. The mere fact of possession, without other circumstances, would not justify a decree for a specific performance, and in most cases the use of the land would be a full compensation for all injuries sustained. The basis for relief in a court of equity is the equitable fraud resulting from setting up the statute of frauds as a defense, and there have been many cases in this court

where equity has afforded a remedy by specific performance if the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages awarded which would be full compensation. In contracts between parties for the conveyance of land there is usually a provision for possession under the contract at some time, and naturally one of the most frequent acts of part performance is taking possession and making improvements on the land. This court has enforced specific performance of verbal contracts where such possession has been taken, coupled with payment of the purchase price, and especially if lasting and valuable improvements have been made. *Ramsey v. Lliston*, 25 Ill. 114; *Langston v. Bates*, 84 Ill. 524, 25 Am. Rep. 466; *Smith v. West*, 103 Ill. 332; *McNamara v. Garrity*, 106 Ill. 384; *Irwin v. Dyke*, 114 Ill. 302, 1 N. E. 918; *Hall v. Peoria & Eastern Railway Co.*, 143 Ill. 163, 32 N. E. 598. And a contract invalid at law may be specifically enforced against the heirs of a party to such contract. *Simonton v. Godsey*, 174 Ill. 28, 51 N. E. 75.

Much of the argument against the right to a specific performance is devoted to the claim that Eva Gladville did not have possession of the land in the lifetime of John P. Jester or Phebe Jester, and that there can be no decree for specific performance without such possession. The keys were delivered to her by Phebe Jester a few days before the death of Phebe Jester, and she was put in such possession of the property as was consistent with existing conditions and circumstances. But if there was no actual possession, and it was merely constructive, it cannot be that equity will deny a remedy upon that ground, alone, where the result would be to accomplish a fraud. The cases where possession has been regarded as of controlling importance are cases where the purchaser became entitled to possession under the terms of the contract; but in this case Eva Gladville was not entitled to possession in the lifetime of John P. Jester or Phebe Jester, but by the very terms of the contract was to have such possession after they died, and she took and has held actual possession ever since the death of Phebe Jester. To say that possession in the lifetime of the other party by one claiming under a verbal contract is indispensable to any remedy in equity would be to say that there can be no remedy where the complainant did not become entitled to possession until the death of the other party, although such a rule would operate as an unmitigated fraud. The ground for interference by a court of equity being that there have been such acts of performance on the part of one claiming the benefit of the contract as would compel him to suffer an injury amounting to a fraud if

the statute is interposed as a defense, it would be as anomalous as it would be absurd to recognize nothing as performance except taking possession of the land when a party could not lawfully take such possession. To permit the defendants to the bill of Eva Gladville to repudiate the contract because she did not have possession before she became entitled to it, when she has performed her contract and cannot be compensated except by an enforcement of it, would be to perpetrate a fraud equal to any other.

In *Warren v. Warren*, 105 Ill. 568, the court considered questions of possession and improvements, and said that the plaintiff in error in that case had possession so far as the premises were capable of being possessed by her under the circumstances of the case, and after her father's death she was in the open, notorious, visible, and undisputed possession. She had made no improvements, but it was said that this was not indispensable to a part performance necessary to take the case out of the statute. She was given relief under the rule that there had been a performance of such acts under the contract that if it was not carried out they could not be compensated in damages, and if the contract was not fully performed it would operate as a monstrous fraud upon her. The principle of that case was reaffirmed in *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, and was re-enforced by many authorities. In neither of those cases was the complainant entitled to possession until after the death of the other party to the contract, and neither of them had or could have had possession under the contract, which would have been contrary to its terms. If this complainant cannot have her contract performed because she had nothing but constructive possession before the death of Mrs. Jester, the inequitable and unjust consequence would be that one can interpose the statute of frauds to defraud another who was not entitled to the possession. Phebe Jester was a party to the original contract and arrangement and had all the benefit of the services of the complainant that John P. Jester had, and, indeed, much more. She received the title to the land without consideration and with knowledge of the contract and the performance on her part by Eva Gladville, and the title conveyed to her was subject to the equities of Eva Gladville and is so subject in the hands of her heirs.

The decree is reversed, and the cause is remanded to the circuit court, with directions to dismiss the bill of John McDole and to enter a decree in accordance with the prayer of the bill of Eva Gladville, subject to the mortgage for \$300 and accrued interest.

Reversed and remanded, with directions.

FARMER and DUNN, JJ., dissenting.

(247 Ill. 112.)

BADGER v. MISSISSIPPI VALLEY PORTLAND CEMENT CO.(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)**1. STATUTES (§ 85*)—SPECIAL LEGISLATION.**

Practice Act 1907 (Laws 1907, p. 450) § 27, providing that any party to a cause of action, or his attorney, may place it upon the short-cause calendar on making an affidavit that he believes it will not take more than an hour to try, and on giving the opposite party 10 days' notice, is not in conflict with Const. art. 4, § 22, prohibiting special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. § 85.*]

2. CONSTITUTIONAL LAW (§ 249*)—SHORT-CAUSE CALENDAR—STATUTES—DISCRIMINATION.

Practice Act 1907 (Laws 1907, p. 450) § 27, allowing either party to place the suit on a short-cause calendar for trial, is not unconstitutional, as a discrimination against defendant, for limiting defendant's rights to an application within 60 days after issue joined, while plaintiff may apply at any time.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. § 249.*]

Appeal from Circuit Court, Cook County; M. W. Pinckney, Judge.

Assumpsit by Horace H. Badger against the Mississippi Valley Portland Cement Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

James M. Gwin, for appellant. Joseph Wright, for appellee.

COOKE, J. This is an action in assumpsit, brought by the appellee, Horace H. Badger, in the circuit court of Cook county, against the appellant, the Mississippi Valley Portland Cement Company, to recover for services as a bookkeeper. The declaration contains only the common counts. The plea of the general issue was filed, and upon affidavit and notice by appellee the cause was placed upon the short-cause calendar. The appellant objected to the jurisdiction of the court to try this cause on the short-cause calendar, and moved to strike the case from the calendar, for the reason that section 27 of the act in relation to practice and procedure in courts of record, approved June 8, 1907 (Laws 1907, p. 450), is unconstitutional. This motion was denied, and, the jury being waived, trial was had before the court, resulting in a judgment against appellant for \$3,345 and costs. From that judgment an appeal has been taken to this court.

The only question presented for review is the constitutionality of section 27 above referred to. That section provides that it shall be the duty of the clerk of each court of record to prepare a trial calendar, in addition to the regular trial calendar, to be known as the "short-cause calendar," and upon any party, his agent or attorney, in any suit at law pending in any court of record, filing an affidavit that he verily be-

lieves the trial of said suit will not occupy more than one hour's time, and upon 10 days' previous notice to all the other parties to the suit or their agent or attorney, such suit shall be placed by the clerk upon the short-cause calendar, but that the suit shall not be placed upon the short-cause calendar by the defendant unless he files his affidavit within 60 days after the suit is at issue. The contention of the appellant is that this section is in contravention of section 22 of article 4 of the Constitution.

Prior to the passage of the practice act of 1907 there was in force "An act to expedite the trial of certain suits at law in courts of record," approved June 1, 1889. Laws 1889, p. 222. The first section of that act is the same as section 27 of the practice act of 1907, except it provided that only the plaintiff, his agent or attorney, might procure the placing of the cause upon the short-cause calendar. The constitutionality of the act of 1889 was questioned in two cases decided by us, the first being the case of *Jensen v. Fricke*, 133 Ill. 171, 24 N. E. 515, and the second the case of *Louisville, New Albany & Chicago Railway Co. v. Wallace*, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787, in both of which we held that the act of 1889 was not special legislation, within the prohibition of section 22 of article 4 of the Constitution. In the latter case it was contended that as the first section of the act granted to the plaintiff, alone, the right to put a cause upon the short-cause calendar, and did not extend the same right to the defendant, the legislation was therefore unequal and partial, and the act unconstitutional. The present act extends to the defendant the privilege of having his cause placed upon the short-cause calendar, provided he does so within 60 days after the suit is at issue, and is less objectionable on the grounds urged than the act of 1889.

In view of the holdings in the cases just cited, the trial court committed no error in refusing to strike the cause from the short-cause calendar, and the judgment of the circuit court is affirmed.

Judgment affirmed.

(247 Ill. 92.)

PEOPLE v. COMMERCIAL LIFE INS. CO.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. CONTRACTS (§ 51*)—CONSIDERATION.

Any act which is a benefit to one party to a contract or a disadvantage to the other party is a valuable consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 223, 224; Dec. Dig. § 51.*]

2. INSURANCE (§ 28*)—LIFE INSURANCE—UNJUST DISCRIMINATIONS.

A life insurance company which gives to an insured the option to purchase within a specified time shares of its stock for a specified

price, lower than the market price, forming the main inducement for the taking of the policy silent as to his right to purchase stock, violates Act June 19, 1891 (Laws 1891, p. 148), prohibiting an insurance company from making any distinction or discrimination between insurance of the same class, and requiring the contract of insurance to be wholly expressed in the policy issued.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 84, 35; Dec. Dig. § 28.*]

3. STATUTES (§ 109*)—TITLE.

Const. art. 4, § 13, providing that no act shall embrace more than one subject which shall be expressed in the title, is complied with where all the provisions of an act relate to one subject indicated in the title, and are parts of it or incident to it or reasonably connected with it, or in some reasonable sense auxiliary to the object in view.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.*]

4. STATUTES (§ 113*)—TITLE.

Since the main purpose of Act June 19, 1891 (Laws 1891, p. 148), entitled "An act to correct certain abuses and prevent unjust discriminations of and by life insurance companies * * * between insureds of the same class * * * in the rates, amount or payment of premiums, and the return of premiums, dividends, rebates or other benefits," is to prevent unjust discrimination between insureds of the same class, the provision in the body of the act that each policy shall contain every advantage or valuable consideration given by the company to insured is within the title within Const. art. 4, § 13, because reasonably adapted to accomplish the main purpose.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 113.]

5. CONSTITUTIONAL LAW (§ 251*)—DUE PROCESS OF LAW—CLASSIFICATION.

The Legislature may form classes for the purpose of police regulations, where it does not arbitrarily discriminate between persons in substantially the same situation, notwithstanding the federal and state Constitutions prohibiting the deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 251.*]

6. CONSTITUTIONAL LAW (§ 240*)—DUE PROCESS OF LAW—ARBITRARY DISCRIMINATIONS.

The object of regular life insurance companies organized to engage in the business is to obtain a profit from the transaction, while the primary object of fraternal associations is to obtain social intercourse among the members and to furnish assistance to members and persons dependent on them, and a statute making a distinction between life insurance companies and fraternal associations is not invalid as an arbitrary discrimination between persons in substantially the same situation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-699; Dec. Dig. § 240.*]

7. CONSTITUTIONAL LAW (§ 296*)—DUE PROCESS OF LAW—ARBITRARY DISCRIMINATIONS.

Act June 19, 1891 (Laws 1891, p. 148), prohibiting life insurance companies from making distinctions or discriminations between insureds of the same class, is not invalid as depriving such companies of their property without due process of law, merely because fraternal associations are exempted from the provisions of the act.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 296.*]

8. STATUTES (§ 79*)—EXCLUSIVE PRIVILEGES.

The statute is not violative of Const. art. 4, § 22, prohibiting special laws granting to any corporation exclusive privileges.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 84, 85; Dec. Dig. § 79.*]

9. INSURANCE (§ 141*)—LIFE INSURANCE—UNCONDITIONAL DELIVERY OF POLICY—WAIVER OF PREPAYMENT OF PREMIUM.

An unconditional delivery to insured of a life policy stipulating that it shall not take effect until the first premium has been paid is a waiver of the prepayment of the premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 260; Dec. Dig. § 141.*]

10. TRIAL (§ 350*)—SPECIAL QUESTIONS.

Where, in an action against a life insurance company for the penalty for making discriminations between insureds in violation of Act June 19, 1891 (Laws 1891, p. 148), the evidence showed that insured obtaining an option to purchase stock of the company gave a note for the first premium on the delivery of the policy to him, and that the note had not been paid, the court properly refused to submit to the jury a special question as to whether insured had paid for the policy, since the delivery of the policy operated as a waiver of prepayment of the premium.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 350.*]

11. APPEAL AND ERROR (§ 1062*)—HARMLESS ERROR—REFUSAL TO SUBMIT QUESTIONS TO JURY.

Where the findings of the jury on special questions could only have been in conformity with the proof of the successful party, the defeated party not controverting such proof was not prejudiced by the refusal of the court to submit the questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.*]

Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Action by the People of the State of Illinois, on the information of George J. Ambrose, against the Commercial Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Dyrenforth, Lee, Chritton & Wiles, O'Bryan & Marshall, and Shutt & Fain (George A. Chritton and William A. Marshall, of counsel), for appellant. Edmund Burke, State's Atty., A. M. Fitzgerald, and George B. Gillespie, for the People.

COOKE, J. The people of the state of Illinois, upon the information of George J. Ambrose, brought an action of debt in the circuit court of Sangamon county against the Commercial Life Insurance Company, the appellant, to recover the penalty prescribed by section 8 of the act of June 19, 1891 (Laws 1891, p. 148), entitled "An act to correct certain abuses and prevent unjust discriminations of and by life insurance companies doing business in this state, between insureds of the same class and equal expectation of life, in the rates, amount or payment of premiums, in the return of premiums, dividends, rebates or other benefits," for the violation

of said act. A trial was had before a jury, which resulted in a verdict finding the issues for the plaintiff and assessing the fine to be imposed on the defendant at \$500. After overruling motions for a new trial and in arrest of judgment the court entered judgment on the verdict, from which the insurance company has appealed to this court.

Appellant is a corporation organized under the laws of this state and engaged in the life insurance business in this state, with its principal office in the city of Chicago. On October 25, 1907, an agent representing the appellant company called upon the informant, George J. Ambrose, in the city of Springfield, in this state, and solicited him to purchase a policy of insurance from appellant. Upon being told by Ambrose that he had all the insurance he desired, the agent stated, "We have got a side issue on this," and proceeded to explain to Ambrose that, if he would take a policy, the company would, with each \$1,000 of insurance, give him an option to purchase, at any time within 15 months, 2 shares of the capital stock of the company at the rate of \$20 per share. The agent represented to Ambrose that this option was of great value; that, when the company commenced business, the stock was worth but \$10 per share; that it was at the time of the conversation worth \$20 per share; and that, if Ambrose should not desire to purchase the stock at the expiration of the 15 months, the agent would take the option off his hands at the rate of \$1,500 per share. He also represented that his son and daughter were following him and gathering up all stock certificates issued to persons who did not desire to keep them. As an illustration of the phenomenal increase in value of insurance stock, the agent told Ambrose that every dollar invested in the stock of the Prudential Insurance Company in 1876 was now worth \$1,996. Thereupon Ambrose purchased from appellant, through this agent, a policy of insurance upon his life in the sum of \$2,000, the annual premium thereon being \$44.40. The policy was delivered to Ambrose, together with an option, duly executed by the company, giving Ambrose the right to purchase four shares of the capital stock of the company at any time prior to February 1, 1909, at the rate of \$20 per share, the par value of the stock being \$10 per share, and Ambrose executed and delivered to the company his promissory note for the first premium. This note has not been paid.

The policy contained no reference to the option or to any right on the part of the insured to purchase shares of stock of the company, and it is contended by the appellee, and was held by the circuit court, that the proof of this transaction established a violation of the act of June 19, 1891, the title of which is above set out and the provisions of which are, in substance, as follows: Section 1 provides that no life insurance com-

pany or association organized under the laws of this state or doing business in this state shall make or permit any distinction or discrimination between insureds of the same class and equal expectation of life in its established rates or in the amount of premium charged or collected, or in the return of premium, dividends or other benefits accruing, or that may accrue, to such insureds, or in the terms and conditions of the contract between the company and the insureds, and requires the contract of insurance to be fully and wholly expressed and contained in the policy issued and the application therefor. The section concludes as follows: "Nor shall any such company or its agents pay, or allow, or offer to pay or allow to any person insured any special rebate or premium, or any special favor or advantage in the dividends or other benefits to accrue on such policy, or promise the same to any person as inducement to insure, or promise to give any advantage or valuable consideration whatever, not expressed or specified in the policy of such company." Section 2 of the act provides that if any such life insurance company or association, its agent or agents, shall make any unjust discriminations, as enumerated in section 1, the same shall be deemed guilty of having violated the provisions of the act and dealt with as provided in section 3 of the act. Section 3 prescribes a penalty of not less than \$500 nor more than \$1,000, to be recovered in an action of debt, upon any life insurance company or association which shall transact its business in this state in violation of the provisions of the act. The fourth and last section provides that the act shall not be construed to apply to fraternal associations dispensing aid or benefits to members or their heirs or legal representatives.

The particular provision of the act claimed by appellee to have been violated by appellant is the last clause of section 1, making it unlawful for any life insurance company to "promise to give any advantage or valuable consideration whatever, not expressed or specified in the policy of such company," appellee's contention being that the stock option which was promised to Ambrose as an additional inducement for purchasing the policy of insurance, and which was delivered to him with the policy, was an "advantage or valuable consideration" not expressed or specified in the policy. Appellant, on the other hand, contends that the act is directed against unjust discrimination alone, and its sole purpose is to prohibit a life insurance company from making different rates, by way of rebates or otherwise, between insureds of the same age and of equal expectation of life, and that in order to bring a transaction, such as the one proven in this case, within the prohibition of the act, it must not only appear that the advantage or valuable consideration was not expressed in the policy, but also that the same was not offered or

given to all policy holders of the same class and equal expectation of life, and upon this theory appellant interposed a special plea, setting up as a defense to the action that it had been its custom and practice to extend to each policy holder the right and privilege of purchasing two shares of the capital stock of the company with each \$1,000 of insurance at the price at which the same was selling at the time the policy was issued. A demurrer to this plea was sustained. Appellant attempted to prove the facts set up in this plea by the introduction of testimony upon the trial, but the court refused to permit such proof. The peremptory instruction offered by appellant at the close of the plaintiff's evidence in chief, and again at the close of all the evidence, presented the same question.

That the act of appellant in promising to give Ambrose the right to purchase four shares of its capital stock at any time prior to February 1, 1909, at the rate of \$20 per share, is within the prohibition of the last clause of section 1 of the act, is too clear to permit denial. That this promise by the company was the main inducement for the making of the contract of insurance by Ambrose is established by the evidence. The option was a valuable consideration moving from the company to Ambrose. By its delivery the company bound itself to sell to Ambrose, at any time prior to February 1, 1909, four shares of its capital stock at the rate of \$20 per share, and by the same act conferred upon him the right to demand the transfer of such stock to him at any time within the specified period upon tender of the specified price. The obligation assumed by the company was in legal contemplation a disadvantage to it and the right acquired by Ambrose was in legal contemplation a benefit to him, for the reason that, even though the market value of the stock should at some time during the fifteen months period exceed \$20 per share, yet Ambrose would, by virtue of the option, have the right at such time to purchase four shares at the rate of \$20 per share. Any act which is a benefit to one party or a disadvantage to the other is a valuable consideration. *Buchanan v. International Bank*, 78 Ill. 500; *Burch v. Hubbard*, 48 Ill. 164. The disadvantage to the company by the assumption of this obligation, and the corresponding privilege or benefit conferred upon Ambrose, constitute the valuable consideration. It is therefore wholly immaterial that the option had no market value, or that the market value of the shares of stock did not, during the time the option was in force, exceed \$20 per share, or that during such period Ambrose could have purchased stock of the company in the open market at a less sum per share, and evidence offered by the appellant to prove such immaterial facts was properly excluded.

Appellant contends, however, that a construction of the act which includes within

its prohibition a transaction not amounting to a discrimination renders the act in that respect unconstitutional and void, because such prohibition would relate to a subject not expressed in the title of the act, in contravention of section 13 of article 4 of the Constitution of this state. The main purpose of the act, as expressed in the title and as apparent from its provisions, is to prevent unjust discrimination between insureds of the same class and equal expectation of life, and any means reasonably adapted to accomplish that purpose is within the title of the act. *Larned v. Tiernan*, 110 Ill. 173; *Cohn v. People*, 149 Ill. 496, 37 N. E. 60, 23 L. R. A. 821, 41 Am. St. Rep. 304. The Constitution is obeyed if all the provisions relate to one subject indicated in the title and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the act shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *Bobel v. People*, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64; *Boehm v. Hertz*, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575. One of the most effective means that could be adopted to prevent unjust discrimination between insureds is the requirement that each policy issued by the company shall contain every advantage or valuable consideration given by the company to the insured. It imposes no hardship upon the company, but, by relieving the state of the burden of proving that some valuable consideration or advantage given to one or more insureds, but not expressed in the policy, was not given to all other insureds of the same class, is a valuable aid to the accomplishment of the main purpose of the act in rendering the enforcement of the provisions against unjust discrimination more effectual. The provision is reasonably adapted to accomplish the main purpose of the act, and is auxiliary thereto, and is therefore within the title of the act.

Appellant contends that the act deprives life insurance companies of property without due process of law, in violation of the fifth and fourteenth amendments to the federal Constitution and in violation of section 2 of article 2 of the Constitution of this state, and also contravenes section 22 of article 4 of the Constitution of this state, prohibiting local or special laws granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. The basis for this contention is the fact that the last section expressly excludes from the operation of the act fraternal associations dispensing aid or benefits to members or their heirs or legal representatives, thus imposing burdens and penalties upon life insurance companies which are not imposed upon fraternal associations. The

constitutional provisions above mentioned do not prohibit the Legislature from forming classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. Rep. 103; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196; *Lowe v. State of Kansas*, 163 U. S. 81, 16 Sup. Ct. 1031, 41 L. Ed. 78; *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. The only question, therefore, necessary to be considered in disposing of these constitutional questions is whether any distinction exists between insurance companies and fraternal associations which justifies the imposition of the burdens and penalties prescribed by the act upon the former and not upon the latter.

That there is a fundamental difference between life insurance companies, on the one hand, and those organizations commonly known as fraternal associations, fraternal beneficiary societies, or mutual benefit societies, on the other hand, requiring separate codes for the management and regulation of each, has been recognized by the Legislature of this state and by this court ever since such associations or societies came into general use as a means of furnishing aid to members and to families of deceased members. The first legislative recognition of this distinction appeared in 1874 in the form of an amendment to section 31 of the act concerning corporations, under which act such associations or societies were then organized as corporations not for pecuniary profit, by which it was provided that "associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies." *Hurd's Rev. St. 1877, c. 32, § 31*. This distinction has been consistently maintained by the Legislature ever since by declaring that such associations or societies shall not be deemed insurance companies by expressly exempting them from the acts passed to regulate life insurance companies and by enacting separate codes for their organization and control. In *Railway Conductors' Ass'n v. Robinson*, 147 Ill. 138, 35 N. E. 168, we recognized such distinction and the propriety of treating such associations as a class distinct from life insurance companies in the following language: "The object and purpose of these provisions exempting mutual benefit associations from the character and status of insurance companies becomes apparent when we examine the general insurance laws of the state, and especially the 'Act to organize and regulate the business of life insurance,' approved March 26, 1869 (Laws 1869, p. 229). That act subjects every life insurance company incorporated or doing business in this state to a variety of rules,

and requires of them the performance of various duties which would be both oppressive and inappropriate as applied to mutual benefit societies. Before any of these societies had been organized or any law enacted providing for their organization the Legislature had passed general statutes providing for the organization and government of both fire and life insurance companies and for the regulation of the entire business of fire and life insurance, and requiring all companies engaged in that business to comply with the rules prescribed by those statutes. Subsequently, when mutual benefit societies began to be organized and that form of life insurance came into use, it became apparent that it would be impracticable to subject those societies to the same code of rules and regulations already in force for the government of the business of life insurance and that an essentially new system of rules was required."

That this distinction, which has at all times been observed in this State, is sound and that the act in question does not arbitrarily discriminate between persons in substantially the same situation, is apparent when the purposes for which life insurance companies and fraternal associations are formed and their methods of doing business are considered. Life insurance companies are organized to engage in the business of insuring the lives of persons for profit. They are authorized to combine, and frequently do combine, with the contract of insurance other features, such as the payment of annual dividends to the insured, and the payment of the face of the policy, together with dividends, to the insured in case he survives a certain period. The whole scheme of such insurance is that of a business transaction between the company and the insured in which the object of the company is to obtain profit from the transaction, and there exists on the part of the company or its agents, in competing with other companies engaged in the same line of business, an incentive to reduce the profits in individual transactions, if necessary to obtain the business, by furnishing insurance at less than the established rate therefor or by giving some advantage or valuable consideration not given to other insureds of the same class and of equal expectation of life, thus creating inequality and making discrimination between policy holders. The primary object of fraternal associations is to obtain social intercourse among the members and to furnish relief and assistance to members and persons dependent upon them—not upon a commercial or business basis, but upon the broad principle of friendship and brotherly love. The insurance feature is but an incident to the main purpose of organization. It is limited to the payment of benefits to members and to persons dependent upon them, and is conducted, not for the purpose of gain or profit to the association, but to further the benevolent purposes of its organization. There being no element

of profit to the association in the contract by which it agrees to pay to the member, or upon his death to certain persons dependent upon him, the amount specified in the benefit certificate, the incentive to give benefits or advantages to one which are not given to all is lacking.

For the reasons above indicated, the act in question does not contravene the sections of the federal and state Constitutions relied upon by appellant.

Appellant contends that the evidence failed to establish the agency of the person soliciting the insurance from Ambrose and the execution of the policy of insurance and stock option by the company. While no direct evidence was produced showing the appointment or authority of the agent or the execution of the policy or stock option by the company or the genuineness of the signatures thereto, the facts and circumstances proven upon the trial would satisfy any reasonable mind of such agency and of the execution and issuance of the policy and stock option by appellant.

Appellant complains of the action of the court in refusing to submit to the jury special questions of fact, as requested by it. The first of these interrogatories asked the jury to find whether Ambrose paid for the policy in question. The evidence was uncontradicted that Ambrose had given to the company his promissory note for the amount of the first premium at the time the policy was delivered to him, but that the note had never been paid. One of the conditions of the policy was that it should not take effect until the first premium thereon had been paid in full, and appellant contended in the circuit court, and contends here, that the first premium not having been paid the policy was not in force, and there being no valid policy existing, there could be no offense under the statute. An unconditional delivery of the policy, however, operates as a waiver of the prepayment of the premium, notwithstanding an express provision therein that the company shall not be liable until the premium is actually paid. 1 Joyce on Insurance, § 79; 25 Cyc. 726; Eclectic Life Ins. Co. v. Fahrenkrug, 68 Ill. 463. The special question of fact called for a finding upon an immaterial matter, and was properly refused. The third and fourth interrogatories asked the jury to find whether the option had any market value, and, if so, to state what that value was. For reasons already given these questions were wholly immaterial. The fifth and sixth of these interrogatories might properly have been submitted to the jury, but, inasmuch as the questions thereby presented had been established by the plaintiff and had not been controverted by any evidence in the case, the finding of the jury thereon could only have been in conformity with the plaintiff's proof, and appel-

lant was not prejudiced by the action of the court in refusing to so submit them.

Complaint is also made of the action of the court in refusing certain instructions offered by appellant. None of them contained correct statements of the law applicable to the case, and they were therefore properly refused.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(247 Ill. 76)

PEOPLE v. KEATING.

(Supreme Court of Illinois. Oct. 28, 1910.

Rehearing Denied Dec. 7, 1910.)

1. TIME (§ 8*)—"DAY."

The word "day" ordinarily means 24 hours, from midnight to the following midnight; but the Legislature may designate a different period of time as a day for particular purposes, as in the statute providing that 8 hours of labor between the rising and setting of the sun shall constitute a legal day's work, when there is no special contract or agreement to the contrary, under which statute the word "day," in contracts of employment to which the statute applies, would mean 8 hours.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 10; Dec. Dig. § 8.*

For other definitions, see Words and Phrases, vol. 2, pp. 1832-1837; vol. 3, p. 7626.]

2. COURTS (§ 65*)—TERMS—TIME FOR BEGINNING OF TERM.

Under Hurd's Rev. St. 1909, c. 37, § 77, providing that the terms of the criminal court of Cook county shall commence on the first Monday of every month, and section 52, providing that, if there is no judge attending on the day appointed for the commencement of any term, the court shall stand adjourned till the next day, and, should a judge not attend by 4 o'clock in the afternoon of the second day, the court shall stand adjourned until the next succeeding term, a placita for a term of the criminal court of Cook county, reciting that the term was begun on the first Tuesday, being the 7th day, of September, sufficiently showed that the term began before 4 o'clock of that day, since the statute in effect limited the second day of the term to the period from midnight till 4 o'clock in the afternoon.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 65.*]

3. CRIMINAL LAW (§ 807*)—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTION.

An instruction that, in passing on the credibility of defendant as a witness, the jury may consider the fact that he is interested in the result of the prosecution, but should not refuse to fairly consider his testimony because of such interest, and that the testimony of a defendant may be of greater weight than the testimony of all the other witnesses in the case, if the jury consider it entitled to such weight, even where he is contradicted and not corroborated, and that the jury should give defendant the benefit of any reasonable doubt of guilt, whether it arises from his testimony or from any other evidence, was properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1806, 1959, 1960; Dec. Dig. § 807.*]

Error to Criminal Court, Cook County; Jesse A. Baldwin, Judge.

John J. Keating was convicted of crime, and brings error. Affirmed.

Charles E. Erbstein, for plaintiff in error. W. H. Stead, Atty. Gen., and John E. W. Wayman, State's Atty. (Jeremiah Sullivan and D. G. Thompson, of counsel), for the People.

VICKERS, C. J. Plaintiff in error was found guilty of rape, by a jury in the criminal court of Cook county, at the September term, 1909, and his punishment was fixed at a term in the penitentiary for 12 years. After overruling a motion for a new trial and in arrest of judgment, the court pronounced sentence in accordance with the verdict of the jury. Plaintiff in error has sued out a writ of error from this court for the purpose of obtaining a review of the record of the trial court. It is not contended by plaintiff in error that the verdict is not supported by the evidence. Two questions are presented for our consideration:

Plaintiff in error contends that the convening order of the court fails to show that the term of court at which the judgment was pronounced was duly convened within the time provided by the statute. The statute provides that the terms of the criminal court of Cook county shall commence on the first Monday of every month. Hurd's Rev. St. 1909, c. 37, § 77. Section 52 of said chapter 37 provides: "If there is no judge attending on the day appointed for the commencement of any regular or special term of court the court shall stand adjourned until the next day, and should a judge of such court not attend by 4 o'clock in the afternoon of the second day of the term, the court shall stand adjourned until the next succeeding term of the court." The first Monday of September, 1909, was the sixth day of the month. The placita for the September term of the criminal court of Cook county recites that the term was "begun and held at the criminal courthouse, in the city of Chicago, in said county, on the first Tuesday, being the 7th day, of September, in the year of our Lord 1909." The plaintiff in error contends that the convening order is defective, in that it fails to show affirmatively that the judge appeared and opened court before 4 o'clock in the afternoon of the second day of the term. The argument in support of this contention is that the record must show affirmatively that the court was convened at the time and place prescribed by law, and that no presumption can be indulged in support of the regularity of the court's proceedings until the fact is shown that the court was legally convened. It is said that, for all that appears upon the face of the record, the court may have convened after 4 o'clock in the afternoon of September 7th, and in that event all the proceedings of that term of court would be void.

Conceding that the term would have lapsed

had a judge not appeared before 4 o'clock in the afternoon of the second day of the term, and that this fact should appear on the face of the record, we are of the opinion that this record is complete and shows all that is necessary under the statute. The record here recites that the term convened on Tuesday, the 7th day of September, 1909. Any time during that day, before 4 o'clock in the afternoon, the court could have been lawfully convened. The word "day" ordinarily means 24 hours, from midnight until the following midnight. But the word does not always refer to this period of time. It is frequently used to designate the time from sunrise to sunset, and it is within the power of the Legislature to declare what shall constitute a day for particular purposes. Thus we have a statute which provides that 8 hours of labor between the rising and setting of the sun, in all mechanical trades, arts, and employments, shall constitute and be a legal day's work, when there is no special contract or agreement to the contrary. Under the statute the word "day" in contracts of employment for services in the industries to which the statute applies would mean 8 hours. We think that the statute, which provides that if a judge does not appear before 4 o'clock in the afternoon of the second day of the term the term shall lapse has the effect of fixing the limit of time when the second day of the term shall end for the purpose of convening the court. When the hour of 4 o'clock in the afternoon arrives, the day is ended for the purpose of convening the court. If the statute had provided that if no judge appeared on the second day to open court the term should lapse, the time would not expire until midnight of the second day, and parties interested could not know until 12 o'clock at night whether a term of court would be convened unless a judge should appear. Manifestly, it was for the purpose of obviating the inconvenience that would thus be imposed upon persons interested in the term of court that the Legislature passed the act making the second day of the term end at 4 o'clock in the afternoon for the purpose of convening the terms of court. Since the word "day" in this connection means that portion of time from midnight, the close of the first day, until 4 o'clock in the afternoon of the second day of the term, the convening order, which recites that the court convened on Tuesday, the 7th day of September, means that the court convened before the legal expiration of the second day. If the court had convened after 4 o'clock, the recital that it convened on the second day of the term would have been untrue, since the second day expired for that purpose at 4 o'clock. It therefore affirmatively appears that the court was properly convened within the time prescribed by statute.

Plaintiff in error next contends that the court erred in refusing to give the following instruction to the jury at his request: "In

passing upon the credibility of the defendant, John Keating, as a witness, while you may, indeed, take into consideration the fact that he is interested in the result of this prosecution, yet you should not refuse to fairly consider his testimony merely because of such interest. The testimony of a defendant may be of greater weight than the testimony of all the other witnesses in the case put together, if the jury consider it entitled to such weight, even where he is contradicted by other witnesses in material parts of his testimony and is corroborated by none. And in this case you should give Keating the benefit of any reasonable doubt of guilt, if any you have, whether such doubt arises from the testimony of Keating or from any other evidence in the case, when all the evidence is considered together." There was no error in refusing this instruction, as it was argumentative.

There are no other reasons urged for a reversal of this judgment. The judgment will be affirmed.

Judgment affirmed.

(247 Ill. 176)

PEOPLE ex rel. BLACK et al. v. SULLIVAN et al.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 7, 1910.)

1. ELECTIONS (§ 175*)—BALLOTS—FORM—AMBIGUOUS BALLOTS.

The ballots used in voting on a proposition to establish a township high school stated the proposition as follows: "For or against establishing a township high school for the benefit of township 4 N., R. 2 W." At the right of the proposition was a square divided into four parts, and in the upper left-hand part was printed the word, "Yes," and in the lower left-hand part was printed the word, "No," leaving the two right-hand spaces blank for the voter. Held, that the ballot should indicate with reasonable certainty how the voter intended to vote, and the ballots furnished were so ambiguous and misleading as to invalidate the election, unless parol evidence were admissible as to how the voter intended to, and did in fact, vote.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 147; Dec. Dig. § 175.*]

2. ELECTIONS (§ 293*)—CONTEST—ADMISSION OF EVIDENCE—EVIDENCE AS TO WHOM VOTES WERE INTENDED FOR.

In quo warranto proceedings to have declared void an election upon the proposition to establish a township high school, where the proposition as printed on the ballots was so ambiguous that, literally construed, a ballot marked, "Yes," indicated that the voter was "for or against" the proposition, while a ballot marked, "No," indicated that he was neither "for or against" the proposition, the affidavits of more than a majority of the voters who voted at the election to the effect that they intended a "yes" vote to be in favor of establishing a school were admissible in evidence.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 288-296; Dec. Dig. § 293.*]

3. ELECTIONS (§ 295*)—AMBIGUOUS BALLOTS—VALIDITY.

Where in proceedings in the nature of quo warranto to declare void an election held on the

proposition of establishing a township high school, though the printed ballots furnished when literally construed were so ambiguous that a ballot marked, "Yes," indicated that the voter was "for or against" the proposition, while one marked, "No," indicated that he was "neither for nor against" the proposition, where 180 of the 334 voters voting, filed affidavits that they understood a ballot marked, "Yes," as being for the establishment of the school, and such ballots were so counted, and only three voters testified to a contrary understanding of the ballots, there was no abuse of discretion in denying leave to file the information.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 295.*]

4. QUO WARRANTO (§ 6*)—LEAVE TO FILE WRIT—DISCRETION OF TRIAL COURT.

Whether leave be granted to file an information in the nature of quo warranto is in a large measure within the sound discretion of the court, exercised, however, according to law, and not arbitrarily.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 7; Dec. Dig. § 6.*]

Carter, J., dissenting in part, and Cartwright, J., dissenting.

Appeal from Circuit Court, McDonough County; R. J. Grier, Judge.

Petition by the People, on the relation of John A. Black and others, against T. D. Sullivan and others, for leave to file an information in the nature of quo warranto. From a judgment dismissing the petition, petitioners appeal. Affirmed.

This proceeding was instituted by the state's attorney of McDonough county in the name of the people of the state of Illinois, on the relation of John A. Black, George N. Runkle, and James A. Butcher, by petition to the circuit court for leave to file an information in the nature of quo warranto against T. D. Sullivan, O. V. Beaver, W. H. Willey, W. R. Clawson, and J. F. Lawyer. The petition alleged that the relators were residents, legal voters, and taxpayers in township 4 north, range 2 west, of the fourth principal meridian, McDonough county, Ill.; that said Sullivan, Beaver, Willey, Clawson, and Lawyer were then, and for more than 90 days last past had been, without any warrant, title, or right whatever, holding and executing the office of members of the board of education of the township high school in said town and were discharging the duties of directors of schools in and for said town, contrary to the statutes in such cases made and provided. The petition alleged that on the 20th day of March, 1909, a petition for the establishment of a high school in said township was presented to the township treasurer of said town, praying for the submission to the legal voters of said township of the question of establishing a township high school therein and that an election be called in accordance with law for that purpose; that an election pursuant to the prayer of the petition was ordered to be held on the 6th day of April, 1909, and notice given that said election would be held

for the purpose of voting for or against the establishment of a high school in said township. The petition further alleges: That at said election a ballot was furnished for the voters which was in the following form:

For or Against establishing a Township High School for the benefit of Township 4, North, Range 2, West.	Yes	
	No	

J. W. Flack, Township Clerk.

And that no other form of ballot was furnished to or used by the voters and voted at said election. The petition alleges that said ballot was uncertain, ambiguous, and misleading, and tended to, and did, confuse and deceive the voters; that many voters desiring to vote against the establishment of the high school placed a cross or other mark in the space following the word, "Yes," on said ballot, and voted the ballot, thus marked, at said election; that many voters who attended the said election and desired to vote against the establishment of a township high school were unable to determine from the ballot in what manner it should be marked to express a vote against the proposition, and for that reason did not vote at said election. The petition alleges that on the day said election was held there were in the township more than 440 legal voters; that 334 ballots were cast; that all of them were void for the reason that they were uncertain, ambiguous, misleading, and confused and deceived the voters who voted them; that the returns of said election show that 252 of the ballots cast were counted in favor of establishing a township high school, and that 82 of them were counted against the proposition. The petition alleges that by reason of the ballots being uncertain, ambiguous, and misleading they could not be legally counted for or against the proposition of establishing a township high school. The petition further alleges that afterwards a pretended election was held for the purpose of electing a township high school board of education, consisting of five members, at which said Sullivan, Beaver, Clawson, Willey, and Lawyer claimed to have been elected, and said pretended board is attempting to issue bonds against said pretended high school district in the sum of \$15,000 and have attempted to levy a tax for educational purposes in the sum of \$2,000. The petition alleges that, by reason of the fact that the election to vote on the proposition of establishing a township high school was illegal and void, no such school or school district was established, and the pretended election of members of the board of education for said pretended township high school district was illegal and void.

Notice was served on respondents August 30, 1909, that application would be made to the court on the 20th day of September, 1909, which was the first day of the term of

said court, for leave to file an information. On the 6th day of October, 1909, the court, of its own motion, entered a rule against respondents to show cause why leave should not be granted to file the information. In answer to the rule respondents filed the affidavits of 180 of the voters who had voted at the election for the establishment of a township high school, stating, in substance, that they voted "yes" by making a cross after the word, "Yes," as printed on the ballot, and that they understood by so voting that they were voting for the establishment of a township high school, and that if it was desired to vote against the establishment of said township high school the cross should have been made after the word, "No," as printed on the ballot. They also filed the affidavits of two of the judges of said election, stating that ballots marked with a cross opposite the word, "Yes," were counted for the establishment of the township high school, and those voted by making a cross opposite the word, "No," were counted against the proposition. A motion by petitioners to strike all these affidavits from the files was overruled except as to the affidavit of respondent O. V. Beaver and part of the affidavit of one of the judges of the election. The petition was supported by an affidavit of one legal voter of said township, who stated he desired to vote against the establishment of a township high school and marked his ballot by placing a cross after the word, "Yes," and also wrote opposite the word, "Yes," the word "against," for the purpose of making it clear how he desired to vote. The affidavits of three other legal voters stated they desired to vote against the establishment of a township high school, but were unable to determine from the ballot how to mark the same to express their intention, and for that reason did not vote at all. Upon this showing of the respective parties, the court refused leave to file the information and dismissed the petition, and petitioners have prosecuted an appeal to this court.

W. H. Stead, Atty. Gen., and T. H. Miller, State's Atty. (Elting & Hainline and Tunnicliff & Gumbart, of counsel), for appellants. Flack & Lawyer, for appellees.

FARMER, J. (after stating the facts as above). The decision of this case depends upon whether the election for the establishment of the township high school was a legal election. Appellants insist that the election was illegal on account of the form of the ballot used. Both parties agree that the election was not required to be held under the Australian Ballot law, and no official ballot was therefore required to be provided by the officers having charge of the calling and holding of an election. It is contended, however, by appellants that no other ballot than the one in the form set out in the statement

preceding this opinion was used by any of the voters at said election; that this ballot was provided by the authorities calling the election, to which was appended the name of the township clerk, and the voters were therefore led to understand and believe that the ballot so prepared was the ballot required to be voted by those who wished to vote at said election. If the decision of the case depended alone upon whether the ballot as prepared and voted is ambiguous and misleading, we would be disposed to hold that the election was not a valid election. While the voters were required to vote upon the proposition for or against the establishment of a township high school, the ballot was required to be in such form as to show, with reasonable certainty at least, how the voter intended to vote upon the proposition. It does not appear by any means clear that by making a cross after the word, "Yes," on the ballot as here prepared, the voter intended to vote for the establishment of the school. In effect it was the same as submitting the question, in the form of an interrogatory, as to whether the voters were for or against the establishment of the school. A vote "yes" would indicate that the voter was for or against it, but which would not very clearly appear. A vote "no" would indicate that he was neither for nor against the establishment of the school, and would fall short of being a vote against its establishment in the form in which the question was submitted. If the ballot had been prepared "For the establishment of a township high school" and "Against the establishment of a township high school," and a square had been left after each proposition, in which the voter could indicate by a cross how he voted upon the question, it would have been free from ambiguity. While the law did not require that the ballot should be prepared in the form suggested, it should have been so prepared, whether furnished by the election officers or provided by the voters themselves, that it would not be uncertain and ambiguous, but would indicate with reasonable certainty how each voter intended his ballot to be counted.

To explain how the voters understood the ballot should be marked to vote "for" or "against" the proposition and how they intended their votes should be counted, respondents presented affidavits of 180 of them; that being more than half of the voters who voted at said election. These affidavits stated that the affiants favored and intended to vote for the establishment of a township high school; that they understood a cross in the square after the word, "Yes," was a vote for establishing the school, and a cross after the word, "No," was a vote against it, and that they made a cross in the square after the word, "Yes," meaning and intending thereby to vote for the establishment of a township high school. Appellants contend

that these affidavits were not competent to be considered by the court and should have been stricken from the files; that the proposition voted upon should have been stated in such clear and unmistakable terms as to remove all ambiguity and uncertainty, so that the voter would understand how to express his intention and so that it would clearly appear from the ballot how each voter intended to vote, and *Harvey v. Cook County*, 221 Ill. 76, 77 N. E. 424, is relied on to support that contention. In that case there was no question of the competency of evidence to explain the intention of the voter. The form of ballot to be used in the election contested in that case was provided by the statute. A ballot prepared in the form prescribed would have been clear and unambiguous, and the voter could not have failed to understand how to mark his ballot so as to give effect to his intention. By the addition to the ballot, as prepared and voted at the election, of the words "Yes" and "No," which were not prescribed by the statute, its meaning was so changed that a voter desiring to vote against the proposition submitted could not do so by voting "no." A ballot so marked, it was held, would indicate that the voter was not against the proposition, while a ballot marked to show the voter voted "yes" was clearly a vote in favor of the proposition, and the court said: "There was no clear and unmistakable way of voting against this proposition. Fairness and equal opportunity to all voters to express their choice required that a vote in the negative could be as clearly and certainly indicated as could a vote in the affirmative." In the case now under consideration the ballot gave no advantage to either side of the proposition. Literally, a ballot marked, "Yes," indicated the voter was for or against the proposition, while a ballot marked, "No," indicated that the voter was neither for nor against the proposition submitted. Notwithstanding that literal meaning, a majority of all those who voted at the election made affidavit that they understood a vote "yes" meant a vote to establish a township high school, and that they voted accordingly, intending their votes to be counted in favor of the proposition. They were not deceived or misled nor prevented from voting. Appellants presented the affidavits of three voters that they were opposed to establishing a high school, but, being unable to determine how to mark the ballot to express their intention, they did not vote. If it was competent for respondents to show by the voters the matters set up in the affidavits filed by them, on the showing made the court was justified in refusing leave to file the information. We are of opinion the principles announced in *McKinnon v. People*, 110 Ill. 305, and *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704, sustain the competency of the affidavits to be considered by the court in

passing upon the motion for leave to file the information.

It appears from the petition that at the election held for the purpose of voting on the question 334 votes were cast, and 252 of the ballots were marked with a cross in the square after the word, "Yes," and 82 after the word, "No." Ballots marked with a cross after the word, "Yes," were counted for the establishment of a township high school, and those marked, "No," against it. The 180 voters who made the affidavits constituted a majority of all those who voted at the election, and it is not shown that there were more than three voters who did not vote because they did not know how to mark the ballot. The voters were not restricted to the ballot prepared by the election officers. If they did not know how to mark it, they were at liberty to prepare a ballot in such form as to express their sentiment upon the proposition submitted. The ruling of the court in considering the affidavits was justified by the authorities above cited and was in the interest of justice, as it gave effect to the will of the voters. Doubtless cases may arise where it would not be proper to consider the testimony of voters as to what they intended, but such is not this case. Whether leave shall be granted to file an information in the nature of quo warranto is in a large measure within the sound discretion of the court. Such discretion, however, is not to be exercised arbitrarily, but in accordance with principles of law. *People v. Town of Thornton*, 186 Ill. 162, 57 N. E. 841; *People v. North Chicago Railway Co.*, 88 Ill. 537; *People v. Waite*, 70 Ill. 25.

We think there was no abuse of discretion in denying leave to file the information in this case, and the judgment of the circuit court is affirmed.

Judgment affirmed.

CARTWRIGHT, J., dissents.

CARTER, J. I concur in the conclusion reached in the foregoing opinion, but I do not think that the affidavits of the voters were admissible in evidence to show the meaning that they placed upon the ballot in question.

(247 Ill. 120.)

PEOPLE v. McCANN.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 7, 1910.)

1. MUNICIPAL CORPORATIONS (§ 184*)—OFFICERS—APPOINTMENT—MODE.

Under Cities and Villages Act (Hurd's Rev. St. 1909, c. 24, § 73) § 2, providing for election of municipal officers, or appointment by the mayor, the appointment of officers of the police department cannot be lawfully delegated to the superintendent of that department.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 482-491; Dec. Dig. § 184.*]

2. MUNICIPAL CORPORATIONS (§ 180*)—OFFICERS—RIGHT TO OFFICE.

One seeking to establish title or right depending upon a valid title to the office of police inspector must show that he is a de jure officer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449-457; Dec. Dig. § 180.*]

3. BRIBERY (§ 1*)—OFFICERS—APPOINTMENT—VALIDITY.

Though an ordinance providing for the appointment of a police inspector by the police superintendent was invalid as violating the cities and villages Act (Hurd's Rev. St. 1909, c. 24, § 73) § 2, requiring municipal officers to be elected or appointed by the mayor, the office of inspector was validly created, and an appointee thereto became a de facto officer and cannot escape punishment for bribery on account of illegality of his appointment.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

4. BRIBERY (§ 1*)—ELEMENTS OF OFFENSE BY OFFICER—TITLE TO OFFICE.

Where a police inspector was a de jure officer, and at the time of committing bribery assumed to be such officer, and exercised the powers and duties of the office, it was immaterial that he was not a de jure officer.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

5. CRIMINAL LAW (§ 1167*)—HARMLESS ERROR—REFUSAL TO QUASH INDICTMENT.

If one of several counts is sufficient to support a conviction, the refusal to quash defective counts was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.*]

6. BRIBERY (§ 2*)—STATUTORY PROVISIONS—REPEAL.

Act April 9, 1872 (Laws 1871-72, p. 671), amending Rev. St. 1845, c. 30, § 86, and making municipal officers punishable, was repealed by Cities and Villages Act (Hurd's Rev. St. 1909, c. 24, § 79) § 8, making it bribery for municipal officers to accept any gift, etc., to influence official conduct, and the latter section was superseded by Cr. Code, § 81 (Hurd's Rev. St. 1909, c. 38), under which such officers are now punishable.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 1; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 867, 868; vol. 8, p. 7593.]

7. BRIBERY (§ 11*)—POLICE INSPECTORS—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of a police inspector for bribery to protect immoral resorts.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 10; Dec. Dig. § 11.*]

8. CRIMINAL LAW (§ 741*)—JURY PROVINCE—WEIGHT OF EVIDENCE.

It is the jury's province to determine the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

9. CRIMINAL LAW (§ 742*)—JURY PROVINCE—CREDIBILITY OF TESTIMONY.

It is the jury's province to determine the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1722; Dec. Dig. § 742.*]

10. CRIMINAL LAW (§ 1159*)—REVIEW—VERDICTS—CONCLUSIVENESS.

A conviction will not be disturbed on appeal, merely because the evidence is contradictory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

11. CRIMINAL LAW (§ 1150*)—REVIEW—CONFLICTING EVIDENCE.

A conviction sustained by sufficient evidence will not be reversed for contradiction by defendant's proof, unless it appears that accused's guilt is improbable or reasonably doubtful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. § 1159.*]

12. BRIBERY (§ 10*)—EVIDENCE—CHECKS—ADMISSIBILITY FOR PARTICULAR PURPOSE.

In a trial of a police inspector for bribery to protect immoral resorts, it was not prejudicial error to admit in evidence checks received by the go-between from a keeper of such resort, though they did not show that accused received the proceeds, since they tended to corroborate the go-between's testimony that he received some of the money he said he paid accused from such keeper on checks.

[Ed. Note.—For other cases, see Bribery, Dec. Dig. § 10.*]

13. CRIMINAL LAW (§ 423*)—EVIDENCE—ADMISSIBILITY—DECLARATIONS OF CONSPIRATORS.

In a trial of a police inspector for bribery to protect immoral resorts, it was not error to permit the go-between to testify for the people as to what he told certain persons pursuant to direction by accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

14. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF HEARSAY EVIDENCE.

In a trial of a police inspector for bribery to protect immoral resorts, error in permitting a witness to state the purpose for which his brother said he wanted money, furnished by witness, which money the brother testified was given accused, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

15. BRIBERY (§ 14*)—INSTRUCTIONS.

Though a bribery charge was that accused as police inspector received money from a particular person to protect immoral resorts, it was not error to instruct that, though accused caused persons to be arrested from such resorts, he was guilty if he collected money from them through such person with intent to permit them to run, where the evidence tended to show that such person collected the money paid accused at the latter's direction.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. § 13; Dec. Dig. § 14.*]

16. CRIMINAL LAW (§ 726*)—ARGUMENT TO JURY—DUTY OF PROSECUTING ATTORNEY.

Since a state's attorney's office is semi-judicial, and he owes a duty to accused as well as to the people, he cannot justify misconduct in argument on account of similar misconduct by accused's counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1681; Dec. Dig. § 726.*]

17. CRIMINAL LAW (§ 699*)—ARGUMENT TO JURY—DUTY OF TRIAL COURT.

The trial court should confine counsel to argument to the jury in proper bounds, though considerable latitude must be allowed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.*]

18. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF STATE'S ATTORNEY—ARGUMENT TO JURY.

The state's attorney's misconduct in argument in stating that he held a telegram showing that accused's witness had been convicted of embezzlement, which the witness had denied, and in stating that it was not true that no previous charges had been made against accused as

a police officer, there being no evidence on that point, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Cooke, J., dissenting.

Error to Criminal Court, Cook County; A. C. Barnes, Judge.

Edward McCann was convicted of bribery, and he brings error. Affirmed.

Edward McCann, plaintiff in error, inspector of police of the city of Chicago, was indicted by the grand jury of Cook county for the crime of bribery. He was tried, convicted, and sentenced to an indeterminate term in the penitentiary, and has brought the case here by writ of error for review.

The first count of the indictment charges McCann was an executive officer, to wit, an inspector of police of the city of Chicago, an incorporated city, legally appointed, confirmed, qualified, and sworn to discharge the duties of that office; that contriving and intending to violate and betray the powers and duties of his said office and the trust and confidence reposed in him, and contriving and intending the powers and duties of his said office to discharge and perform with partiality and favor and contrary to law, he then and there, with the intent aforesaid, unlawfully, knowingly, corruptly, and feloniously did accept and receive from Louis Frank \$475 in money as a bribe and pecuniary reward offered and given by the said Louis Frank, and taken, accepted, and received by said Edward McCann with the intent and purpose to induce him, the said Edward McCann to permit, authorize, and allow certain keepers of certain houses of ill fame and places for the practice of prostitution, to wit, Harry Hoffman and several others named in the indictment, to keep, use, and occupy buildings and rooms for the purpose of and devoted to the practice of prostitution and lewdness and to the encouragement of idleness, gaming, drinking, fornication, and other misbehaviors in the corporate limits of said city of Chicago, and to induce and influence him, the said Edward McCann, not to arrest or cause to be arrested the keepers of said houses of ill fame and places for the practice of prostitution, and to keep and protect them from arrest and punishment and from municipal or police molestation or interference while engaged in keeping, using, and occupying buildings and rooms for the purpose of practicing prostitution and lewdness and the encouragement of idleness, gaming, drinking, and fornication.

The second count is in all respects like the first, except that it charges McCann was "an officer," instead of "an executive officer," as alleged in the first count.

The third count charges McCann was a member of the police force in and for the city of Chicago, to wit, an inspector of said

police force, and that he unlawfully, feloniously, and corruptly, and contrary to his duty as such inspector and member of the police force, did receive and accept as a bribe from Louis Frank \$475 lawful money to induce him, said McCann, as such inspector and member of the police force, to refrain from arresting and prosecuting numerous persons named in said indictment for a violation of the laws of the state of Illinois then before committed by them, to wit, the violation of said laws relating to keeping and maintaining houses of ill fame and places for the practice of prostitution; it being then and there the duty of said Edward McCann, as inspector and member of the police force aforesaid, to enforce said laws.

The fourth count is substantially the same as the third, except that it alleges Edward McCann, a member of the police force, accepted a bribe of \$475 from Louis Frank for the purpose of inducing him, said McCann, to permit the same persons named in the other counts to continuously violate the laws of the state of Illinois relating to keeping houses of ill fame and places for the practice of prostitution.

The fifth count is as follows: "The grand jurors aforesaid, chosen, selected, and sworn in and for the county of Cook, in the state of Illinois, in the name and by the authority of the people of the state of Illinois, upon their oaths aforesaid do further present: That one Edward McCann, late of the county of Cook, on the 1st day of July, in the year of our Lord one thousand nine hundred and nine, in said county of Cook, in the state of Illinois aforesaid, was a member of the police force, and an inspector thereof, of the city of Chicago, an incorporated city there situate, the said Edward McCann being then and there duly appointed, qualified, and acting as such inspector and member of the police force of said city of Chicago. That the said Edward McCann theretofore was appointed as such member of the police force, as aforesaid, under and by virtue of the laws of the said state of Illinois and the ordinance of said city of Chicago relating to the appointment and qualification of members and inspectors of the police force, which said ordinance of said city of Chicago relating to the appointment and qualification of members and inspectors of the police force of said city of Chicago is in words and figures as follows, to wit:

"1731. Department established.—There is hereby established an executive department of the municipal government of the city which shall be known as the department of police, and shall embrace the general superintendent of police, an assistant general superintendent of police, a secretary of the department of police, a private secretary to said general superintendent, one inspector of police for each police division, one captain of police for each police district, and such number of lieutenants, detective sergeants,

patrol sergeants, desk sergeants, patrolmen and other employees as may be provided by ordinance.

"1732. General superintendent—office created—appointment.—There is hereby created the office of general superintendent of police. He shall be appointed by the mayor, by and with the advice and consent of the city council."

"1734. Management of department—appointment of members.—The general superintendent shall have the management and control of all matters relating to the department, its officers and members. He shall appoint, according to law, all officers and members of said department."

"Which said ordinance relating to the appointment and qualification of police officers were before then duly passed, adopted, and promulgated, according to law, as ordinances of said city of Chicago by the city council and mayor of said city of Chicago, and was then and there a part of the laws in force in the said city of Chicago. That said ordinance so passed, adopted, and promulgated also prescribed in and by another section thereof the duties of the police officers and inspectors of said city of Chicago, which said section thereof is in words and figures as follows, to wit:

"1760. Police duties—power of arrest.—The several members of the police force of the city of Chicago, when on duty, shall devote their time and attention to the discharge of the duties of their stations according to the laws and ordinances of the city and the rules and regulations of the department, to preserve order, peace and quiet and enforce the laws and ordinances throughout the city. They shall have power to arrest all persons in the city found in the act of violating any law or ordinance or aiding or abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

"Which said section of said ordinance was then and there a part of the laws in force in said city of Chicago. That it was then and there the duty of said Edward McCann to enforce a certain ordinance of the city of Chicago relating to houses of ill fame and assignation, which said ordinance of said city of Chicago relating to houses of ill fame and assignation is in words and figures as follows, to wit:

"1456. No person shall keep or maintain a house of ill fame or assignation, or place for the practice of fornication or prostitution or lewdness, under a penalty of not to exceed \$200 for every twenty-four hours such house or place shall be kept or maintained for such purpose."

"Which said ordinance relating to houses of ill fame and assignation was before then duly passed, adopted, and promulgated, according to law, as an ordinance of said city

of Chicago by the city council and mayor of said city of Chicago and was then and there a part of the laws in force in said city of Chicago, and it was the duty of said Edward McCann then and there to arrest, complain against, summon, prosecute, and appear as a witness against the violators of said ordinance and law. That Harry Hoffman, Bertha Gordon, Sarah Gordon, Sam Cooperman, Louis Levine, Charles Yanker, Louis London, Mrs. Schwartz (whose first name is to the said jurors unknown), Max Yanker, Sam Arnstein, Max Plummer, Louis Sutta, Dutch Hettler, and one Weiss (whose first name is to the said jurors unknown), each then kept and maintained a certain house of ill fame and place for the practice of prostitution in said city of Chicago, county and state aforesaid, contrary to the statutes of the state of Illinois and the said ordinances of said city of Chicago, and thereby each of them became indebted to the said city of Chicago in a sum of money not to exceed \$200, and each of them then and there rendered themselves liable, by reason thereof, to pay the fines provided by law in that regard; and said Edward McCann then and there contriving and intending the powers and duties of his said office and the trust and confidence thereby reposed in him to violate, prostitute, and betray, and contriving and intending then and there the powers and duties of his said office to discharge and perform contrary to law and with the intent and for the purpose of being influenced in his acts and doings in the performance of his said duty, to wit, the duty of enforcement of the terms of the said ordinance relating to houses of ill fame and assignation then brought before him, said Edward McCann, in his official capacity as a police officer and inspector of the said city of Chicago, and to then and there cause him, the said Edward McCann, to execute the powers in him vested as a police officer and inspector as aforesaid, and to perform said duty of him required with partiality and favor to the said Harry Hoffman, Bertha Gordon, Sarah Gordon, Sam Cooperman, Louis Levine, Charles Yanker, Louis London, Mrs. Schwartz (whose first name is to the said jurors unknown), Max Yanker, Sam Arnstein, Max Plummer, Louis Sutta, Dutch Hettler, and one Weiss (whose first name is to the said jurors unknown), and contrary to the terms of said ordinance relating to houses of ill fame and assignation and contrary to law in said city of Chicago, then and there knowingly, corruptly, and feloniously did take, accept, and receive from Louis Frank, while he, the said Edward McCann, was then and there on duty as police officer and inspector, as aforesaid, in the said city of Chicago aforesaid, a large sum of money, to wit, the sum of \$475 in money, of the value of \$475 lawful money of the United States of America, as a bribe, present, and reward offered and given by said Louis Frank, and by him, said Edward Mc-

Cann, then and there taken, accepted, and received with the unlawful, wicked, and corrupt purpose and intent of influencing him, the said Edward McCann, in his office aforesaid, in his acts and doings in his said official capacity of member of the police force of said city of Chicago and inspector thereof, in the matter of the enforcement of the terms of the ordinance aforesaid relating to houses of ill fame and assignation, and in the collection of the indebtedness aforesaid due to said city of Chicago, and in the enforcement of the laws aforesaid, and to wickedly and corruptly cause him, said Edward McCann, to execute the powers in him vested as a member of the police force and inspector, as aforesaid, and to perform his said duties of him required by law with partiality and favor, and to then and there induce him, the said Edward McCann, in his office aforesaid, to permit, authorize and allow said keepers of houses of ill fame and assignation to keep, use, and occupy buildings and rooms for the purpose of prostitution and assignation and lewdness, and to induce and influence him, the said Edward McCann, then and there and thereafter not to arrest nor cause to be arrested the said keepers of said houses of ill fame and assignation, and to keep and protect them from arrest and punishment, and free, clear, and exempt from municipal or police molestation, interference, or attack while engaged in the keeping, using, and occupying of buildings and rooms for the purpose of and devoted to the practice of prostitution and assignation and lewdness, contrary to the statute and against the peace and dignity of the same people of the state of Illinois."

James Hamilton Lewis, Cornellus Lynde, and Wallace I. Streeter, for plaintiff in error. W. H. Stead, Atty. Gen., and John E. W. Wayman, State's Atty. (Thomas Marshall, Frederic Burnham, and Clyde Smith, of counsel), for the People.

FARMER, J. (after stating the facts as above). Many grounds are urged for a reversal of the judgment. Not all of them could be treated separately within the reasonable limits of an opinion. We have given the entire record and the briefs and arguments of the respective counsel the careful investigation that the importance of the case to plaintiff in error and to the public requires, and our conclusions are based upon a consideration of all the questions raised by the assignment of errors which are discussed in the briefs, though we shall treat in detail only those that appear to us most important.

It is contended the criminal court erred in overruling the motion of plaintiff in error to quash the indictment, principally for the reason that it does not appear from the allegations of any count that plaintiff in error was an officer within the meaning of section 31 of the Criminal Code (Hurd's Rev. St. 1909, c. 38) or section 8 of article 6 of the

cities and villages act (Hurd's Rev. St. 1909, c. 24, § 79). The officers designated by section 31 of the Criminal Code who may commit the crime of bribery are "any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, Attorney General, state's attorney, county attorney, member of the General Assembly, or other officer, ministerial or judicial, or to any legislative, executive or other officer of any incorporated city, town or village, or any officer elected or appointed by virtue of any law of this state." The officers mentioned in section 8 of article 6 of the cities and villages act are "any member of the city council or board of trustees or any officer of the corporation."

Plaintiff in error insists that none of the counts describe any office designated under section 31 of the Criminal Code, and none of them allege facts showing the legal existence of any such office of the incorporated city of Chicago as inspector of police. It must, we think, be conceded that, unless the allegations of the indictment show plaintiff in error to have been an officer of the city of Chicago, they do not show him to have been an officer within the meaning of either of the bribery statutes mentioned.

The city of Chicago is, and has been since 1875, under the cities and villages act. Section 1 of article 6 of that act provides for the election of a mayor, city council, city clerk, city attorney, and city treasurer. Section 2 authorizes the city council, by ordinance, to provide for the election by the legal voters or the appointment by the mayor, with the approval of the council, of certain other officers named, "and such other officers as may by said council be deemed necessary or expedient." Section 1731 of the ordinance, set out in the fifth count of the indictment, establishes an executive department of the city to be known as the department of police, and to embrace "a general superintendent of police, an assistant general superintendent of police, * * * one inspector of police for each police division, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, patrol sergeants, desk sergeants, patrolmen and other employees as may be provided by ordinance." Section 1732 provides for the appointment of the general superintendent by the mayor, by and with the advice and consent of the council, and section 1734 provides for the appointment of all other officers and members of the department by the general superintendent.

The power to appoint persons to fill offices established by ordinance is vested by the statute in the mayor with the approval of the city council, and could not lawfully be delegated to another officer. *Bullis v. City of Chicago*, 235 Ill. 472, 85 N. E. 614. The city council may, by ordinance, create offices; but they must be filled by the authority and in the manner prescribed by the statute. *Moon v. Mayor*, 214 Ill. 40, 73 N. E. 408. It

follows that, as plaintiff in error was never elected inspector of police and was never appointed to said office in any manner authorized by law, he never was, in fact, a de jure officer. We do not, however, think this a controlling question in determining the sufficiency of the indictment. If plaintiff in error was seeking to establish his title, or some right depending upon a valid title, to the office of police inspector, he would be required to show that he is a de jure officer. *Stott v. City of Chicago*, 205 Ill. 281, 68 N. E. 736; *McNeill v. City of Chicago*, 212 Ill. 481, 72 N. E. 450; *Bullis v. City of Chicago*, supra; *Moon v. Mayor*, supra. But, as between himself and third parties (the state in this case), if the office of inspector of police of the city of Chicago had a legal existence, and plaintiff in error assumed the duties and discharged the powers and functions of the office, he became a de facto officer, and cannot be permitted to deny his responsibility, while so acting, on the ground that he was not legally elected or appointed to said office. We are of opinion the ordinance pleaded did create the office of inspector of police. It is not, and could not be, questioned that the ordinance did establish the department of police and create the office of general superintendent. The same section of the ordinance provides that as a part of the department there shall be one inspector of police for each police division. True, by another section of the ordinance provision is made for the appointment of the general superintendent in a manner authorized by law, and no such provision is made with reference to filling the office of inspector. The city council had the power to create the office of inspector, but could only provide for filling it in the manner designated by statute.

It does not follow, however, that because the ordinance providing for the manner of appointing an inspector was invalid, and there was, therefore, no legal manner of filling the office, the ordinance creating the office is not valid. The decision of this question is not controlled by the decisions in the mandamus and certiorari cases above cited, as counsel contend. Those cases involved the de jure right of parties to the offices of police patrolmen and sergeants. In some of them the ordinances were pleaded, and in some they were not. It was held it was not shown that said offices had any legal existence; but it must not be overlooked that the provisions of the ordinance as to the creation of those offices are entirely different from the provision relating to the creation of the office of inspector. The ordinance provides that the department of police "shall embrace * * * one inspector of police for each police division." With reference to the offices of sergeants and patrolmen the ordinance provides that the department of police "shall embrace * * * such number of lieutenants, detective sergeants, patrol sergeants,

desk sergeants, patrolmen and other employees as may be provided by ordinance." The distinction was pointed out in *Bullis v. City of Chicago*, supra. The ordinance before the court in that case was substantially like the ordinance now before us. In that case the word "prescribed" was used instead of the word "provided." The court said: "Section 1477 of the Revised Code, in providing that the police department should embrace as many patrolmen 'as has been or may be prescribed by ordinance,' cannot be regarded as creating any office of patrolmen. *Moon v. Mayor*, supra. The word 'prescribed,' as there used, is equivalent to 'established.'" Here, neither the office of inspector nor the number of inspectors is left to be "prescribed" or "provided" for by the ordinance, as is the case with respect to the offices of sergeants and patrolmen. As to them the ordinance provided that the department of police should embrace such number "as may be provided for by ordinance," and until they are "provided" for by an ordinance no such office exists.

The fifth count of the indictment sufficiently shows there was a de jure office of inspector of police, and that the plaintiff in error, at the time of the acts complained of, assumed to be such officer and was exercising the powers and duties of the office. The people were therefore not bound to allege or prove that he was a de jure officer. *North v. People*, 139 Ill. 81, 28 N. E. 936. The fifth count being good, it was sufficient to support the judgment, and, even if the other counts are defective, the denial of the motion to quash was not such error as to require a reversal of the judgment. *Hiner v. People*, 34 Ill. 297; *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698; *Sahlinger v. People*, 102 Ill. 241; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

The objection that none of the counts of the indictment state "facts, acts, or circumstances constituting any crime" we think not well taken.

It is contended by plaintiff in error that an officer of a city or village is not amenable to the provisions of section 31 of the Criminal Code; that that section is part of a general act and was intended to apply to other higher and more responsible officers than those of cities and villages; and that by section 8 of article 6 of the cities and villages act the Legislature made special provision for the crime of bribery committed by officers of a city or village, and such officers can be prosecuted and punished for bribery only under said section 8 of article 6. It is conceded by counsel for the state that the indictment in this case is based upon section 31 of the Criminal Code, and plaintiff in error was prosecuted, convicted, and sentenced under that statute. If the position of counsel for plaintiff in error is correct, the judgment would necessarily have to be re-

versed, for the punishment provided by the two statutes is entirely different. The punishment provided by section 31 is imprisonment in the penitentiary not less than one nor more than five years, while the punishment provided by section 8 of article 6 is imprisonment in the penitentiary not exceeding two years, or fine not exceeding \$5,000, or both, in the discretion of the court. By instructions given at the request of the people the court defined bribery in the language of section 31, and told the jury the penalty provided by the statute for said offense was confinement in the penitentiary for a term not less than one nor more than five years. By their verdict the jury found plaintiff in error guilty in manner and form as charged in the indictment, and the court sentenced him to confinement in the penitentiary at Joliet until discharged according to law, provided such term should not exceed the maximum term for the crime for which he was convicted and sentenced.

Section 86 of chapter 30 of the Revised Statutes of 1845, entitled "Criminal Jurisprudence," related to the offense of bribery of public officers and the punishment for said offense. The officers embraced in that statute who were amenable to its provisions were "any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, Attorney General or state's attorney, member of the General Assembly or other officer, ministerial or judicial." The punishment fixed was imprisonment in the penitentiary for a term not less than one nor more than five years. In *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569, it was held this statute did not include an alderman. In 1872 the Legislature passed an act entitled "An act to amend chapter 30 of the Revised Statutes, entitled 'Criminal Jurisprudence,' so as to prevent misfeasance in office, or charging or receiving illegal fees, and in giving or offering to give, or receiving or offering to receive, a bribe." This act consisted of three sections, and was approved April 9, 1872, and in force July 1, 1872 (Laws 1871-72, p. 671). The first and second sections relate to officers charging, demanding, or receiving illegal fees. The third section makes it bribery for "any officer of any city or incorporated town or village" to receive any money, present, etc., for the purpose of influencing him to execute the powers vested in him or to perform any duty required of him with partiality or favor or otherwise than is required by law, and the punishment is fixed at imprisonment in the penitentiary for a term not less than one nor more than five years. The cities and villages act was approved April 10, 1872 (one day later than the act just referred to) and went into effect on July 1st of that year. Section 8 of article 6 of that act makes it bribery for "any member of the city council or board of trustees or any officer of the corporation" to accept any gift, etc., under any agreement or understanding

"that his vote, opinion, judgment or action shall be influenced thereby, or shall be given in any question, matter, cause or proceeding then pending, or which may by law be brought before him in his official capacity." The punishment for the offense is fixed at imprisonment in the penitentiary at not exceeding two years, or by fine not exceeding \$5,000, or both, in the discretion of the court, and the person convicted shall forfeit his office and be disqualified from thereafter holding any public office, trust, or appointment under the city or village. "An act to revise the law in relation to criminal jurisprudence," generally known as the Criminal Code, was approved March 27, 1874, and went into effect July 1st following. Section 31 of that act is the one under which this indictment was drawn and the plaintiff in error convicted and sentenced. It designates as officers amenable to its provisions the same officers mentioned in the act of 1845, and in addition thereto county attorneys, and "any legislative, executive or other officer of any incorporated city, town or village, or any officer elected or appointed by virtue of any law of this state." The punishment provided is imprisonment in the penitentiary not less than one nor more than five years.

It would seem the only purpose of passing section 3 of the act approved April 9, 1872, to amend the act of 1845, entitled "Criminal Jurisprudence," was to make city and village officers subject to prosecution for bribery. The day following its approval the cities and villages act was approved, which also made city and village officers liable to prosecution and conviction for bribery and fixed a different punishment from the amendment to the act of 1845. Obviously, those two acts were intended for the same purpose, namely, the punishment of city and village officers for bribery; but, being inconsistent, both could not stand, and under a familiar rule of statutory construction the subsequent act, which is the cities and villages act, must be held to have repealed the amendment of 1872. The cities and villages act then contained the only provision of our statutes making city and village officers liable for bribery until 1874, when the "act to revise the law in relation to criminal jurisprudence" was adopted. We have seen section 31 of that act included all city and village officers, and made their punishment, on conviction, the same as that of the other officers therein named. If, as contended by the plaintiff in error, it was the intention of the Legislature that city and village officers should be subject to prosecution for bribery under section 8 of article 6 of the cities and villages act only, and that section 31 of the Criminal Code should apply to other officers, it is difficult to understand why, in enacting section 31, the Legislature made it applicable to "any legislative, executive or other officer of any incorporated city, town or village." Officers of that class were not embraced in the Criminal

Code prior to the revision of 1874, and, unless the Legislature meant they should be amenable to that act, then there could have been no purpose for including them within its provisions. By the plain letter of section 31 city and village officers are subject to prosecution under and to the penalties provided by that act. The Legislature must be assumed to have known of section 8 of article 6 of the cities and villages act when section 31 was amended by the revision of 1874, and it must have been the legislative intent to include in the general act all officers intended to be made liable for the crime of bribery. To hold otherwise it would have to be decided that the words "any legislative, executive or other officer of any incorporated city, town or village," in the act of 1874, are meaningless. Conceding that if it appeared to have been the intention of the Legislature that city and village officers should be subject only to the provisions of section 8 of article 6, effect should be given to that intent, even though such officers might also be embraced in some general description of officers enumerated in section 31, such an intention is negated by the specific designation of city and village officers in said section 31. In *People v. Town of Thornton*, 186 Ill. 162, 174, 57 N. E. 841, 845, it was said: "It is also a well-settled principle that, where two statutes are clearly repugnant to each other, the one last enacted operates as a repeal of the former; and this principle is applicable even though the prior statute is a local or special act which is repugnant to a subsequent general act. * * * There is no rule which prohibits the repeal of a special act by a general one, and the question is always one of intention." Numerous decisions of this court and other authorities will be found cited in the opinion in that case which sustain the rule announced.

A case very much in point is *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374. In that case the defendant was a member of the common council of the city of New York. He was tried and convicted for bribery. The indictment charged the defendant with agreeing to receive \$20,000 for his vote and influence in favor of an application by the Broadway Surface Railroad Company, a corporation, for permission to construct and operate a railroad on Broadway, in the city of New York. Defendant was sentenced to imprisonment in the state prison for a term of nine years and ten months under section 72 of the Penal Code. On appeal it was contended he was not punishable under that statute; that he could only be liable to punishment for bribery under the New York City consolidation act. Section 58 of the consolidation act (Laws 1882, c. 410) made any member of the common council, or any municipal officer, accepting a bribe guilty of a felony, and liable, on conviction, to imprisonment in the penitentiary for a term not exceeding two years, or to a fine not exceeding \$5,000,

or both, in the discretion of the court. The Penal Code was, in fact, passed and went into effect before the consolidation act did; but it contained a provision that it was to have the same effect as if it had been enacted after the consolidation act. This provision the court held did not transcend the legislative power, and the consolidation act was subordinated to the Penal Code wherever the two statutes were in conflict. The Penal Code made the penalty for bribery imprisonment for not more than ten years or a fine of not more than \$5,000, or both. Section 72 did not specifically mention municipal officers as liable to its provisions, but designated certain officers and also "a person who executes any of the functions of a public office." The court said in part: "It is material, at the outset, to inquire whether the offense of bribery committed by municipal officers is, as a general rule, embraced within and punishable under this section of the Penal Code. If the section does not apply to the bribery of a municipal officer in any case, then, plainly, there is an end of the argument in support of this conviction. If on the other hand the section applies, in general, to this class of officers, then it becomes necessary, in order to reverse the conviction, that it should be found that the special case of bribery committed by municipal officers in the city of New York is excepted or in some way taken out of the operation of this section. The comprehensive character of the provisions of the Penal Code relating to bribery, both in respect to the definitions of the offense and the officers by whom it may be committed, is apparent upon the most cursory reading. * * * It is plain that a member of the common council, or other municipal officer, is a person 'who executes the functions of a public office,' and we cannot doubt that municipal officers are within the purview of section 72." The argument that the consolidation act was special in its application to municipal officers and was not repealed by the subsequent general act on the same subject was answered by the court in the following language: "It will be found, I think, on examining the cases in which the courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are, as a general rule, cases where the Legislature was not dealing directly with the subject of the prior law and it was not in the mind of the Legislature when the general law was enacted, or where the special law was part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment of a subsequent general rule covering the same subject. The general bribery act not only covers the whole subject, but was, we think, plainly intended to furnish the only rule governing the crime and punishment of bribery. It includes, by enumeration and description, all officials of every

grade—town, city, county, and state officers—provides a uniform punishment, but gives to the court a discretion in applying it, within the limit prescribed, to meet the circumstances of the particular case."

We are of opinion section 8 of article 6 of the cities and villages act was superseded by section 31 of the Criminal Code, and that bribery of municipal officers is the subject of indictment and prosecution under said section of the Criminal Code.

It is earnestly contended by counsel for plaintiff in error that the evidence is insufficient to warrant the verdict of guilty and the judgment thereon. The testimony was very voluminous, and we can only refer to it in a general way and to the substance and character of its material points. The most important testimony given for the prosecution was that of Louis Frank, Julius Frank, and S. B. Goldberg, though a number of other witnesses testified to facts of more or less importance and tending in a greater or lesser degree to corroborate the testimony of the principal witnesses. The assignment of error that the verdict and judgment are not supported by the evidence requires a somewhat more extended reference to the evidence for the prosecution than to that of the defense, though what we shall give is but the substance of what appear to us the most material matters testified to on the trial.

Patrick T. Mulvihill, a police officer at Desplaines street station, testified he and officer Griffin were assigned by the plaintiff in error to look after houses of prostitution in the district; that, including saloons where women congregated, there were 90 or 95 such houses in the district. The witness named as keepers of houses of prostitution the persons mentioned in the indictment. He testified that in pursuance of his instructions he carried in his pocket a book containing the names of all keepers of houses of ill fame and the names of all the inmates; that the keepers were required to notify the station when any new girls came, and they were not allowed to stay in the house overnight until they had been taken to the station and an investigation made; that if a girl had not been in a house of ill repute before she was not allowed to return. Other evidence showed that the custom in such cases was, if the woman was new to a life of shame, to send her to her parents or relatives or turn her over to some charitable or rescue organization. Mulvihill testified that he reported to plaintiff in error and in performing his duties acted under his instructions.

Louis Frank was the most important witness for the prosecution. He and his brother, Julius, were engaged in the saloon business at the corner of Madison and Halsted streets, which is in the Desplaines street district. They owned considerable real estate in the segregated vice district, and houses of prostitution were run in two of their buildings. They had been in the sa-

loon business in that district several years. Louis Frank testified he first met plaintiff in error after he had been made inspector of the Desplaines street district; that he was introduced to him by Charles Hawkins, desk sergeant of police under plaintiff in error; that afterwards plaintiff in error sent for him, and he went to the station and saw plaintiff in error; that plaintiff in error said to him he had been recommended by Hawkins and other good people and inquired of the witness if he could do some collecting for him; that witness replied he would let him know in a few days. Witness testified he went to his place of business, talked the matter over with his brother, went back to the station, and told plaintiff in error he would do so; that plaintiff in error told him to collect the money and give it to Griffin; that he did so for two months; that the plaintiff in error called witness over to the station and told him keepers of houses must pay \$20 per month for each floor occupied, and if they did not deal square with him he would give their money back, and told witness to tell them so; that he did tell them, and they paid for both floors thereafter; that the money was brought to witness' place of business by the parties running the houses and given to him, his brother, or their bookkeeper; that the number of the house paying was noted on a slip of paper pinned to the money and laid in the desk; that the money was paid the first of the month; that after the first two months, at the request of the plaintiff in error, witness delivered it to him in his office; that after five or six months plaintiff in error told witness he was being watched, and directed him not to put slips with each collection, but to make one slip and put all the names and numbers on that; that witness had money and he might be searched; that after that the names and numbers were placed on a long slip, which he carried in the band of his hat to the station when he took the money to the plaintiff in error. The witness testified that on or about July 1, 1909, he delivered to plaintiff in error \$475; that prior to that time, when plaintiff in error was ill, he twice took the money to him at his residence; that on the first occasion he went to the residence of plaintiff in error he was in bed; that the second time he was sitting up, and Judge Fake was there, but the witness thought Judge Fake did not see him; that on each of these two visits the witness took alcohol, desired for use by plaintiff in error in his illness. The witness testified that afterwards he went to the residence of plaintiff in error twice with Max Plummer in an automobile; that Plummer kept a house of prostitution, and, the witness said, paid \$40 a month to the plaintiff in error; that on the first of these visits Plummer wanted to talk with plaintiff in error something about some

policeman "letting up"; that Plummer and his wife were arrested for pandering, and the witness testified Plummer asked him to go with him to see plaintiff in error; that when they went to the house plaintiff in error was upstairs, and both went in and talked to him; that they talked about the case, and Plummer left the room; that witness then asked plaintiff in error what he was going to do about the case; that plaintiff in error said that Plummer ought to pay \$300; that witness said he would pay \$250, and the plaintiff in error agreed to accept that amount; that witness told plaintiff in error Plummer would not pay until the case was disposed of, and plaintiff in error said witness could hold the check until the case was over; that, after the case was disposed of satisfactorily, the witness got the check cashed and paid the money to the plaintiff in error. Witness testified he either took or sent alcohol to plaintiff in error a number of times while he was ill; that it cost him \$2.80 a gallon, and he paid for it himself. A woman named Jennie Streeter, known as "English Jennie," kept a house of prostitution at 17 Halsted street. The property belonged to the Frank brothers. Witness testified that on one occasion he took the money to the plaintiff in error for that place at the end of the month; that plaintiff in error inquired what was the matter that she did not pay promptly, and witness replied he did not know and said he would not collect from her; that plaintiff in error told him he had better make her move; that witness said he would do so, and afterwards rented the place to Charles Yanker; that when witness told this to the plaintiff in error he demanded \$100, and witness paid it. The witness testified that Mike Heitler, known as "Mike the Pike," wanted to rent the place occupied by Mrs. Plummer; that plaintiff in error was told of it, and the matter was adjusted by Mr. Plummer paying him, through the witness, \$50. The witness testified plaintiff in error sent for him to talk about a complaint that had been made in the city hall by Charles Yanker; that plaintiff in error asked him to get Yanker to withdraw it; that witness went to Yanker and told him what plaintiff in error had requested and he withdrew the complaint. Witness testified he was at the station one Saturday and the police brought in a woman and a man named Schatz; that Schatz, Sergeant O'Malley, and witness went into plaintiff in error's office; that Schatz told him he had given \$120 to Mike Heitler—\$40 a month—and asked plaintiff in error if Heitler gave it to him; that plaintiff in error said he did not. Witness testified plaintiff in error refused to permit a hotel license to be issued for 185 West Madison street until witness got \$50 from the man wanting the license and paid it to plaintiff in error. Witness went over the names of the

persons mentioned in the indictment as keepers of houses of prostitution, gave the location of their places, and told how much he collected monthly from each and gave to plaintiff in error. He testified he had an agreement with plaintiff in error to discharge women whom the witness did not want prosecuted, who had been arrested and taken to the station, upon the payment to plaintiff in error by the witness of \$10 for each woman discharged, and that he made him a number of payments for that purpose. Witness identified a number of checks drawn by Max Plummer on the Prairie State Bank, payable to the order of Frank Bros., which he said were given him for plaintiff in error, and that he (the witness) cashed them and gave plaintiff in error the money. Witness testified that all the money he received from keepers of houses of prostitution was for plaintiff in error and was given him for protection against police interference; that plaintiff in error said he would not bother them, but they must stay inside the house. Witness testified that on one occasion plaintiff in error sent for him, and he went to the station; that plaintiff in error, referring to "English Jennie," said, "That woman is hollering," and gave him \$20 the witness had previously received from her and paid to plaintiff in error and told witness to give it back to her, and he did so. He testified he paid plaintiff in error \$40 in February to let a woman named Evelyn Osborne out of prison, and that he received this from the woman's "fellow." The witness testified that on Monday before the indictment in this case was returned he had a talk with the plaintiff in error, and told him that he (witness) was arrested and in trouble; that plaintiff in error said to him, "Tell those people to keep quiet." The witness could read Yiddish, but could not read or write the English language.

Thomas O'Malley, a police officer at Desplaines street station, testified he had been there about a year and a half; that he was in plaintiff in error's office once when Schatz was in the office; that Schatz complained about "Mike the Pike" collecting \$40 from him for protection money for two or three months; that he said he was collecting it for the inspector, and plaintiff in error said he never collected any money for him, and directed that "Mike the Pike" be notified he could not have any more women at his place; that nothing further was done about the matter.

Julius Frank testified he was in partnership with his brother, Louis; that shortly after plaintiff in error came to Desplaines street station he (witness) had a talk with his brother, and after that money was brought to their place; that the first month Louis received the money, and witness made the slips pinned to it; that after that witness received money from the people named in the indictment;

that prior to the talk with his brother he received no money from them; that it was never put with the money of witness and his brother, but was kept in a place to itself; that the first two months Officer Griffin came and got it; that when money was brought in and witness was absent the bookkeeper made out the slips; that later all the entries were made on one slip and Louis would put it in his hatband and the money in his pocket; that witness went with his brother to the station once and saw him hand plaintiff in error a bundle of money. Witness testified that none of the money given him and his brother by keepers of resorts was kept by them; that prior to plaintiff in error becoming inspector they never collected money from those people. Witness identified a check signed by Max Plummer, drawn on the Prairie State Bank, payable to the order of Frank Bros., for \$250, and said they kept the check in the desk until the case against Plummer was over, then cashed it, placed the money with the other money for plaintiff in error, and it was all turned over to him. The records offered later showed: That Max Plummer and his wife (under the name of Annie Green), Louis Berg, and Al Lekker, were jointly indicted for pandering. That the case came up for trial in November, 1908, and at the close of the evidence for the state, on motion of their counsel, the court directed a verdict of not guilty as to Max Plummer and Annie Green. That the other two defendants were convicted. At one time witness gave his brother \$100 of their money to take to plaintiff in error with reference to the renting of 17 South Halsted street, but did not see it given to him and did not know that it was. That witness made an entry of it in their books. That the date was May 18th.

John Rehm, a captain on the police force, testified he was stationed at Desplaines street station until June, 1909; that one night about 11 o'clock he met plaintiff in error and "Mike the Pike" on the street; that plaintiff in error inquired for Nathan's place and asked the witness to go in with him; that there was a saloon in one room and music hall in the other; that all sat down at a table, and some girls joined them and they had some drinks; that they then went to Broderick's saloon; that on the way they passed Frank's, stepped in and had a drink; that witness left the plaintiff in error and "Mike the Pike" at Broderick's saloon about a quarter before 12. Witness testified he saw "Mike the Pike" in plaintiff in error's outer office one day counting a handful of bills.

Max Friend testified he owned 13 North Peoria street and rented it to Max Plummer; that plaintiff in error requested witness to call at his office, and he did so; that plaintiff in error said he heard witness had rented his building to Mike Heltler, and that Mrs. Plummer did not like it; that witness said he was

offered more rent than Mrs. Plummer was paying, and offered to let her have it but she refused; that Heitler said there was some spite work between him and Plummer; that the plaintiff in error said Mrs. Plummer told him she was going to fight for possession and said the matter had better be fixed up; that witness said he could not fix it unless Heitler would surrender his lease; that the witness had Heitler and Max and Mrs. Plummer come to his office, and it was arranged that Heitler should surrender his lease and Mrs. Plummer continue to occupy it at the rental she had formerly paid.

John F. Tyrell, a lawyer, testified he was the attorney for Max Plummer and his wife in the pandering case; that plaintiff in error, since his indictment, had talked with witness three times about who paid witness his fees; that the first time plaintiff in error made the inquiry witness answered he did not remember definitely, but supposed the defendant paid him; that plaintiff in error told witness he thought Louis Frank paid him; that witness promised to look the matter up; that the next talk they had witness told plaintiff in error he was about in the same condition as at their first talk; that the third time they talked witness said he would ask Max Plummer, but at best his own testimony would be vague and indefinite, to which plaintiff in error said, "Can't you kind of stretch your imagination and say you got it from Louis Frank?" that witness replied he did not think he could. Witness was shown two checks payable to him, signed by Max Plummer, and identified them as the checks Plummer gave him in payment of his fee. One was for \$111, which included \$11 stenographer's fees, and the other was for \$50.

Judge Fake testified he visited plaintiff in error two evenings while he was ill, about the 1st of October. The witness said a friend was with him at his first visit, and they went upstairs where plaintiff in error was; that the next visit was about three weeks later; that they went in the rear room on the first floor, where plaintiff in error was; that a smooth-faced, stout man was also there, and witness thought he was introduced to him. Witness testified that in leaving he walked out through the parlor to the front door.

S. B. Goldberg testified he was a trusted employé and bookkeeper of Frank Bros. and had been with them over two years. The witness testified he made slips placed with the money left with Frank Bros. by a number of persons named in the indictment as keepers of houses of prostitution; that when the money first began to come in Louis Frank would call off the name, number, and amount, and witness would write it on a slip, pin it to the money, and put the money in a certain place in the desk; that the money usually came in about the first of the month; that Julius Frank would write the slips when the witness was not there; that the first month Griffin came in with Louis Frank; that witness got off his

chair and walked out; that when they came in there was \$250 or \$300 on the desk; that witness returned in three or four minutes and it was gone; that something similar occurred the second month; that after that Louis Frank would take the money; that later one long slip would be made by Julius Frank; that none of the money went into Frank Bros.' account; that it came in every month until July, 1909.

Plaintiff in error testified in his own behalf and emphatically denied the testimony of the Frank brothers about receiving any money from them or either of them, or that he ever talked with either of them about collecting the money from keepers of houses of prostitution. He denied receiving money at any time from any such source and denied receiving any of the money Louis Frank testified to paying him. He testified to efforts made by him and his subordinates, under his instructions—and in this he was corroborated by other witnesses—to control and minimize lewdness and prostitution in his district. He denied previous knowledge of intended visits of or being responsible in any way for any of the visits of Louis Frank to his residence, and testified he understood the alcohol was sent by Hawkins. In short, he contradicted or explained substantially most of the incriminating circumstances testified to by Frank. Hawkins testified he gave the money to Louis Frank for the alcohol, and that Frank said he would send it out by a messenger. He said it was true he introduced Louis Frank to plaintiff in error. He testified that at the time Capt. Rehms said Heitler had money in plaintiff in error's outer office plaintiff in error ordered him out of the station. Edward Dwyer a policeman testified Julius Frank told him in February or March, 1909, that the new czar (referring to the plaintiff in error) was breaking up everything and everybody; that if they could not get him politically they would "job him"; that they always got their man, and made other statements of like character. There was testimony by other witnesses of the Franks complaining of interference with business by the police and threats by them against plaintiff in error. Some testimony offered by the defense tended to impeach Louis Frank by showing he had made complaints to parties of the actions of the police under plaintiff in error's administration and made statements which he denied in his testimony for the people that he had made. Plaintiff in error and his sister-in-law, who lived in his house, contradicted the testimony of Louis Frank about the persons present, their location in the house, and the conditions surrounding, on the occasion of his visits to the residence of plaintiff in error. Also, they and two lady visitors who were present at the time Frank testified Max Plummer went into the house and talked with plaintiff in error, testified Plummer did not see plaintiff in error; that

he came in the door and started upstairs, and Frank told him to go back; and that he went out to his automobile and did not come in again.

There was other testimony, of more or less importance, explanatory of transactions and acts testified to by the Franks tending to favor plaintiff in error, and 30 or more persons from the various walks of life—clergymen, charity workers, business and professional men—testified to the good reputation of plaintiff in error for honesty and integrity and for being a law-abiding citizen. The testimony, it can be seen, was conflicting. Some of it, on one side or the other, must have been untrue. If the testimony of the prosecution was believed, it was amply sufficient to warrant a conviction. If it was not believed, and the testimony of plaintiff in error was believed, then the verdict should have been in his favor. Our opportunities for determining the weight and credibility of the evidence are much less favorable than were the opportunities of the jury and the judge who presided at the trial. If convictions could only be sustained where the proof was so strong and overwhelming as to exclude every possibility of innocence, instances would be rare where they could be sustained. It is the province of the jury to determine the weight and credibility of the testimony, and, where their finding has received the sanction of the presiding judge, an appellate tribunal will not disturb the verdict, even in a criminal case, solely because the evidence is contradictory. Where the proof for the people is amply sufficient to warrant a conviction, its contradiction by the proof of the defendant will not warrant a reversal unless a consideration of all the evidence produces the conviction that the guilt of the accused is improbable or reasonably doubtful. While in this case the proof for the prosecution discloses a most revolting state of affairs and one we would be glad to know did not exist, there is enough circumstantial detail and corroboration in the testimony of the prosecution here to stagger one's faith in the integrity and honesty of plaintiff in error's administration of his official duties. It must be recognized as an irreparable wrong to an innocent man to convict him of so heinous a crime and incarcerate him in the penitentiary; but, on the other hand, it would be an irreparable wrong to the public to acquit one who is, in fact, guilty of such an offense as is charged against plaintiff in error. It is the duty of courts to endeavor, as best they can, to see that justice is done both to the accused and the public; but, as the agencies through which this result is sought to be attained are human and fallible, the exact truth cannot always be demonstrated with absolute certainty.

We have not overlooked the contention of counsel for plaintiff in error that the Frank brothers, as appears from the evidence in

this case, may not be the most exemplary citizens. Their business, environment, and associations, it may be admitted, have not tended to elevate their moral natures. The jury and the trial judge, however, had all this before them, and had the opportunity, that we have not, of seeing and hearing them testify and observing their manner and demeanor while testifying. It does not necessarily follow that because one may not be an exemplary citizen he will not tell the truth. The jury and the trial judge thought the witnesses for the prosecution did tell the truth or the case would not be here. The matters and things the Franks testified to were, for the most part, matters about which there could not possibly have been any mistake. In these respects their testimony was either true or willfully and corruptly false. Being contradicted, it became the peculiar province of the jury to determine on which side the truth lay.

This court will not hesitate to reverse judgments of conviction in criminal cases when the proof for the prosecution, considered with all the evidence in the case, is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt; but it will not usurp the functions of the jury by substituting its judgment for theirs in passing on the weight and credibility of conflicting testimony. In *Hanrahan v. People*, 91 Ill. 142, defendant was convicted of an assault with intent to commit murder. It was insisted the verdict and judgment were contrary to the evidence. The court said, on page 148: "As regards the question of fact, it is true that the evidence is contradictory. It was the province of the jury to judge of the credibility of the witnesses. If they believed the witnesses in behalf of the prosecution, their finding was justified by the evidence. They had the better opportunity to judge of the credibility and weight to be attached to the testimony of the several witnesses." In *Rogers v. People*, 98 Ill. 581, defendant was convicted of the crime of burglary. The only testimony connecting him with the crime was that of a boy ten years old. Defendant denied his guilt and was corroborated by the testimony of two women. The court said, on page 583: "The boy was a competent witness although so young in years, and, if believed, the jury were justified in finding the verdict they did. They did believe the boy and disbelieved the story of the other witnesses. We cannot say they erred in this and found a verdict which was against the evidence." The rule announced in those cases has been frequently reiterated in other cases. *Steffy v. People*, 130 Ill. 98, 22 N. E. 861; *People v. Horchler*, 231 Ill. 566, 83 N. E. 428; *Rafferty v. People*, 72 Ill. 37; *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109. We would not be justified in disturbing the judgment in this case on the ground that it was not warranted by the evidence.

The court permitted the prosecution to introduce in evidence four checks for \$40 each and one for \$250, drawn by Max Plummer on the Prairie State Bank, payable to Frank Bros. The checks were all stamped paid, and Louis Frank testified they were given for plaintiff in error; that he paid him the money obtained on the checks; that the four \$40 checks were the monthly contributions of Plummer for protection for his house of prostitution, and the \$250 check was for services of plaintiff in error in connection with the indictment against Plummer and his wife. It is insisted these checks were incompetent evidence. It is true, nothing appeared upon the checks tending to show plaintiff in error received the money, and they did not corroborate the statement of Louis Frank that he gave the money received on the checks to plaintiff in error. They did, however, corroborate his statement that he received some of the money he said he paid plaintiff in error from Max Plummer on checks. It was not claimed by the prosecution that the plaintiff in error had any knowledge of any of the checks given by Plummer except the one for \$250, which Frank testified it was agreed he should hold until the case against Plummer and his wife was disposed of. The introduction in evidence of these checks confirmed Frank's testimony that he received money from Max Plummer. What he did with it depended on other testimony in the case. We do not think plaintiff in error has any substantial basis for complaint on account of the admission in evidence of the checks.

Complaint is made that the court admitted hearsay evidence on behalf of the prosecution. The principal instances complained of were the following: Louis Frank testified plaintiff in error asked him to request Charlie Yanker to withdraw a complaint he had made at the city hall. The court permitted Frank to testify that he went to Yanker and told him plaintiff in error wanted him to withdraw the complaint and Yanker promised to do so. Louis Frank testified to giving plaintiff in error \$100 of his and his brother's money to obtain permission for Yanker to run a place at 17 South Halsted street which belonged to the Frank Bros. and had been rented by them to Yanker. Julius Frank testified to giving Louis \$100 of the firm's money, and that Louis said at the time it was for plaintiff in error for permission to Yanker to run the place. Louis Frank testified that when he went to see the keepers of houses of prostitution about paying for protection, at the request of plaintiff in error, he told them "the inspector says he won't stand for you if you got women upstairs; that you got to pay \$20 for upstairs and \$20 for downstairs." According to the testimony of Louis Frank, he was acting for and on behalf of plaintiff in error, and the statements proven to have

been made by him to Yanker and other keepers of houses of prostitution were in carrying out the instructions of plaintiff in error. It was impossible, in the nature of things, that Frank could have collected tribute from a large number of people every month to protect them from police interference without disclosing to them what it was for. He testified plaintiff in error directed him to tell them what he said and he was simply carrying out the instructions of his principal, and we think his testimony that he told them what his principal directed him to tell them was competent. *Samples v. People*, 121 Ill. 547, 13 N. E. 536; *Card v. State*, 109 Ind. 415, 9 N. E. 591. While the testimony of Julius Frank that his brother told him what he wanted the \$100 for was not strictly competent, its admission was not of such a prejudicial character, in view of all the other evidence in the case, as to require a reversal of the judgment.

It is contended the court erred in giving a large number of instructions on behalf of the people. We have examined the instructions complained of, and the criticisms made of them, with care, and find no reversible error was committed in giving them. The most serious complaint is made of instruction No. 32. That instruction told the jury that even though they believe, from the evidence, that the plaintiff in error, while acting as a police officer, caused persons to be arrested from houses of prostitution run by persons named in the indictment, still if they further believe, from the evidence, beyond a reasonable doubt, that he collected money from them through Louis Frank with the intent and purpose of permitting them to run within the city of Chicago in manner and form as charged in the indictment, they should find him guilty. It is said this instruction was erroneous because the indictment did not charge plaintiff in error with collecting money from persons through Louis Frank, and that under the instruction he might have been found guilty of some other charge than the one upon which he was being tried. We do not think the instruction was prejudicial to plaintiff in error or could have misled the jury. While the charge was that plaintiff in error received money as a bribe from Louis Frank, the evidence for the prosecution was that Frank collected it first, by direction of plaintiff in error, from those who were to be favored by him in administering the duties of his office, and the instruction, in view of the evidence, considered with all the other instructions in the case, was not erroneous.

Serious complaint is made of statements of the state's attorney to the jury in his closing argument. Some of these complaints are not without justification, and we think should not be passed over without some comment. We will only notice the most objectionable conduct of the state's attorney in his closing argument.

One of the positions of the defense on the trial of the case was that the witness Louis Frank was actuated by malice toward plaintiff in error because of his interference with certain business the witness was interested in, and for the purpose of proving such malice, thereby affecting his credibility, plaintiff in error introduced as a witness Fred Boyer, an insurance man. The witness testified he met Frank one morning on the front platform of a street car, spoke to him, and inquired, "How is business?" That Frank replied: "Business is very poor. The administration is not letting up any." On cross-examination the state's attorney asked the witness if he was not in the army in the Philippines. The witness replied he was. The state's attorney then asked him if he was not convicted, while in the army, for embezzlement. The witness replied, "No, sir." The state's attorney then asked him if he was not sentenced to dismissal and one year's confinement, and if the sentence was not afterwards held to be illegal. This was objected to and the objection sustained. One of counsel for plaintiff in error, in his argument to the jury, referred to the cross-examination of this witness and said, "Boyer was not a man convicted as an embezzler," and charged the state's attorney with attempting to create suspicion against the witness because he had testified to something in behalf of plaintiff in error. The state's attorney, in his closing argument, referred to the statement of counsel for plaintiff in error that it was not proved the witness Boyer had been convicted of embezzlement in the Philippine Islands, and said, "But it is true, and I have in my hand a telegram from the War Department which shows it is true, and I am going to read it to this jury so that they may know that it is true." Counsel for plaintiff in error objected, and the state's attorney stated he insisted on reading it and said he thought he had a right to do so. The court sustained the objection, and the telegram was not permitted to be read. Counsel for the people justify this conduct of the state's attorney because, they assert, counsel for plaintiff in error had argued a matter to the jury that had been ruled out by the court and used it as a basis for ridiculing the state's attorney and creating prejudice against him in the minds of the jury.

The plaintiff in error testified that he entered the police force of the city of Chicago as patrolman September 21, 1891; that he held that position about two years and was then promoted to sergeant and sent to South Chicago; that he held that position a little over eleven months; that in May, 1896, he was reduced to patrolman; that afterwards he took the civil service examination and was appointed sergeant; that he held that office a little more than three years and then became lieutenant; that he was made cap-

tain in 1906; that in March, 1908, he was appointed inspector and assigned to the Desplaines street division. His counsel, in their argument to the jury, stated that during all the time of his service on the police force no charge had been made against him; that owing to the "mutations of politics" he had been reduced from sergeant to patrolman; and that he had advanced from post to post until appointed to the position he occupied at the time of his indictment. In his closing argument the state's attorney said counsel for plaintiff in error had no right to argue that nothing was shown against him or that no charge had ever been made against his record, "because that is not a fact; they have no right to argue it because they know it is not true."

Mr. Neely: "What evidence is there here that it is not true?"

Mr. Wayman: "The records of the office in the hands of Si Mayer show exactly opposite to what you say is true. There is no evidence that he never had a black mark in the police department, but I have as much right to argue that he had as you have to argue that he had not."

Mr. Neely: "Oh! That is simply your opinion."

Mr. Wayman: "No! No! No! It is substantiated by the records."

Mr. Neely: "Well, it is not in evidence, if your honor please."

Mr. Wayman: "Just as much as yours is, and I have just as much right to argue on it as you have."

The Court: "Neither side can argue before the jury about anything not in evidence."

Mr. Wayman: "That is the point they first brought up—"

Mr. Neely: "I object to his statement, if your honor please."

The court sustained the objection and said: "If one side has argued about anything not in evidence, that does not warrant the other side arguing about matters not in evidence. No, counsel must keep within the record on both sides."

The state's attorney attempted to justify this conduct on the ground that counsel for defendant in error were unfair in their argument; that they frequently went outside the record and in various ways conducted themselves in an improper manner, which was unfair toward the prosecution and the state's attorney and greatly annoyed and irritated him. Conceding this all to be true as alleged, it furnishes no justification for the state's attorney, whose office is semi-judicial, and who owes a duty to defendant as well as the people, to resort to similar tactics. However aggravating and unfair counsel for the defense may be in argument to the jury—and in this case the complaint of the state's attorney is not without foundation—it is to be remembered they are not on trial, and if any one is made to suffer from improper argument of the state's at-

torney it is the defendant, not his counsel. Necessarily, considerable latitude must be allowed in argument to a jury; but under no circumstances is it allowable to either party to go outside the record in the manner shown by the examples above given. If either side transgresses the rule, the court has the power, and self-respect as well as the orderly administration of justice demands that it exercise the power, to control the argument within proper bounds. "It is the duty of the court to regulate the trial and the argument and conduct of attorneys, to preserve the dignity and decorum of the proceedings, to prevent wrangles between attorneys, and to compel obedience to rulings and decisions." *North Chicago Street Railroad Co. v. Leonard*, 167 Ill. 618, 47 N. E. 752.

Complaints of improper arguments of counsel have frequently been considered by this court, and judgments have sometimes been reversed on account of them. In *Gallagher v. People*, 211 Ill. 158, 169, 71 N. E. 842, 847, the court said: "It is very difficult to lay down an inflexible rule as to the proper limit of an argument upon the facts and circumstances of a case, and, unless the court can see that statements are unprovoked or so foreign to the case as to be calculated to produce a result which otherwise would not have been reached, a judgment of conviction will not be reversed on that ground. The matter is one which must in every case be very largely intrusted to the discretion of the presiding judge." In *Bulliner v. People*, 95 Ill. 394, 405, the court said: "The trial judge should always see that the line of argument is kept within reasonable bounds and not allow the defendant to be convicted or prejudiced on account of real or imaginary crimes for which he is not upon trial, and unless for a palpable abuse of discretion in this regard, manifestly tending to an improper conviction, there should be no reversal." In *Spahn v. People*, 137 Ill. 538, 547, 27 N. E. 688, 691, the court, referring to the argument of the state's attorney complained of, said: "While arguments of that character are not to be approved or looked upon with favor, still they will not ordinarily be deemed sufficient to necessitate a reversal of the judgment unless they are of such a character as to raise an inference that the jury were probably misled or improperly influenced thereby." In *Siebert v. People*, 143 Ill. 571, 591, 32 N. E. 431, 436, the court said: "It is impossible to lay down any general rule in regard to what shall or shall not be said in an argument to the jury, but unless it is apparent that defendants have been injured by improper remarks the judgment should not be reversed on that ground alone." In *Ochs v. People*, 124 Ill. 399, 430, 16 N. E. 662, 675, it is said: "The course of the people's counsel on the trial was not free from censure. There was a harshness of bearing and intemperance of language

toward the defendants which it is not pleasant to witness in a record and which should never be assumed and indulged in against a prisoner on trial. There may, perhaps, be somewhat of extenuation in the circumstances of the case. Defendant's counsel themselves were not faultless in their own bearing." In *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899, the court said that while in clear cases it would reverse, and frequently had reversed, judgments on account of improper remarks to the jury, this was always done with hesitation and reluctance.

It will be seen from the cases referred to that, while improper remarks of counsel in argument to the jury have uniformly been condemned by this court, judgments have been reversed on account of such remarks only in cases where the evidence for the prosecution was of such character that the court was of opinion the improper remarks contributed to produce the verdict of the jury. The court sustained objections by counsel for plaintiff in error to the argument of the state's attorney, and instructed counsel for both sides, in the presence of the jury, that they must not argue matters not in evidence. The jury were also instructed that it was not proper for counsel to state anything in argument upon his personal knowledge or which might have been told to him by others who were not witnesses, and to disregard any such statements and base their verdict upon the evidence, giving no consideration to statements of counsel not supported by the evidence. Observing the rule which has uniformly been followed by this court, we would not be justified in reversing the judgment on account of the improper argument of counsel for the people complained of by plaintiff in error.

We find no error in this record that requires or justifies a reversal of the judgment of the criminal court, and it is therefore affirmed.

Judgment affirmed.

COOKE, J. (dissenting). In my opinion this judgment should be reversed on account of the improper and highly intemperate remarks of the state's attorney in his closing argument to the jury. Plaintiff in error attempted to show in his defense that he was doing everything in his power to control and discourage the vice and prostitution prevalent in his district, and that as a result of his activities along that line certain of the denizens of the district had conspired to discredit and ruin him. The state relied for its conviction chiefly upon the testimony of the two Franks, who were admitted to be interested in the conduct of two houses of prostitution—a disreputable and illegitimate business. Anything that tended to contradict either of them in any material matter was of importance to the defense. The testimony of the witness Boyer that Louis Frank said to

him in the early part of the year 1909, "Business is very poor; the administration isn't letting up any"—contradicted the testimony of Frank, and, if true, tended strongly to corroborate the claim of the defense that plaintiff in error was attempting to rigidly control the illegitimate business in which the Franks and others were engaged in that district. Plaintiff in error was entitled to have this testimony go to the jury without any improper attack being made upon it. If Boyer was not a credible witness, there are well-defined rules, with which the state's attorney must have been familiar, governing the methods by which he might have been impeached. The state's attorney did not see fit to avail himself of any proper method of impeachment. When Boyer was first on the stand his cross-examination was waived. The next day he was recalled for cross-examination. That examination was as follows:

Q. "Were you not convicted in the Philippine army, as a member of the regular army, for embezzlement?"

A. "No, sir."

Q. "Were you not sentenced to dismissal and one year's confinement, and it was held illegal because the court was composed partly of regular officers?" To this question objection was interposed on the part of defendant.

The Court: "Objection sustained. The only proof is to be made by record."

Mr. Wayman: "Unless he would admit it."

The Court: "And he denies it."

No attempt was thereafter made by the prosecution to show that Boyer had been convicted of any crime that would affect his credibility, and the state's attorney seeks to justify his use of the language quoted in the majority opinion, and his offer to read to the jury the alleged telegram from the War Department at Washington, on the ground that one of the counsel for plaintiff in error in his argument stated to the jury, referring to this cross-examination of Boyer: "If that was true, why not prove it? Why make that assault on the man? Boyer was not a man convicted as an embezzler, yet he was able to assault him unjustly." Whether there could be any justification for the statement of the state's attorney, it cannot be said that under the circumstances there was anything improper in the argument of counsel for plaintiff in error on this point.

In addition to the other instances cited in the majority opinion, the state's attorney, on a number of occasions, traveled outside the record in his argument to the jury. His statements on these occasions were not in reference to matters so material as those pointed out; but they were all calculated to improperly influence and prejudice the jury, and no doubt had that effect. In referring to a character witness called on the part of plaintiff in error, he stated that the chief thing in his career was that he had beaten a

lawyer up so that he died in an insane asylum. Of Rev. E. A. Bell, another character witness, he stated: "My only connection with Mr. Bell, and my only introduction to him, was when he interceded with all his might to save from the gallows a dirty burglar who had shot down a police officer in the middle of the night, and I would not stand for it. * * * I stood by the police force at that time and Bell did not. Don't tell me Bell knows more about this case than I do." Again, in attempting to bolster up the reputation of Frank, who owned two houses of prostitution, he stated that there was not an estate in Cook county that did not own houses used for the purpose of prostitution, and named the estate of one prominent citizen of Chicago as being among the number. These statements were all objected to and the objections sustained; but the jury heard the statements made, and these rulings of the court could not have the effect of removing from the minds of the jurors the impressions created by hearing the statements made. Some of these remarks were of such a character and were concerning matters so material, and were calculated to so influence the jury, that it is impossible to say they produced no effect or that the verdict of the jury would have been the same had they not been made. This is particularly true of the Boyer incident and of the attack made on the record of plaintiff in error as a member of the police force, which is set out in the majority opinion. If the jury believed the testimony of the Franks, it was inevitable that they must find the plaintiff in error guilty. On the other hand, if they did not believe their testimony, it is very improbable that a verdict of guilty would have been returned. Anything bearing upon the credibility of either of these witnesses was a material matter, and plaintiff in error had the right to have it properly presented to the jury.

In my opinion the misconduct of the state's attorney was so gross and so prejudicial in its tendency that it is impossible for this court to say that the jury was not influenced by it. We have not hesitated, in civil cases, to reverse a judgment on account of impressions wrongfully conveyed to the jury's mind by improper conduct of counsel. *Chicago City Railway Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112; *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957. The rule in this regard should be more strict in criminal cases than it is in civil cases. In *McKevitt v. People*, 208 Ill. 460, 468, 70 N. E. 693, 696, we said concerning similar conduct: "The prosecuting attorney, who thus violated a fundamental rule of practice, should not be permitted to sustain a verdict if his conduct has contributed to the conviction of the defendant." And in the earlier case of *Raggio v. People*, 135 Ill. 533, 545, 26 N. E. 377, 381, in discussing the same subject, we said: "The trial court erred in overruling defendant's

objections to these statements, and, while a court of review will always hesitate to set aside a conviction for such error alone, yet in a case like this, where there is much reason to fear that the verdict was not the result of a dispassionate consideration of all the evidence in the case, it becomes material and substantial error." In this case there is reason to fear that the verdict was not the result of a dispassionate consideration of the evidence, and as was said in the McKevitt Case, *supra*, the prosecuting attorney should not be permitted to sustain this verdict if his conduct has contributed to the conviction.

I have not attempted to set out all of the remarks of the prosecuting attorney that were objectionable; but for the reasons given above this judgment should, in my opinion, be reversed.

(247 Ill. 124)

GODFREY et al. v. DIXON POWER & LIGHTING CO. et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 7, 1910.)

1. WATERS AND WATER COURSES (§ 170*)—ERECTION OF DAMS—LIABILITY.

In an action for the destruction of the water power created by an old dam by the building of a new dam, the evidence showed that the old dam, as a means for developing water power, was destroyed before the new dam was begun, and did not show that defendant was under any obligation to plaintiff to repair or rebuild the old dam, and showed that after the new dam was built the water was raised to the same level as before, so that the new dam, had the old dam remained intact, would not have interfered with the water power of the old dam. *Held*, that there was a failure to show a cause of action.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 203, 231; Dec. Dig. § 170.*]

2. JUDGMENT (§ 743*)—RES JUDICATA.

Where the ownership of a power dam carried with it the right to have it occupy the land on which it stood, and so long as it did so the land was capable of no other possession, the title to the dam was directly in controversy in ejectment for the land, since, if plaintiff in ejectment owned the dam, he had the right to the possession of the land, and the judgment in the action settled the ownership of the dam.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1275-1277; Dec. Dig. § 743.*]

3. PROPERTY (§ 9*)—VALIDITY—POSSESSION OR TITLE OF GRANTOR.

A deed without proof of possession or title in the grantor is not evidence of title in the grantee.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

4. EVIDENCE (§ 273*)—DECLARATIONS OF PERSON IN POSSESSION OF REALTY—ADMISSIBILITY.

The competency of declarations of one in possession of land is limited to showing the character of the possession of the declarant or the title by which he holds.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

5. EVIDENCE (§ 353*)—DECLARATIONS OF PERSON IN POSSESSION OF REALTY—ADMISSIBILITY.

A recital, in a deed conveying an undivided one-half of the surplus of the water power created by a dam, that the same is owned by the grantor in common with third persons named, does not, as against a subsequent grantee of the grantor, not claiming under the deed, qualify the character of the grantor's possession or title, and it is not competent to prove title in the third persons.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1408-1411; Dec. Dig. § 353.*]

Appeal from Circuit Court, Lee County; Oscar E. Heard, Judge.

Action by William C. Godfrey and others against the Dixon Power & Lighting Company and others. From a judgment for plaintiffs, defendants appealed to the Appellate Court, from which the cause was transferred to the Supreme Court. Reversed and remanded.

E. E. Wingert and A. C. Bardwell, for appellants. William D. Barge, for appellees.

DUNN, J. The appellees recovered a judgment against appellants for \$15,000. An appeal was taken to the Appellate Court, and that court, finding that a freehold was involved, transferred the cause to this court.

The action was for damages occasioned by the destruction of a certain dam across the Rock river and of the water power connected with it. A litigation between these same parties concerning this dam was before us at a former term. *Godfrey v. Dixon Power Co.*, 228 Ill. 487, 81 N. E. 1069. The opinion in that case states many facts material to this controversy which will be referred to but not repeated here.

A dam was built across the Rock river at the place in question before 1851, and a race was constructed through the Mill block, on the south side of the river. Industries using water power were established on either side of the river and were supplied with power from the dam. Frequent and extensive breaks occurred in the dam, and repairs were made from time to time, which were sometimes very expensive. The dam was originally constructed of trees and stones and was repaired with the same materials. In the course of time these rotted and washed out in places, and leaks were large and constant. In the spring of 1904 the dam was in bad repair, with many leaks, and a break occurred that year which practically destroyed the power. The evidence indicates that the water practically all went through the break and that there was no power. Many of the mills and other buildings on the south side of the river which received power from the dam were destroyed by fire in 1880. After that time no power was taken or used by the appellees or their predecessors in title, but the dam and water power were possessed, controlled, and used only by the appel-

lants and their predecessors in title, and all repairs were made by them at their own cost. After the breaking of the dam in 1904, no attempt was made to repair or rebuild the old dam. A new dam was built of cribs filled with stone. The distance of the cribs from the west line of the old dam was about 5 feet, and the crest of the new dam was 25 or 30 feet west of the crest of the old dam. The abutments at the north and south ends of the old and new dams were practically in the same positions. The crests of the new dam and the old dam were of the same height. The plaintiffs claim to be the owners of an undivided half of the dam and of a large part of the water power created by it.

The declaration consisted of eight counts. The first count charged that the construction of the new dam caused a backwater which destroyed the old dam and the water power belonging to plaintiffs. The second count charged that the construction of the new dam caused backwater which destroyed the plaintiffs' water power. The third count charged that the plaintiffs owned certain property in Dixon suitable and convenient for the location thereon of machinery to be operated by water power and also owned certain water power created by the old dam, and that the building of the new dam destroyed the water power and injured the value of the plaintiffs' premises. The fourth count was similar to the third. The eighth count charged that the plaintiffs owned certain property in North Dixon suitable for the erection and maintenance of machinery to be operated by water power created by the old dam and also owned the right to cut a raceway around the north end of said dam, and that the building of the new dam destroyed the water power and greatly damaged the plaintiffs' premises. All these counts go upon the theory that the building of the new dam destroyed the old dam or destroyed the water power created by the old dam. In fact, as appears from the statement heretofore made, the old dam, as a means for the developing of water power, was destroyed before the construction of the new dam was begun, and there was then no water power to be destroyed. The water was running uselessly through the break in the old dam. The appellants are not averred to have been under any obligation to the appellees to repair or rebuild the old dam or to build a new one. Had they done nothing, there would have been neither dam, water power, nor claim for damages. After the new dam was built, the water was raised to the same level as before. Had the old dam remained intact, the new dam, and the backwater caused by it, would not have interfered in the slightest degree with the water power of the old dam. The head was the same; the boundaries of the pond were the same, except for the narrow space between the two dams; the water left the pond at the same place, flowed through the same race and back to

the river at the same level as before, below both dams. There was an entire failure of evidence to sustain these counts.

The fifth count charges that appellees were the owners of the undivided half of the old dam, and that the appellants chopped and split up the timbers and planks and dug up and carried away the stone, gravel, soil, and rock in said dam and converted it to their own use. The question of appellees' ownership or possession of any part of the dam is in controversy, and many instruments have been introduced in evidence showing much complication in the title to the dam, the surrounding premises, and the water power. Such title as appellees have to the dam descended to them from their father, who inherited it from his mother. She derived such title as she possessed under the will of her husband, Charles Godfrey, who died in 1864. So far as the south half of the dam is concerned, the question of ownership was decided adversely to the appellees in the case of *Godfrey v. Dixon Power Co.*, supra. The south half of the dam stands upon lot 1 of the Mill block. In the case cited the present appellees sought to recover from the appellants, in an action of ejectment, that part of said lot 1 on which the dam stood, which the plaintiffs claimed in fee. The plaintiffs were defeated; the court holding that the defendants' plea of the statute of limitations was established. The appellees contend that this judgment concerned the land, only; that the owners had severed the dam and water power from the land; and that therefore the adjudication of the title to the land is not binding as to the dam. Whether severed or not, it is certain that the ownership of the dam carried with it the right to have it occupy the land on which it stood, and that so long as it did occupy that land such land was capable of no other possession. The title to the dam was therefore directly in controversy, for if the plaintiffs owned the dam they had the right to the possession of the land, and should have recovered and not been defeated.

Charles Godfrey's title to the north half of the dam rests upon a deed to him from William W. Heaton, dated May 13, 1857, purporting to convey property on each side of the river and the undivided half of the dam. There is no evidence in the record that Heaton ever had possession of any of the premises described in this deed, the dam or the water power, or that he had any title thereto. A deed without proof of possession or title in the grantor is not evidence of title in the grantee. *Metropolitan Elevated Railway Co. v. Eschner*, 232 Ill. 210, 83 N. E. 809.

The appellees insist that the appellants should not be permitted to deny that Heaton had an interest in the dam because of a recital contained in a deed from John Dement, who was one of the appellants' grantors, to Harriet Godfrey and James B. Charters, dat-

ed February 28, 1867. That deed conveyed to the grantees the "undivided one-half of any excess or surplus of the water power created by the present dam across said Rock river at Dixon, in said county of Lee, and now owned by said John Dement, in common with the said Harriet Godfrey and James B. Charters." It is a familiar rule that the declarations of one in the possession of land are competent to show the character of his possession. The rule has no application here. The competency of such declarations is limited to showing the character of the possession of the person making them or the title by which he holds. *Dodge v. Freedman's Savings & Trust Co.*, 93 U. S. 379, 23 L. Ed. 920; *Bowen v. Chase*, 98 U. S. 254, 25 L. Ed. 47. The appellants do not claim under the deed in question, and the recital does not qualify the character of their grantor's possession or title. It is not competent to prove title in another. The evidence was insufficient to show that the appellees were the owners of any part of the dam.

The sixth and seventh counts of the declaration aver the appellees' ownership of lots 5 and 6, in block 3, in Dixon, and of certain water power, and the right to the perpetual use of an arch in the wall of the race, and of the use of a strip of land through which to convey, by shafting, a portion of their water power for propelling machinery on the said lots. They then aver that the appellants constructed across said strip a concrete wall, 14 feet high and 8 feet wide. The wall mentioned is the wall at the west end of the race. The evidence shows that this wall is the same height as the north wall of the race; that all the shafts for the transmission of power to the south side of the street are carried over the latter wall; that the street is four or five feet higher than the wall; and that there is a tunnel under the street for the shaft to pass through. It further appears that it would not be proper to run the shaft below the top of the north wall because at an ordinary stage of water the gear wheel would be under water. When the knitting mill which formerly stood on lot 5 was in operation, the power was derived from a wheel placed north of the north wall of the race, and the water for this wheel was taken from the race through an arch in this wall. The evidence shows that the shaft by which the power was transmitted passed over the wall and through the tunnel yet remaining under the street, and the erection of the wall complained of would not interfere with such shaft.

Objections are made to the giving and refusing of instructions, and other questions have been argued; but, in view of what has been said, these objections and questions will not probably arise on another trial, and are therefore not now necessary to be considered or decided.

The judgment will be reversed, and the cause remanded.

Reversed and remanded.

(247 Ill. 60.)

EVANS v. MOORE et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

1. TRUSTS (§ 92½*)—CONSTRUCTIVE TRUSTS—PAROL PROMISE.

A mere parol promise of a grantee or devisee to hold the title to real estate in trust, unattended by any fraud in procuring the conveyance or devise, does not raise a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141; Dec. Dig. § 92½.*]

2. TRUSTS (§ 110*)—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence held not to charge a devisee as trustee under a constructive trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 160; Dec. Dig. § 110.*]

3. WILLS (§ 59*)—CONSIDERATION.

An agreement by a naturalized citizen, who was a childless widower, to leave all his estate to a nephew who resided in a foreign country, if he would come to this country and become a citizen thereof, is supported by a valid consideration, and when performed by the nephew the agreement is binding.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 166; Dec. Dig. § 59.*]

4. TRUSTS (§ 356*)—CONVEYANCE OF TRUST PROPERTY—TITLE OF GRANTEE.

Where property subject to a trust is conveyed in violation of the trust, the purchaser with notice of the trust holds subject to the trust, and equity will impress the trust on the property in his hands and compel him to perform it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. § 356.*]

5. EQUITY (§ 87*)—LIMITATIONS.

A court of equity, in a case in which its jurisdiction is exclusive, is not bound by limitations applicable to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the case.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 87.*]

6. TRUSTS (§ 365*)—EQUITY (§ 87*)—ENFORCEMENT—LACHES.

Testator, who had orally agreed to give his property to a nephew, devised the same to a third person, who frequently declared to the nephew that he held the property for his benefit, and that he would turn it over to him when his habits became better, or when he married. The third person at no time denied holding the property in trust for the nephew. He and the nephew maintained friendly relations for many years. Held, that the right of the nephew to enforce in equity his rights against the property was not barred by limitations, nor by the nephew's laches in delaying to sue to enforce the trust till after the death of the devisee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.* Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

Appeal from Circuit Court, Lee County; Oscar E. Heard, Judge.

Suit by Samuel T. Evans against Ernest H. Moore and others. From a decree for complainant, defendants appeal. Affirmed.

This is a bill in equity by appellee, Samuel T. Evans, as complainant, against appellants, who are executors, heirs, and devisees of John H. Moore, deceased, to require them to account for, convey, and assign to complainant certain real estate in the city of Dixon, Ill., and certain personal property which in his lifetime belonged to David L. Evans, uncle of complainant, and was by said David L. Evans devised by last will and testament to John H. Moore, deceased, who left a last will and testament devising the same property to his children.

David L. Evans was originally from Wales, but had resided in the city of Dixon, Ill., many years before his death. He had been married, but his wife had been dead a long time, and they had no children. His only living relatives were a brother, two sisters, and nephews and nieces, all of whom resided in Wales and were citizens of Great Britain. The bill alleges that in the latter part of 1891 and the early part of 1892 David L. Evans was in ill health and believed he had but a short time to live; that he wrote to complainant, asking him to come to Dixon as soon as possible and become a citizen of this country, and, in consideration of his doing so, stated he would leave to complainant all his property. At the time these letters were written, the complainant was 25 years old, a single man, residing with his parents. The bill alleges that in consideration of the request and promise of David L. Evans the complainant came to Dixon, Ill., renounced allegiance to Great Britain, and became a citizen of this country. The bill alleges that in November, 1894, David L. Evans was taken seriously ill, and believing it was his last illness he consulted with one Moses C. Weyburn, and being of opinion, on account of complainant's age and unsteady habits, it was not wise to vest him with immediate custody and control of the property, he requested Weyburn to accept title to it and hold it in trust for complainant; that Weyburn declined to accept the trust and secured the consent of John H. Moore to accept the same, and said Moore promised said David L. Evans to accept the trust and hold the property for the benefit of complainant, and agreed that he would turn it over to complainant after his habits became steadier or after he had reached years of greater maturity; that David L. Evans was at that time very ill and confined to his bed and unable to give the matter of the preparation of the will personal attention; that he reposed great confidence in Moore; that Moore was then giving him his personal attention in his illness; that he exercised great influence over said David L. Evans and promised to consult an attorney about having the will prepared; that, either through a fraudulent purpose or misunderstanding as to the proper way to carry into effect the expressed intentions of said David L. Evans, said Moore procured the will to be drawn in

such manner as to give him the property absolutely and not in trust; that when the will had been so drawn said Moore took it to said David L. Evans, who executed it, but was at the time so weakened by disease and his mental faculties were so dulled that he did not comprehend the manner in which the will was drawn. The bill further alleges that after the will was executed, and before the death of said David L. Evans, said Moore told complainant the property had been given to him (Moore), but that he would turn it over to complainant in a short time; that said David L. Evans died December 6, 1894, three days after making his will, and Moore took possession of the estate and property of the said David L. Evans and took out letters testamentary; that said Moore dealt out to complainant small sums of money from the proceeds of said estate, and allowed him to occupy rooms in the building and to let rooms to other parties and receive the rent therefor; that on numerous occasions the said Moore professed to be holding the property for complainant, and kept the money of said estate separate from his own private means and kept a separate bank account, as executor; that he never assumed to complainant or to others to hold the property adversely to complainant, but acknowledged complainant's rights in the premises; and that complainant never learned anything to the contrary until the death of said Moore, in June, 1907, when it appeared by his will that he had disposed of his property among his children. The bill prays that defendants be ordered and decreed to convey to complainant, by good and sufficient deed, the real estate owned by David L. Evans in his lifetime, and that they be required to account to complainant for the personal property and the rents and profits received by John H. Moore from said real estate.

The answer of defendants denied that any trust relation existed between John H. Moore and the complainant, and denied all the material facts alleged out of which it was claimed in the bill the trust arose, and averred that by the will of David L. Evans John H. Moore became the absolute owner of all the estate and property of said Evans, and claimed and asserted such ownership from the time of the admission of the will to probate until his death. The answer also set up and claimed the benefit of the statute of limitations and the statute of frauds, and interposed the defense of laches as a bar to any relief.

The cause was referred to the master in chancery to take the proof and report his conclusions. The master reported that the complainant was not entitled to the relief prayed, on the ground that there was an agreement between David L. Evans and Moore by virtue of which Moore held the property for complainant as trustee of a constructive trust. He found that the agreement of David L. Evans to leave his proper-

ty to complainant was a valid and binding contract between them; that complainant performed his part of it; that Moore had sufficient knowledge of the agreement to charge him with notice thereof; that those claiming under him in equity took the property as naked trustees for the benefit of complainant; that the statute of frauds, under the circumstances, was not a defense, but that complainant was chargeable with notice of his legal and equitable rights to enforce the trust as early as December, 1894, but failing to take any steps to do so until the commencement of this suit, July 8, 1907, he is barred by laches and the statute of limitations; that but for laches and the statute of limitations complainant would be entitled to a decree for the conveyance of the real estate to him and for an accounting for the property and the rents and profits. He reported the defendants were entitled to a decree dismissing complainant's bill. Both parties filed objections, which were overruled by the master and by order of the court stood as exceptions on the hearing. The exceptions filed by defendants were overruled. The exceptions filed by complainant were sustained, and a decree entered granting the relief prayed for. From that decree the defendants have prosecuted this appeal.

Henry S. Dixon, George C. Dixon, and John B. Crabtree, for appellants. Trusdell, Smith & Leech, for appellee.

FARMER, J. (after stating the facts as above). The bill in this case proceeds upon two theories recognized by both parties in their briefs: (1) That John H. Moore was the trustee of a constructive trust arising out of the facts and circumstances under which he obtained title to the property in controversy; (2) that David L. Evans made a valid and binding contract with complainant to leave him his property, and that complainant is entitled to the enforcement of the performance of that contract against the devisees of John H. Moore.

First. On the first ground mentioned we do not think the evidence would warrant the relief prayed by complainant. Conceding that the evidence shows Moore promised David L. Evans to hold the property in trust for the benefit of complainant, this alone would not create a trust which could be enforced where the statute of frauds was interposed as a defense. A mere parol promise of a grantee or devisee to hold the title to property in trust, unattended with any fraud in procuring the conveyance or devise to be made, does not raise a resulting trust. This question has been so often the subject of decision by this court that it will be unnecessary to do more than to refer to some of the cases. In *Lantry v. Lantry*, 51 Ill. 453, 464 (2 Am. Rep. 310), will be found a discussion of the question and the citation of numerous authorities. In that case it was said: "It will be observed that in all

these cases there is something more than the mere receipt of the title to real estate with a parol promise to hold it subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a false promise and through such false promise obtaining title to the property.

* * * If A. voluntarily conveys land to B., the latter having taken no measure to procure the conveyance but accepting it and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interposed and advised A. not to convey directly to C. but to convey to him, promising if A. would do so he (B.) would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A." The rule announced in the *Lantry Case* was not new. It was the law as laid down in text-books and followed generally by all courts. A few of the many cases decided since the *Lantry Case*, where that case was cited with approval, are *Walter v. Klock*, 55 Ill. 362; *Fischbeck v. Gross*, 112 Ill. 203; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Champlin v. Champlin*, 136 Ill. 309, 26 N. E. 528, 29 Am. St. Rep. 323; *Pope v. Dapray*, 176 Ill. 473, 52 N. E. 53; *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229; *Markham v. Katzenstein*, 209 Ill. 607, 70 N. E. 1071.

The evidence in this record shows that David L. Evans, at the time he made his will, did not desire or intend then to place the title in complainant. Complainant was to some extent dissipated, and his uncle thought it would not be wise to give him the immediate control of the property. For that reason he desired to place the title in some one else for the time being. Moore did not solicit or request that the devise be made to him to hold for the benefit of complainant and did nothing to induce it to be so made, beyond, possibly, promising David L. Evans to hold the title for the benefit of complainant until he was more mature in years and less given to dissipation. It was the intention and desire of Evans to devise the property to Moses C. Weyburn before he ever said anything to Moore about it. Weyburn testified he declined to accept the devise and recommended Evans to make it to Moore, and it was at his suggestion that the devise was so made. We do not think the contention of the complainant that Moore fraudulently prevented David L. Evans from expressing in the will the trust upon which the property was devised is sustained by the evidence. There is no proof that Evans ever said or did anything to indicate that he intended or thought it advisable to express in the will the trust upon which he devised the

property. It is true the will states that all the property should "go to and be the absolute property of the said John H. Moore." The will was written by a lawyer of high standing in the profession, in the presence of Moore and Weyburn, and after, as testified to by Weyburn, he was told by both of them the purpose for which the devise was made to Moore. Evans was very ill and feeble in body at the time he executed the will, but according to the testimony of Weyburn, which is uncontradicted, his mind was clear enough when he gave directions for the preparation of the will to fully understand the purpose of making it and the disposition he desired to make of his property, and no suggestion was made by him that the trust be written in the will. Apparently all parties having knowledge of the transaction relied on the verbal promise of Moore and did not think it necessary to write in the will the conditions of the devise. If the decree depended alone upon the enforcement of a constructive trust, we are of opinion it could not be sustained.

Second. The proof shows that David L. Evans came to this country from Wales many years ago and had lived at Dixon, Ill., a long time. He was a childless widower for many years and lived in rooms in the two-story building on a lot owned by him in the city of Dixon, which constitutes the bulk of his estate. At the time of his death he owned personal property to the value of \$1,100. All his relatives lived in Wales and were citizens of Great Britain. In the latter part of 1891 he first wrote requesting his nephew, who was then 24 or 25 years old, to come to Dixon, renounce his allegiance to Great Britain, and become a citizen of the United States, promising if his nephew would do so he would leave him all his property at his death. Two or three of the letters written by David L. Evans had been lost, but members of the family of complainant, whose depositions were taken in Wales, testified they read and heard read the lost letters; that in them David L. Evans urged complainant to come to Dixon to live, and said if he would do so he would leave complainant all of his property at the time of his death, as he had no relatives in this country to whom he could leave it. Three letters written by David L. Evans to his nephew in February, 1892, were introduced in evidence. In one of them the writer states he incloses a ticket from Liverpool to Dixon and \$30 in money. In all of them the writer expresses a great desire that complainant come to Dixon and become a citizen of this country as soon as he can, under the law, after arriving. In one or more of them he states he has made his will, and expresses some apprehension about whether he will live until his nephew arrives. He says his will is in the vault of the City National Bank; that John H. Moore and a Mr. Carpenter are executors of it, and advises complainant, if the writer should

not survive until he arrives, to confer with Moore and Carpenter; in the hands of one or both of whom would be left all his affairs. He expresses anxiety that complainant shall take out his first papers for naturalization immediately upon his arrival at Dixon, and advises him to take possession of the building at once if he (David L. Evans) should not be alive when complainant arrives. These letters show conclusively that David L. Evans promised complainant, in writing, if he would come to Dixon and become a citizen of the United States the writer would leave him all of his estate and property. The agreement and promise were in writing. Complainant complied with this request and performed the conditions imposed upon him by David L. Evans.

An agreement, based upon a valuable consideration, to make a particular disposition of property by will, will be enforced in equity against those to whom the legal title has descended, and the remedy will not be allowed to be defeated by a devise or conveyance during the lifetime, inconsistent with the agreement, unless rights of purchasers deserving of protection have intervened; and where specific performance would be decreed between the original parties to the contract it will be decreed as to all who claim under them, unless intervening equities would make the decree an injustice to the parties. *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172, 48 L. R. A. 557, 75 Am. St. Rep. 124; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619. The consideration for the agreement was that complainant should leave his parents, brothers, sisters, and other relatives, renounce allegiance to the land of his birth, come to this country to live, and become a citizen of the United States. It was not a case of a promise to make a gift without consideration, but was an agreement made upon a legal, valid consideration, and when performed by complainant the agreement became binding upon David L. Evans, and the law imposed upon him the obligation of performing it. *Schutt v. Missionary Society*, 41 N. J. Eq. 115, 3 Atl. 398; *Bush v. Whitaker*, 45 Misc. Rep. 74, 91 N. Y. Supp. 616; *Spencer v. Spencer*, 25 R. I. 239, 55 Atl. 637; 28 Am. & Eng. Ency. of Law (2d Ed.) p. 26.

It is insisted by the defendants that no services were performed by complainant for David L. Evans and that the consideration for the agreement was inadequate. The agreement did not require the performance of any service by complainant for David L. Evans. There is no evidence in the record tending to show that David L. Evans contemplated or required the performance of any service for his benefit by complainant as one of the conditions of leaving complainant his property. David L. Evans appears to have been engaged in no business at the time the agreement was made and did not engage in any business before his death. He lived

in rooms in his building, and, when well, kept his own house and for the most part prepared his own meals. He seems neither to have required nor desired the services of any one else except in case of illness. Upon the arrival of complainant at Dixon he went to the rooms of his uncle and resided there for a time until he secured employment, after which he boarded at other places. When his uncle was sick he returned to the rooms kept by him and gave him such attention as he was able to do. There is some evidence tending to show that occasionally there was friction between the uncle and nephew, due, probably, to complainant's drinking. One witness testified he heard complainant on one occasion speak disrespectfully of his uncle, and say he could see him die and tell him he had to die, but there is no other testimony in the record tending to show any lack of respect for or duty toward his uncle by complainant. On the contrary, aside from drinking, there is no evidence, except that of the one witness referred to, that complainant was ever lacking in respect for his uncle, and there is no evidence that he ever failed in the performance of any duty or service requested or desired by his uncle, except in the matter of drinking. The evidence does not show that complainant was badly dissipated, but that he drank intoxicating liquors chiefly when out of employment and occasionally became, to some extent, intoxicated. While this was displeasing to the uncle, it was not a condition imposed by him when he made the agreement to leave his property to complainant that he should abstain from the use of intoxicating liquors, and it clearly appears from the evidence that David L. Evans never intended to deprive complainant of the property absolutely or refused to perform his agreement because of his nephew's habit of drinking, but merely wished to postpone the time when he would come into possession and control of it until his habits had been improved. Nothing complainant did or failed to do relieved David L. Evans of his obligation to perform his agreement. It is a fair inference, we think, from all the evidence, that John H. Moore knew of the agreement; but whether he did or not is unimportant. He paid no consideration for the title to the property, and, whether he had knowledge of the agreement or not, he took it subject to the rights of complainant. Upon the performance of the contract by complainant David L. Evans became trustee for his benefit, and Moore took the property subject to the trust, and his devisees took it in like manner. "Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustees, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person who is a mere volunteer

or is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed and becomes himself a trustee for the original beneficiary. Equity impresses the trust upon the property in the hands of the transferee or purchaser, compels him to perform the trust if it be active and to hold the property subject to the trust, and renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. It is not necessary that such transferee or purchaser should be guilty of positive fraud or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is, in fact, impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice. This universal rule forms the protection and safeguard of the rights of beneficiaries in all kinds of trust. It enables them to follow trust property—lands, chattels, funds of securities, and even of money—as long as it can be identified, into the hands of all subsequent holders who are not in the position of bona fide purchasers for value and without notice. It furnishes all those distinctively equitable remedies which are so much more efficient in securing the beneficiary's rights than the mere pecuniary recoveries of the law." *Pomeroy's Eq. Jur.* § 1048. Therefore, unless the complainant is barred by laches or the statute of limitations from asserting his rights, we think he is entitled to the enforcement of the agreement of David L. Evans against the devisees of John H. Moore.

While courts of equity usually follow the law in applying the statute of limitations, and especially so in cases where courts of law and equity have concurrent jurisdiction, but where the jurisdiction of courts of equity is exclusive, it is not bound by the limitations applicable to actions at law, but may restrict or enlarge them according to the peculiar circumstances of the particular case. "While the limitation fixed by the statute is ordinarily followed as a convenient measure for determining the length of time that ought to operate as a bar, it is not regarded as conclusive or binding. Relief may be refused although the time fixed by the statutory limitation has not expired, or may be granted although the time of such limitation has long elapsed. In some cases of purely equitable jurisdiction time may never be a bar." 19 *Am. & Eng. Ency. of Law*, p. 154. "The result of this rule of analogy is that courts of equity, in cases in which their jurisdiction is exclusive, adopt the limitation provided by statute for analogous remedies at law as fixing the period beyond which any delay requires explanation and within which any suit may be

brought, unless it affirmatively appears that peculiar facts exist which justify the application of some equitable exception to the ordinary rules. In short, it makes the statute controlling in the absence of proof of special circumstances showing that its strict application would work injustice and wrong. The persuasiveness of the statute acquires the force and effect of absolute law unless the inequity of such an application of the rule is made clearly apparent." *Id.* pp. 160, 161. This rule has been repeatedly announced by this court. "The statute of limitations is a purely legal, as contradistinguished from an equitable, defense, and, although courts of equity will ordinarily act in obedience and in analogy to the statute of limitations, yet they will also, in proper cases, interfere in actions at law to prevent the bar of the statute where it would be inequitable and unjust. 2 Story's Eq. Jur. § 1521. And so it has been held that where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction." *Thorndike v. Thorndike*, 142 Ill. 450, 32 N. E. 510, 21 L. R. A. 71, 34 Am. St. Rep. 90. In *Reynolds v. Sumner*, 126 Ill. 58, 71, 18 N. E. 334, 337 (1 L. R. A. 327, 9 Am. St. Rep. 523), the court said: "Ordinarily, courts of equity adopt the time fixed by statute for barring claims at law, in analogous cases, as the period at the end of which they will conclude recovery in equity. This rule is by no means inflexible, and its application will always depend, upon consideration of the allegations and proof, on whether the presumption from which the bar arises prevails. The presumption arising from the mere lapse of time may be repelled by proof of other facts and circumstances inconsistent with it. When possession of trust property is taken by the trustee under the trust, it is the possession of the cestui que trust, whether the trust be express or implied, and cannot be adverse until the trust is openly disavowed or denied and this fact is brought home to the knowledge of the cestui que trust." In *Board of Supervisors v. Winnebago Swamp Drainage Co.*, 52 Ill. 209, 301, it was said: "The fact that the statute is positive in its terms will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction and enforce the right for the prevention of a fraud." This language was cited with approval in *Kelly v. Donlin*, 70 Ill. 378, and *Farwell v. Great Western Telegraph Co.*, 161 Ill. 522, 44 N. E. 801. Authorities might be multiplied, but we deem the rule so well established as not to require the further citation of cases.

The question then arises: Is the rule announced in those cases applicable to this case? We think this question must be answered in the affirmative. One witness, an old lady, who was present when the will was executed and signed it as a witness, testified she heard John H. Moore say to the complainant, immediately after the will was executed, that it was made, that everything was all right, and he would turn the property over to complainant later. A large number of witnesses testified to declarations by Moore, made on different occasions, that he held the property for the benefit of the complainant. To some of them he stated he would turn it over to him when his habits became better, and to one, at least, that he would turn the property over to the complainant when he married. These declarations were made frequently up to within three or four years of Moore's death. While there is no proof of any such declarations or statements during the last three or four years of his life, there is no evidence that he at any time denied holding the property in trust for complainant. In addition to the trust relation sustained by him to the complainant, Moore manifested friendship for and a deep interest in the welfare of complainant. He was anxious that complainant should become a Christian and join the Baptist church of which Moore was a member. He solicited him to attend church and Sunday school and wrote him about his spiritual welfare. Complainant did finally join the church, and the friendly relations between him and Moore appear never to have been disturbed. While Moore retained possession and control of the property, so far as the record shows he never claimed it as his absolute property, and under the relations existing between him and complainant and the purpose for which he claimed the control of the property, we do not think it can be said that Moore's possession was adverse to complainant. He allowed complainant to keep rooms in the building for a time without the payment of rent. He also allowed complainant to collect rent for rooms occupied by others for a while. At one time he gave complainant \$50 in money to enable him to buy a bicycle. His conduct and declarations were such as to lull complainant into a feeling of security and cause him to believe that Moore would do precisely as he said he would do and that there was no necessity for any resort to the courts to secure his rights. Moore kept the account of the estate and property of David L. Evans in his name as executor and separate and apart from his private account. While he stated in his final report, in June, 1908, that as executor of the David L. Evans estate he had taken possession of the property as owner in fee and that no one else was interested in it, there is no proof that complainant had any actual knowledge of this report;

and even if he had, under the fiduciary relations existing between him and Moore and the trust and confidence reposed in Moore by him, we do not think this act, alone, sufficient to charge complainant with notice that Moore claimed adversely to him. The proof justifies the conclusion that complainant refrained from asserting his rights by reason of the assurances and conduct of Moore, and it would be inequitable and unconscionable to permit Moore, or the devisees who represent him, to reap the benefit of his own wrong by sustaining the statute of limitations as a defense. The delay of complainant in asserting his rights worked no injury to Moore or his devisees, and they were not induced to do anything, or refrain from doing anything, that would make it inequitable to require them to account to complainant for the property which, in effect, he bought and paid for and his uncle intended him to have, and which Moore and his devisees, entire strangers to the blood of David L. Evans, never paid one cent for.

For the same reasons that equity will not permit the defense of the statute of limitations, it will not permit laches to be interposed as a bar to the relief sought by the complainant.

The decree of the circuit court will be affirmed.

Decree affirmed.

(247 Ill. 54.)

O'CONNOR et al. v. BOARD OF TRUSTEES OF FIREMEN'S PENSION FUND OF CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. JUDGMENT (§ 489*)—COLLATERAL ATTACK—WANT OF JURISDICTION.

If a court has no jurisdiction over the subject-matter, judgments rendered in respect thereof are void and can be attacked collaterally as effectively as they can be in a direct proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

2. JUDGMENT (§ 470*)—COLLATERAL ATTACK—JURISDICTION—TEST.

The proper test as to whether a court has jurisdiction of the subject-matter is: Would that court under any circumstances have the authority to enter the orders and judgments rendered? If it has, it has jurisdiction over the subject-matter, and the particular questions and circumstances involved and determined in the case cannot be inquired into in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

3. MANDAMUS (§ 100*)—JURISDICTION OF CIRCUIT COURT.

The circuit court has jurisdiction to review by mandamus the action of the board of trustees of the firemen's pension fund of Chicago in passing upon applications for pensions.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 205-210; Dec. Dig. § 100.*]

4. MANDAMUS (§ 187*)—REVIEW.

An erroneous judgment in mandamus can be reviewed only by direct appeal or writ of error.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

5. JUDGMENT (§ 677*)—CONCLUSIVENESS—PERSONS CONCLUDED.

A judgment rendered in a court of competent jurisdiction is conclusive between parties and privies as to all matters of controversy determined by the judgment, and, in mandamus against the board of trustees of the firemen's pension fund of Chicago to compel the board to place relators upon the roll of pensioners, the board of trustees represented all persons interested in the fund in respect to the defense, including veteran captains, entitled upon discharge or retirement to receive a pension from the fund, so that such captains were concluded by the judgment, though they were not made parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1193; Dec. Dig. § 677.*]

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Bill by Robert J. O'Connor and others against the Board of Trustees of the Firemen's Pension Fund of the City of Chicago and others. There was a decree of dismissal, affirmed in part and reversed and remanded in part by the Appellate Court, and complainants appeal from the Appellate Court judgment in so far as it affirmed the decree of the trial court on a certificate of importance. Affirmed.

Hayes McKinney (S. P. Shope and John R. Cochran, of counsel), for appellants. Edward J. Brundage, Corp. Counsel, and Clyde L. Day, for appellee Board of Trustees. William A. Doyle (Joseph J. Thompson, of counsel), for other appellees.

COOKE, J. The appellants, Robert J. O'Connor, John J. Evans, and Peter J. Vogt, all veteran captains in the Chicago fire department and entitled to retire on half pay under the statute, filed their bill against the board of trustees of firemen's fund of the city of Chicago, and against six pensioners of that fund, to restrain the further payment of any sum to the said six pensioners in the way of pensions. The pensioners made defendants were Mathias Benner, Arthur J. Calder, John C. Schmidt, Adolph Wilke, John D. Cavanaugh, and Daniel H. Flynn. The defendants filed their several demurrers to the bill of complaint, and the same were sustained, and on motion of defendants the bill was dismissed. From the decree sustaining the demurrers and dismissing the bill the complainants appealed to the Appellate Court for the First District, where the decree of the court in sustaining the demurrers of Benner, Calder, Schmidt, and Wilke, and dismissing the bill as to them, was affirmed, and so much of the decree as sustained the demurrers of the defendants Flynn

and Cavanaugh and the board of trustees was reversed and the cause remanded, with directions to overrule said demurrers. The appellants then prayed for and were allowed an appeal from that part of the judgment of the Appellate Court which affirmed the decree of the circuit court as to the appellees Benner, Calder, Schmidt, and Wilke, together with a certificate of importance, and the case is here upon that appeal.

As to the appellees Benner, Calder, Schmidt, and Wilke, the bill alleged, in part, that Mathias Benner served in the fire department of the city of Chicago from April 5, 1859, to July 16, 1879, when he was discharged from the service; that he had been out of the service for 28 years when he applied for a pension; that Arthur J. Calder served in the fire department from May 9, 1868, until July 5, 1884, when he resigned in order to avoid a trial upon charges which had been preferred against him for misconduct; that he had been out of the service for 23 years when he applied for a pension; that John C. Schmidt served in the fire department from April, 1860, until August, 1882, when he was discharged because of his refusal to pay just debts incurred while in the service; that he had been out of the service 26 years when he applied for a pension; that Adolph Wilke served in the fire department from January 5, 1859, until January, 1868, when he resigned; that he re-entered the service December 12, 1877, and served until September 1, 1881, when he again resigned; and that he had been out of the service 27 years when he applied for a pension. The bill further alleged that appellees severally applied to the board of trustees of firemen's pension fund of the city of Chicago for pensions; that in each instance, upon an opinion secured from the corporation counsel of the city of Chicago, the pension was denied; that appellees then filed their several petitions for mandamus in the circuit court of Cook county to compel the board of trustees to pay them pensions under the statute; that in each of these cases the board of trustees interposed a demurrer to the petition, which demurrers were severally overruled, and, the board having in each case elected to stand by its demurrer, judgments were entered severally in favor of appellees, and the board of trustees in each case prayed an appeal to the Appellate Court; that these appeals were never perfected, and the board of trustees, pursuant to the orders and judgments of the circuit court in the mandamus cases, placed the appellees upon the roll as pensioners and allowed them their respective pensions, which have since been regularly paid.

The brief and argument of appellants is very voluminous, and many reasons are assigned why the judgment of the Appellate Court should be reversed. Appellees contend that the judgments in the mandamus cases are res judicata, and that a court of equity will not in a collateral proceeding inquire in-

to the validity of a judgment entered by a court of law which had jurisdiction of both the parties and the subject-matter. To this contention appellants reply that the judgments in the mandamus cases are each of them absolutely void because of lack of jurisdiction in the circuit court, and that in any event they could not bind appellants, because they were not parties to the mandamus proceedings. The contention is correct that if the circuit court had, under the law, no jurisdiction over the subject-matter of those cases, then the judgments are each of them void and can be attacked collaterally as effectively as they can be in a direct proceeding. Appellants base their contention that the circuit court lacked jurisdiction to determine the mandamus cases upon the ground that the action taken by the board of trustees in passing upon applications for pensions is, under the statute, made final and cannot be reviewed or inquired into by any court. The proper test as to whether the circuit court had jurisdiction is: Would that court under any circumstances have the authority to enter such orders and judgments as it did enter? If it had, then it had jurisdiction over the subject-matter and the particular questions and circumstances involved and determined in those cases cannot be inquired into or attacked in a collateral proceeding.

Circuit courts have jurisdiction to hear and determine petitions for mandamus in cases of this class, and, if the court has committed error in entering judgment in a petition for mandamus where the facts alleged did not warrant the entry of such judgment, relief can be had only through a direct appeal or upon review by writ of error. On this question of jurisdiction, in *O'Brien v. People*, 216 Ill. 354, 363, 75 N. E. 108, 111 (108 Am. St. Rep. 219), we used the following language: "It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court has jurisdiction of the subject-matter and of the parties, nothing further is required. The cause of action may be defectively stated, but that does not destroy jurisdiction. A bill may state conclusions, but if not demurred to, and the evidence supports a decree conforming to the general allegations of the bill, and the decree is within the power of the court to render, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. State of Rhode Island v. State of Massachusetts, 12 Pet. 657, 9 L. Ed. 1233; United States v. Arredondo, 6 Pet. 709, 8 L. Ed. 547; Grignon's Lessees v. Astor, 2 How. 338, 11 L. Ed. 283; Applegate v. Lexington Mining Co., 117 U. S. 267, 6 Sup. Ct. 742, 29 L. Ed. 892. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but

jurisdiction of the class of cases to which the particular case belongs. *State ex rel. v. Wolover*, 127 Ind. 306, 26 N. E. 762; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Fields v. Maloney*, 78 Mo. 172; *Dowdy v. Wamble*, 110 Ind. 280, 19 S. W. 489. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for, if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide, whether the pleading is good or bad. 1 *Elliott's Gen. Practice*, § 230; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be."

If the jurisdiction of the court extended over that class of cases, it was the province of that court to determine for itself whether any particular case of that class was within its jurisdiction, and whether the court decided correctly or not cannot be inquired into in a collateral proceeding. If error is committed in that regard, it can only be taken advantage of by appeal or writ of error. *Gardner v. Maroney*, 95 Ill. 552. The circuit court had jurisdiction over the subject-matter involved in the mandamus cases, and if any error was committed it cannot be taken advantage of in this collateral proceeding.

Appellants insist, however, that as they were not made parties in the mandamus cases, and were not represented there, they are not bound by the judgments entered and have a right to attack them in this proceeding. Appellants are in error in contending that they were not fully represented in the hearing of those cases by the board of trustees. "It is a well-settled rule that a judgment rendered in a court of competent jurisdiction is conclusive between parties and privies in regard to all matters of controversy determined by the judgment, and all persons represented by the parties, both plaintiff and defendant, are bound and concluded as privies by the judgment which may be rendered." *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133. The board of trustees fully represented the appellants and all others interested in this fund in the action taken in regard to the defense in the mandamus cases, and the appellants are concluded by the same.

For the reasons above set forth, the demurrers of the appellees to the bill were properly sustained, and the judgment of the Appellate Court must be affirmed. As appellants are entitled to no relief in this collateral proceeding, it is not necessary to notice any of the other points raised.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 220.)

PEOPLE v. STRAUCH.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. CRIMINAL LAW (§ 1092*)—APPEAL—BILL OF EXCEPTIONS—TIME.

A bill of exceptions must be taken at the term at which the rulings were made, unless the court at that term extends the time within which the bill may be signed and sealed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2847-2861; Dec. Dig. § 1092.*]

2. CRIMINAL LAW (§ 1092*)—APPEAL—REVIEW—PRELIMINARY OBJECTIONS.

Alleged error in overruling a motion to quash an indictment will not be reviewed where no bill of exceptions was presented at the term, nor leave asked for an extension of time beyond the term.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2834-2861; Dec. Dig. § 1092.*]

3. INDICTMENT AND INFORMATION (§ 137*) — STATE'S ATTORNEY—CONFLICTING POSITION.

Where there was nothing to show that the state's attorney acted as state's attorney and also as prosecuting witness in securing an indictment against accused, except the fact that he signed the indictment and there was uncontroverted proof that he appeared before the grand jury as a witness at the request of its foreman and was not present when any other witness beside himself was before the jury, that he was there as a witness only, and told the court that he felt that he could not have anything to do with the case except as a witness, and was not present when the jury were discussing the evidence, or voting on the indictment, a motion to quash because he acted in inconsistent capacities was properly denied.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 480-487; Dec. Dig. § 137.*]

4. INDICTMENT AND INFORMATION (§ 139*) — MOTION TO QUASH—PLEA.

Where accused has pleaded to the indictment, he may not as matter of right thereafter move to quash for any error occurring before the grand jury.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 478; Dec. Dig. § 139.*]

5. CRIMINAL LAW (§ 301*)—PLEA—MOTION TO WITHDRAW—DISCRETION.

Leave to withdraw a plea of not guilty, in order to move to quash the indictment, is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 687; Dec. Dig. § 301.*]

6. GRAND JURY (§ 34*)—INDICTMENT—PARTICIPATION OF PROSECUTING ATTORNEY.

Where a state's attorney is to be a witness before the grand jury, the court should appoint a special state's attorney before the matter is presented to the grand jury, but a failure to do so was not fatal to an indictment returned without active participation on the part of the state's attorney except as a witness.

[Ed. Note.—For other cases, see *Grand Jury*, Cent. Dig. § 73; Dec. Dig. § 34.*]

7. INDICTMENT AND INFORMATION (§ 33*) — FORM—SIGNATURE.

In the absence of statutes to the contrary, it is not essential to the validity of an indictment that it be signed by the prosecuting attorney.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 132-137; Dec. Dig. § 33.*]

8. LABEL AND SLANDER (§ 145*)—CRIMINAL "LIBEL"—INDICTMENT.

Cr. Code, § 177 (Hurd's Rev. St. 1909, c. 88), defines libel as a malicious defamation, expressed either by printing or by signs or pictures, tending to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive and thereby expose him to public hatred, contempt, ridicule, or financial injury. *Held*, that a newspaper article published by accused charging prosecutor with improper and dishonest actions as state's attorney, and with having prostituted his office for private interests and political purposes, and that he was in collusion with violators of the liquor law, that he was actuated by improper motives with reference to an alleged bridge trust, and that there was no doubt but that such trust had "proven a fat goose to some one," that there was also good ground to suspect something dishonest and crooked in the matter, and that it was not prosecutor's purpose to enforce the law, was libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 404; Dec. Dig. § 145.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4116-4125.]

9. CRIMINAL LAW (§ 1166½*)—WRIT OF ERROR—OBJECTIONS TO JURY—REVIEW.

An objection that the court erred in refusing a challenge for cause against a talesman who was afterwards peremptorily challenged, and that accused during the trial exhausted all his peremptory challenges, could not be reviewed where it was not shown that he was forced to accept an undesirable juror.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3125; Dec. Dig. § 1166½.*]

10. CRIMINAL LAW (§ 1088*)—WRIT OF ERROR—RECORD—AFFIDAVITS.

Alleged error in refusing a challenge for cause and requiring accused to exercise a peremptory challenge on a juror cannot be brought into the record on a writ of error by affidavits in support of a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746-2766; Dec. Dig. § 1088.*]

11. WITNESSES (§ 372*)—CROSS-EXAMINATION IRRELEVANT DOCUMENTS.

Where complainant had testified that he was not friendly to accused, and had not been friendly with him since 1906, the court did not err in refusing to admit on complainant's cross-examination an open letter written by complainant to accused, and published some time prior to the alleged libelous publication for which accused was being tried, but which did not relate to the same subject.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

12. LABEL AND SLANDER (§ 155*)—EVIDENCE—OTHER PUBLICATIONS.

In a prosecution for libel, articles published by the prosecuting witness reflecting on accused are inadmissible.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

13. CRIMINAL LAW (§ 661*)—EVIDENCE—SURROUNDING CIRCUMSTANCES.

The admissibility of surrounding circumstances must be determined by the trial judge, according to the degree of their relation to the fact in controversy, in the exercise of a sound discretion.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 661.*]

14. WITNESSES (§ 372*)—CROSS-EXAMINATION—HOSTILITY TO ACCUSED.

Complainant having already admitted his hostility to accused in a prosecution for libel,

the court did not err in refusing to require complainant to answer further for the same purpose, whether in a debate he did not state that accused was a perjurer.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

15. CRIMINAL LAW (§ 706*)—CROSS-EXAMINATION—MISCONDUCT OF PROSECUTOR.

In a prosecution for libel, accused testified that he did not have any unfriendly feeling toward complainant, whereupon the state's attorney asked him on cross-examination whether he had not published an article in a newspaper stating that prosecutor had prostituted the office of state's attorney for his private interests and for political purposes, and through it to eke out his spite and that of others. An objection to the question being sustained, he asked whether accused had not published a printed handbill containing a similar statement, and, this being disallowed, he asked whether he had not printed, or caused to be printed, an article opening with the charge "Let every man—let every citizen of Carroll county take this statement home with him," followed by a similar charge against complainant, insisting that he was entitled to prove the publication of such articles to show defendant's feelings. *Held*, that it did not appear that the prosecuting attorney did not ask such questions in good faith, and that accused was not prejudiced by their repetition.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 706.*]

16. LABEL AND SLANDER (§ 155*)—OFFENSES—EVIDENCE.

Evidence as to what accused intended by certain portions of the alleged libelous article was inadmissible under the rule that the article must be construed as a whole, and the meaning gathered by determining what men of ordinary understanding would infer therefrom.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 430-436; Dec. Dig. § 155.*]

17. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSIDERATION.

Instructions given in a criminal case must be considered as a whole.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1090-1095, 3158; Dec. Dig. § 822.*]

18. LABEL AND SLANDER (§ 154*)—DEFENSES—TRUTH—BURDEN OF PROOF.

Though truth is a defense to a prosecution for libel when published with good motives and for justifiable ends, the burden of proof thereof is on the defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 423, 429; Dec. Dig. § 154.*]

19. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—LABEL AND SLANDER.

In a prosecution for libel, requests to charge calling particular attention to particular portions of the alleged libelous article were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.*]

20. CRIMINAL LAW (§ 786*)—CREDIBILITY OF ACCUSED—INSTRUCTIONS.

A request to charge that accused was a competent witness, and that his testimony should not be discredited from caprice or because he was the defendant, that he should be treated the same as any other witness and subjected to the same tests, and that, while the jury might consider his interests, yet they should also consider the fact that he was corroborated by

other circumstantial evidence, or by facts and circumstances proved, was correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901; Dec. Dig. § 786.*]

21. CRIMINAL LAW (§ 1173*)—INSTRUCTIONS—CREDIBILITY OF ACCUSED—PREJUDICE.

Accused was not prejudiced by the refusal of an instruction as to the weight to be given to his testimony, where he did not testify to any material facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.*]

22. LIBEL AND SLANDER (§ 143*)—PUBLICATION PER SE LIBELOUS—GOOD FAITH.

Where a publication was libelous per se, it was not material that portions of the article were published in good faith; there being no attempt to prove that the charges were true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 406; Dec. Dig. § 143.*]

23. LIBEL AND SLANDER (§ 162*)—PUBLICATION LIBELOUS PER SE—PUNISHMENT—FINE.

Where accused printed a publication concerning complainant in the exercise of his duties as state's attorney, which was libelous per se and charged him with misconduct in office, a judgment imposing a fine of \$300 on his conviction was not excessive.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 447; Dec. Dig. § 162.*]

Cartwright, Dunn, and Cooke, JJ., dissenting.

Error to Appellate Court, Second District, on Error to Circuit Court, Ogle County; J. S. Baume, Judge.

Andrew Strauch was convicted of criminal libel, and he brings error. Affirmed.

Franc Bacon, E. E. Wingert, and O. M. Grove, for plaintiff in error. W. H. Stead, Atty. Gen., W. J. Emerson, State's Atty., and Ralph E. Eaton, Special State's Atty., for the People.

CARTER, J. Plaintiff in error was indicted in Carroll county for criminal libel, and on a change of venue to Ogle county the first trial resulted in a disagreement and on the second trial a verdict of guilty was found against him, the court thereafter imposing a fine of \$300 and costs. The Appellate Court affirmed the judgment of the trial court. This writ of error was then sued out.

Plaintiff in error on June 26, 1907, and for some time prior, was publisher of the Chadwick Clarion, a newspaper published at Chadwick, in Carroll county. He was also supervisor of that county, and had previously been postmaster and collector of his town. The complaining witness, Frank J. Stransky, was on June 26, 1907, and has been since 1904, state's attorney of that county. During his term of office, he assisted the state's attorney of Stephenson county, in this state, in the prosecution of corporations and persons forming what is called in the evidence the "bridge trust," for alleged violations of the laws concerning conspiracies against trade. In 1907 the matter of the illegal sale of liquor on election day was before the

grand jury of Carroll county, and a number of citizens of Chadwick, including plaintiff in error, were subpoenaed as witnesses. The question also apparently came up as to whether a certain drug store in Chadwick had sold liquor on that day. In the issue of his newspaper of June 26th the plaintiff in error published an article headed "Stransky, Chadwick and the Grand Jury." The portions of the article that are especially claimed as libelous read as follows:

"The attention of the last grand jury was directed to Chadwick. Many of its citizens had an invitation to appear before it, and so had we. The result of the stir-up has brought out comparatively little violations. Of course, it was not so much concerning violations than to get a little political capital out of it and some new material for attack. * * * We do not wish to criticize any honest intention against violations of laws, but, so far as the state's attorney and his local henchmen are concerned, there was nothing in the movement but spite work and a chance at giving us a good grilling before the grand jury. We did not hesitate in the least to answer every fool question put to us by the conceited fool of a state's attorney. Could we have reversed the order we should have asked him whether he had not at one time drank whisky in the Chadwick drug store and called for beer as a wash; also, whether he did not play poker with a Chadwick gentleman till three o'clock in the morning. We have been more than confirmed in our belief that the attitude of Stransky in connection with the bridge combine is one that will not bear investigation. While we have no direct knowledge of his offering his service or the getting in on the Stephenson county prosecution, we are satisfied it was at his instigation. * * * There are some who have been deluded into the belief that Stransky's aim is to enforce the laws. * * * In connection with the bridge investigation it is evident an idea struck him that had a well-defined purpose. To become associated with the Stephenson county attorney made other plans feasible. * * * It strikes one peculiar that of the facts gathered in Stephenson county, some of the principal ones have not been reached or even an attempt has been made. To sum it all up, there is good grounds to suspect a nigger in the bush. Once a prosecution started in one county it made it easy to bring other violators to terms. There will be nothing further done in Carroll county about a bridge trust. One can feel safe on making this assertion. There is no doubt but that the bridge trust has proven a fat goose for some one. * * * This much came out of it while Stransky was quite willing to go after the saloons, but when it came to the drug store he was ready to shut off further investigation. It is a fact that he agreed with a certain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gentleman to call off on the saloons with a light penalty if the drug store crowd would not be examined."

It is urged that the trial court erred in refusing to quash the indictment for the reason that, while the grand jury was in its private room investigating the indictment of plaintiff in error, the presiding judge entered the room and read a statement concerning the law of criminal libel from some typewritten sheets. Certain affidavits were offered concerning this point. It appears from them that some time during its deliberations, and before the indictment in question was found, the judge was requested by the grand jury to give instructions on the law of libel, and that the appearance of the judge before the jury was in response to that request. The affidavits do not set up any improper statement that it is claimed was made by the judge to the grand jury, but it is insisted it was error for him to make any statement in the jury room; that all instructions to the grand jury by the court should be given in open court. The record shows that the indictment in this case was returned to the November term, 1907, of the Carroll county circuit court. The motion to quash the indictment was made on March 4, 1908, and overruled on March 6, 1908, at the March term of that court, but a bill of exceptions was not then presented containing the evidence and an exception to the ruling of the court in refusing to quash the indictment, nor did plaintiff in error ask leave for time to present such bill of exceptions. The leave to present the bill of exceptions was obtained on February 8, 1909, after plaintiff in error had been twice tried and once convicted and judgment pronounced against him.

These affidavits were presented on a motion to quash at the March term, 1908, of the circuit court of Carroll county. No motion was made at that term or leave granted to file a bill of exceptions of the matters heard at that term. The leave to present the bill of exceptions in this case was obtained at another term nearly a year later. A bill of exceptions must be taken at the term at which the rulings were made unless the court at that term extends the time within which the bill may be signed and sealed. *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521; *Village of Franklin Park v. Franklin*, 228 Ill. 591, 81 N. E. 1132; *Cella v. Chicago & Western Indiana Railroad Co.*, 217 Ill. 326, 75 N. E. 373; *Dougherty v. People*, 118 Ill. 160, 8 N. E. 673. These affidavits are not properly in the record before this court.

It is further urged that the indictment should have been quashed because, it is claimed, Franklin J. Stransky, the state's attorney, was also the prosecuting witness in this case and appeared before the grand jury in his official capacity as state's attorney, examined witnesses, and prepared and signed the indictment. There is nothing in

the record to support these contentions except as to the signing of the indictment. On the contrary, the uncontroverted evidence shows that Stransky appeared before the grand jury as a witness at the request of its foreman; that he was not present at any time when any other witness besides himself was before the grand jury in this case; that he was not there as state's attorney, but as a witness only; that he told the court there was a case to come before the grand jury in which he was to be prosecuting witness, and that he did not feel that he should give the grand jury any instructions or have anything to do with the case, only as a witness; that he was not present at any time when the grand jury were discussing the evidence or voting on the case. After the denial of the motion to quash on March 6, 1908, plaintiff in error pleaded not guilty. The first trial was then had, in which the jury disagreed. January 16, 1909, before the commencement of the second trial, plaintiff in error entered a motion for leave to amend his motion to quash the indictment for the reasons just stated. A defendant who has pleaded to the indictment cannot, as a matter of right, thereafter make a motion to quash it for any error that occurred before the grand jury. While the court may have the power to permit the plea of not guilty to be withdrawn for that purpose, the exercise of such power rests in the sound discretion of the trial court. 1 Bishop's New Crim. Proc. §§ 761, 882. The fact that the state's attorney signed the indictment and appeared as a witness before the grand jury was as well known to plaintiff in error and his counsel at the time the original motion was made to quash the indictment as it was nearly a year later, when this question was first raised in the trial court. After the indictment was returned to the November term, 1907, of the circuit court of Carroll county that court entered an order finding Stransky interested as a witness in said cause and appointed Ralph E. Eaton, an attorney, as special state's attorney to prosecute said cause. The court had the authority (*Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 92 N. E. 291), and we think it would have been the better practice to have appointed the special state's attorney before the matter was presented to the grand jury. The general rule is that, in the absence of a statute to the contrary, it is not essential to the validity of an indictment that it be signed by the public prosecutor. *Joyce on Indictments*, § 447; *Commonwealth v. Stone*, 105 Mass. 469; *Ex parte Lane*, 135 U. S. 443, 10 Sup. Ct. 760, 80 L. Ed. 219; 1 Bishop's New Crim. Proc. § 702; *Edwards on Grand Jury*, p. 134; 10 Ency. of Pl. & Pr. 446; 22 Cyc. 252. Our statute is silent as to the signature of the state's attorney on the indictment. His signature does not make the indictment. It becomes an indictment when

returned in open court by the grand jurors with the indorsement thereon, "A true bill," and signed by the foreman. On the facts in this record we do not think the court erred in refusing to permit plaintiff in error to raise this question for the first time after the plea. Nor do we think there is anything shown on this record that would justify the court in quashing the indictment on the ground here urged, even though the motion had been made before the plea of not guilty was entered.

It was admitted on the trial that the article set forth in the first, second, third, and seventh counts of the indictment was published by plaintiff in error in the *Chadwick Clarion*, a newspaper controlled and edited by him. It is insisted, however, by plaintiff in error that this article does not show a malicious defamation or one that comes within the definition of libel as set forth in our statute. Section 177 of the criminal Code defines a libel as a "malicious defamation, expressed either by printing, or by signs or pictures * * * tending * * * to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule or financial injury." *Hurd's Rev. St.* 1909, p. 786. The parts of the article in question heretofore set out in this opinion charge, directly and indirectly, that the state's attorney of Carroll county was guilty of improper and dishonest actions as a public official. The remainder of the article (which was of such length that we deem it unnecessary to set it out) does not lessen in any particular the force of the charges in those parts which we have quoted. The article charges the said Stransky with having prostituted his office for private interests and political purposes for spite; that he was in collusion with violators of the liquor law; that he was actuated by improper motives with reference to the bridge trust; that there was no doubt but that the bridge trust had "proven a fat goose to some one"; that, to sum it all up, there was good ground to suspect something dishonest and crooked in the matter; that it was not the purpose of the state's attorney to enforce the law. Manifestly both directly and by thinly veiled insinuation it charged the state's attorney with a gross abuse of his office. It was libelous per se. *People v. Fuller*, 238 Ill. 116, 87 N. E. 336; *Hatch v. Potter*, 2 Gilman, 725, 43 Am. Dec. 88; *Mitchell v. Milholland*, 106 Ill. 175. No evidence was offered as to the truth of any of the charges. This article impeached the honesty, integrity, virtue, and reputation of the complaining witness, and thereby exposed him to public hatred, contempt, and ridicule. The court ruled properly in refusing to quash the indictment on the ground that the article was not libelous.

Counsel for the plaintiff in error further

urge that the court refused a challenge for cause against one of the talesmen who was afterward peremptorily challenged, and that plaintiff in error during the trial exhausted all of his peremptory challenges. At the time this juror was excused, the plaintiff in error still had several peremptory challenges, and it does not appear that an undesirable juror was forced upon him. This question is attempted to be preserved in the record by an affidavit in support of the motion for a new trial. Under the authorities heretofore cited, these alleged occurrences, being shown only by affidavit, are not properly preserved for review here.

The plaintiff in error next insists that the trial court erred in improperly restricting the cross-examination of the prosecuting witness. On his cross-examination Stransky was shown an "open letter" addressed by him to plaintiff in error, which he admitted he wrote and caused to be published before the publication upon which the indictment was founded. This letter, on being offered in evidence by plaintiff in error, was objected to and the objection was sustained. The letter was published some eight months before the alleged libelous matter. It did not relate to the same subject. The complaining witness had already testified that he was not friendly to plaintiff in error, and had not been on friendly terms with him since learning about his connection with the bridge trust, some time in 1906, and that he did not like him before that date. He further testified that he had expressed this hostile feeling more than once. The letter showed on its face that it was in answer to a prior letter from plaintiff in error. Had it been admitted, the offer of such prior letter might have followed, and that, in its turn, might have brought up still other communications. This would have raised collateral issues which had nothing to do with the alleged libel. The rule is well established that, in a prosecution for libel, articles published by the prosecuting witness reflecting on the defendant are incompetent and inadmissible. Were such publications allowed to be shown, the complaining witness would be compelled to defend his own writings without in any way explaining or tending to explain the character of the libel. *Bee Publishing Co. v. Shields*, 68 Neb. 750, 94 N. W. 1029, 99 N. W. 822; *Newell on Libel and Slander*, p. 520; *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693; *Maynard v. Beardsley*, 7 Wend. (N. Y.) 590, 22 Am. Dec. 595; *Smurthwaite v. News Publishing Co.*, 124 Mich. 377, 83 N. W. 116. It is contended that this letter was admissible to show the surrounding circumstances and give the jury an opportunity to judge correctly as to the purport of the alleged libelous article. The admissibility of the surrounding circumstances must be determined by the trial judge according to the degree of their relation to the fact in controversy and

in the exercise of his sound discretion. *Davison v. People*, 90 Ill. 221. Neither was the letter admissible in order to show the state of feeling of the complaining witness. It was too remote and would open a field of collateral matter too wide for any purpose of real justice. *Merritt v. Merritt*, 20 Ill. 65.

It is also urged that the court improperly sustained an objection to a question put to the prosecuting witness. It appears that the prosecuting witness and plaintiff in error had a joint debate at Chadwick in 1908. The following question was asked as to that debate: "Did you not say of the defendant on that occasion that he was a perjurer?" The only purpose of this question was to show the hostility of the witness, and he had already admitted that. It is insisted, however, by counsel for plaintiff in error that the special facts as to this hostility should have been allowed to be shown. The character and extent of the feeling of hostility entertained by a witness should be permitted to be shown. 1 *Thompson on Trials*, § 451; *Roberts v. People*, 226 Ill. 296, 80 N. E. 776; *State v. Collins*, 33 Kan. 77, 5 Pac. 368; *Geary v. People*, 22 Mich. 220; *Strange v. Commonwealth (Ky.)* 64 S. W. 980; *Jones v. State*, 76 Ala. 8; *Butler v. State*, 34 Ark. 490; *Stewart v. Kindel*, 15 Colo. 539, 25 Pac. 990; *State v. Dee*, 14 Minn. 35 (Gil. 27); 1 *Greenleaf on Evidence*, § 450. This, however, had already been shown by the evidence. If this question had been answered, all the collateral questions raised by this joint debate might have been brought into question. While there should not be any undue restriction of the cross-examination of the complaining witness, a large discretion is necessarily left to the trial judge in determining questions of this character. *Spohr v. City of Chicago*, 206 Ill. 441, 69 N. E. 515. Had the question of this debate or of the open letter been gone into, the trial court would almost necessarily have been forced to abandon the trial of the real issues and enter upon those that were wholly immaterial. *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068. Nothing would have been gained by a further investigation as to the feeling or prejudice of the complaining witness towards the plaintiff in error.

Plaintiff in error further insists that reversible error was committed by the special state's attorney in the cross-examination of the plaintiff in error. He was asked, on cross-examination, whether he had published in the issue of his paper July 8, 1908, an article containing the statement: "Franklin J. Stransky has prostituted the office of state's attorney for his private interests and for political purposes and through it to eke out his spite and that of others." An objection to this question was sustained. He was then asked if he had not published a printed handbill or "dodger" containing a similar statement. An objection to this question was sustained by the court. He was

then asked if he had not written and caused to be printed in the same month an article which opened with the statement, "Let every man,—let every citizen of Carroll county,—take this statement home with him," followed by a charge against the state's attorney similar to the one already referred to. An objection was also sustained to this question. It is urged that the continued repetition of these questions tended to prejudice the jury, even though the court sustained the objections. The plaintiff in error testified that he did not have any unfriendly feeling towards the prosecuting witness, and it was insisted by the special state's attorney that he had a right to prove the publication of these articles by plaintiff in error in order to show his feeling. Without deciding that question, we deem it sufficient to say that we do not think the prosecuting attorney asked these questions of the witness from an improper motive, or that he persisted in asking similar questions merely for the purpose of prejudicing the jury. In the light of all the facts in the record, we do not think the jury were improperly prejudiced by these questions.

Plaintiff in error next contends that the court erred in excluding evidence offered by the plaintiff in error as to what he intended by certain portions of the alleged libelous article. The rule is that in the construction of an article such as this the whole of the language of the article must be read together and the meaning of any part gathered from the reading of the whole article. The test is: What would men of ordinary understanding infer from the words of the libel? *People v. Fuller*, supra; *Newell on Libel and Slander*, p. 301; *Townsend on Slander and Libel* (2d Ed.) § 139. The sense in which the publisher meant the language cannot be material. When a party has clearly imputed wrongdoing on the part of another, he cannot afterwards be permitted to say: "I did not intend what my words legally imply." The guilt of plaintiff in error must be determined by the article itself and the meaning that would naturally be attributed to the words used therein, and not by any unexpressed meaning unknown to the readers of the article. *State v. Heacock*, 106 Iowa, 191, 76 N. W. 654; *Miller v. Johnson*, 79 Ill. 58.

Plaintiff in error argues at length in regard to the giving and refusal of instructions. Twenty-two were given for the people, 18 for plaintiff in error, and 21 asked by him were refused. Plaintiff in error argues that substantially all of those given for defendant in error were erroneous, and that all the refused instructions were improperly refused. It is insisted that the first instruction for the people is misleading because, after setting out the definition of criminal libel as given in section 177 of the Criminal Code, it afterwards, in repeating the substance of the definition, left out the word "thereby," as given in the statute. We do

not think it possible that the jury were misled on this account.

It is insisted that the sixth instruction given for the people permitted the jury to judge of the libelous article as ordinary and reasonable men would in the light of the surrounding circumstances, and that the instruction did not confine the jury to the facts and circumstances in evidence. We do not think this instruction is open to this criticism. If it were, the other instructions given clearly tell the jury that they were limited to the facts and circumstances in evidence, and, as instruction No. 6 did not direct a verdict, it must necessarily be considered in connection with all the other instructions.

Other instructions given for the people are complained of because, it is alleged, they put the burden of proof as to the truth of the article in question upon plaintiff in error. At common law the truth could not be shown in the defense of a prosecution for libel. The rule is changed in this state, and the truth is now a defense when published with good motives and for justifiable ends. It is, however, an affirmative defense and must be proved by the defendant. *People v. Fuller*, supra. The instructions in question were in harmony with this rule.

It is further insisted that certain instructions for the people failed to tell the jury that when the words of an alleged libel could have two meanings, one harmless and the other libelous, the innocent one should be taken. The instructions in question are not open to this charge. Furthermore, other instructions given for the plaintiff in error fully set out his contention on this question. Neither is there basis for counsel's contention that certain instructions for the people took from the jury the right to determine the law as well as the facts in the case.

The complaint as to the refusal of the court to give the first, second, third, fifth, eighth, ninth, and tenth instructions asked by plaintiff in error is without merit. Each of these instructions called particular attention to isolated portions of the article in question. The rule is too well settled to require a citation of authorities that such instructions are improper. Other refused instructions cast upon the people the burden of proving the falsity of the statements in said libelous article. The truth as to this article was an affirmative defense resting upon the plaintiff in error. *People v. Fuller*, supra. Certain other refused instructions were covered by those that were given.

The fourteenth refused instruction stated that plaintiff in error was a competent witness and that his testimony should not be discredited from caprice or because he was the defendant, that it should be treated the same as that of any other witness and subjected to the same tests, and, while the jury might consider his interest in the result of

the trial, yet they should also take into consideration the fact, if it was a fact, that he was corroborated by other credible evidence or by facts and circumstances proven on the trial. This instruction stated a correct rule of law, and could properly have been given. *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058; *Schultz v. People*, 210 Ill. 198, 71 N. E. 405.

Plaintiff in error, while called as a witness, did not testify as to any material facts, and therefore there was no testimony in the case that corroborated him. His testimony could not have influenced the verdict. The article was libelous in itself. His testimony, in substance, was as to only a few of the less serious charges in said article, claiming that they were published in good faith. The fact that they were published in good faith could have no bearing on the question at issue unless the charges were true. No attempt was made to show that they were true. The question of good faith could therefore have no bearing except as to the amount of the fine. With this the jury were not concerned. They only found whether he was guilty or innocent and the court fixed the fine. We do not think the refusal of this instruction injured plaintiff in error.

The instructions, taken as a series, fully and fairly instructed the jury as to the law of the case. While there was some inaccuracy in some of the instructions, it is impracticable to require absolute accuracy. It is sufficient if they substantially present the law of the case fairly to the jury. *Ritzman v. People*, 110 Ill. 362.

It is admitted that plaintiff in error wrote the article in question. It was clearly libelous, and no attempt was made to show that the charges were true or that the main portions of the article were published with justifiable motives. The plaintiff in error was admittedly guilty. Considering the nature of the article in question, the fine was certainly not excessive. Under such circumstances, this court will not reverse a judgment for slight errors committed on the trial when it can see they did not affect the result. *Wistrand v. People*, 218 Ill. 323, 75 N. E. 891, and cases cited.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CARTWRIGHT, DUNN, and COOKE, JJ., dissenting.

(247 Ill. 27.)

RUDOLPH WURLITZER OO. v. DICKINSON.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 8, 1910.)

1. COURTS (§ 190*)—TIME FOR FILING—EXTENSION BY STIPULATION.

The time for filing a bill of exceptions in a case of the fourth class was extended by stipu-

lations of the parties and orders of the municipal court entered thereon more than 30 days after judgment, and the bill of exceptions was not filed within 30 days. *Held*, that as the municipal court under Municipal Court Act, § 28, par. 6 (Hurd's Rev. St. 1909, c. 37, § 286), had no power in a case of the fourth class to extend the time for filing a bill of exceptions by an order made more than 30 days after entry of judgment, a bill of exceptions so filed was no part of the record on appeal, though the extension was ordered on stipulation of the parties.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

2. STATUTES (§ 181*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The mere fact that a certain construction of a statute will work injustice will not prevent the courts from so construing it, when that is the only fair and reasonable inference from the wording of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 181.*]

3. STIPULATIONS (§ 3*) — MATTERS WHICH MAY BE STIPULATED.

Counsel cannot, by stipulation, avoid the requirement of the statute requiring that, in cases of the fourth class in the municipal court, the statement or stenographic report shall be filed within 30 days after judgment, or within such further time as shall, within such 30 days, be ordered.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 2; Dec. Dig. § 8.*]

4. APPEAL AND ERROR (§ 1082*)—RULE OF COURT—OBJECTION NOT WAIVED.

The objection that a bill of exceptions was not filed within the time required by statute will not be held to be waived for failure to make such objection in the Appellate Court where, under rule 15 (225 Ill. 15, 85 N. E. vii), no certified briefs and arguments have been filed in the Supreme Court to enable it to determine what questions were presented in the Appellate Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4281; Dec. Dig. § 1082.*]

Vickers, O. J., and Cartwright and Hand, JJ., dissenting in part.

Appeal from Branch Appellate Court, First District, on Error to Municipal Court of Chicago; Anthony J. Clarity, Judge.

Action by the Rudolph Wurlitzer Company against Charles F. Dickinson. Judgment for the plaintiff, and defendant appeals. Judgment affirmed.

F. William Kraft, for appellant. Elbert C. Ferguson, for appellee.

CARTER, J. This is an action of the fourth class, brought in the municipal court of Chicago by appellee, the Rudolph Wurlitzer Company, against appellant, Charles F. Dickinson. After a trial before a jury a judgment was entered against appellant for \$761.01. The Appellate Court affirmed this judgment. A certificate of importance having been granted by that court, this appeal followed.

Appellee is an Ohio corporation dealing in musical instruments, with a branch place of business in Chicago. At the time the debt was contracted the appellant was a retail

dealer in musical instruments in Chicago. The judgment was founded on six promissory notes, of \$25 each, given by appellant to appellee, and upon a balance due to appellee upon an open account. March 24, 1900, appellee secured a license from the Secretary of State of Illinois to carry on business in this state pursuant to the statutes then existing. The license so granted stated that the appellee company was authorized to do business in the state of Illinois "for the term of ninety-nine years, and is entitled to all the rights and privileges granted to foreign corporations under the laws of this state."

Appellant contends that although appellee has paid the fee required by the law in force when the license was issued, and was entitled, under that law, to prosecute suits in this state, yet that said company may not maintain this suit in any court of this state because it has failed to comply with the provisions of the law that went into force in 1905 as to licensing foreign corporations. Appellant further contends that the trial court erred in admitting certain evidence. Counsel for appellee insists that the bill of exceptions (called in the municipal court act [Hurd's Rev. St. 1909, c. 37, § 286] a "statement" or "stenographic report") in this case was not filed within the time required by statute, as appears from the record, and that, therefore, neither of these questions, which are shown only by the bill of exceptions, can be considered by the court.

The record shows that judgment was entered in this case on June 28, 1908; that the writ of error was sued out from the Appellate Court on the next day; that July 10, 1908, an order was entered, by stipulation of the parties, extending the time to file bill of exceptions to 20 days from July 28, 1908. On August 11, 1908, a similar order was entered on a similar stipulation extending the time to file a bill of exceptions to August 28, 1908. A similar order was entered August 26, 1908, on a similar stipulation, extending the time to and including September 2, 1908, in which to file a bill of exceptions. The bill of exceptions was filed August 29, 1908.

In *Lassers v. North-German Steamship Co.*, 244 Ill. 570, 91 N. E. 678, we held that under paragraph 6 of section 23 of the municipal court act (Hurd's Rev. St. 1909, c. 37, § 286) the municipal court could not, as to cases of the fourth class, extend the time for filing the statement or stenographic report after 30 days from judgment; that the municipal court had no power to make such an order. Counsel for the appellant insists that this construction of the municipal court act results in great injustice. However that may be, such construction seems to be the only fair and reasonable one from the wording of the statute. If it results in injustice to litigants, any suggestions for a change

must be addressed to the Legislature and not to the courts.

Counsel for the appellant contends that the Lassers Case does not control here, as in this case there was a stipulation to extend the time to file the stenographic report, which was not the fact in the Lassers Case. The provisions of the statute on this point cannot be waived by stipulation. The reasoning in the Lassers Case is conclusive on the facts here.

Counsel further contends that this point was not raised by the appellee in the Appellate Court and therefore it was waived. Rule 15 of this court (235 Ill. 15, 85 N. E. vii) provides that, where it is important to determine what questions were presented in the Appellate Court, certified copies of the briefs and arguments filed and used in that court may be filed and used in this court on motion and leave granted. No certified copies of the Appellate Court briefs are on file in this court and no motion was made for leave to file them. This court, therefore, is not informed, under our rules, whether or not such question was raised in the Appellate Court. *City of Chicago v. Cook*, 204 Ill. 373, 68 N. E. 538. For this reason, we cannot hold that the question whether the statement and stenographic report in the municipal court were filed within the time required by the municipal court act was waived by failing to raise it in the Appellate Court.

The statement and stenographic report, or bill of exceptions, by whichever name it may be called, cannot be regarded as a part of the record. Since no errors are complained of which appear otherwise of record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

VICKERS, C. J., and CARTWRIGHT and HAND, JJ. (dissenting). We do not concur in that part of the foregoing opinion which holds that the question whether a bill of exceptions was filed in proper time can be raised in the brief and argument upon the errors assigned on the record. We think it must be presented by motion, and, if not so presented, it is waived.

(247 Ill. 84)

PROVIDENCE-WASHINGTON INS. CO. v. WESTERN UNION TEL. CO.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 8, 1910.)

1. TELEGRAPHS AND TELEPHONES (§ 53*)—PROXIMATE CAUSE—FAILURE TO DELIVER TELEGRAM.

Where a telegraph company failed to deliver a message from an insurer's state agent to its local agent canceling a fire policy, and because of such failure the insured property was destroyed by fire before cancellation of the policy, the failure to deliver the message, and

not the fire, was the proximate cause of the damages sustained by the insurer.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 53.*]

2. TELEGRAPHS AND TELEPHONES (§ 36*)—TRANSMISSION OF MESSAGES—CARE REQUIRED.

While telegraph companies are not common carriers and insurers of the correct and prompt transmission and delivery of messages, they exercise a quasi public employment, with duties analogous to those of common carriers and are required to use a high degree of care and skill in the correct and prompt transmission of messages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.*]

3. TELEGRAPHS AND TELEPHONES (§ 67*)—FAILURE TO DELIVER MESSAGE—DAMAGES—NOTICE.

Where a message was sent by an insurance company's state agent to a local agent at a town in the same state, not far away, instead of by mail, which message disclosed the nature of its subject-matter to be the cancellation of fire insurance on certain property, so that the telegraph company's agents could not have been ignorant of the fact that the prompt delivery of the message was important, the telegraph company had all the information necessary to charge it with damages resulting directly from a failure to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

4. TELEGRAPHS AND TELEPHONES (§ 70*)—FAILURE TO DELIVER MESSAGE—MEASURE OF DAMAGES.

Where the loss to an insurance company from destruction by fire of insured property was the direct result of the negligent failure of a telegraph company to transmit a message canceling the policy, the measure of damages is the amount of loss sustained by the insurance company, and not the difference between the reasonable value of carrying the risk for the additional number of days and the amount of the unearned premium on the policy.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; John H. Hume, Judge.

Action by the Providence-Washington Insurance Company against the Western Union Telegraph Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals on a certificate of importance. Affirmed.

This action was brought by appellee, against appellant, to recover damages alleged to have resulted to the appellee from a breach of appellant's contract to deliver a message. Appellee had written a policy of insurance on a paper mill in Newark, Ohio, belonging at the time to Frank B. Silk. The property subsequently passed to the Newark Paper Company, and on January 2, 1902, the policy was, by the consent of appellee, assigned to the Newark Paper Company. The policy contained a clause authorizing its cancellation at any time upon the request of the insured, or by the insurer upon giving

five days' notice of the cancellation. April 29, 1902, between 11 and 12 o'clock in the morning, F. W. Ransom, state agent of appellee, delivered to appellant's agent at Van Wert, Ohio, for transmission to M. J. Reese, appellee's local agent in Newark, Ohio, the following message: "Van Wert, Ohio, April 30, 1902. M. J. Reese, Agt. Providence-Washington Ins. Co. Regret must cancel paper mill line. Daily was passed inadvertently. F. W. Ransom." This telegram was never delivered to appellee's agent at Newark, Ohio, but was sent to New York City and delivered to appellee's agent there, finally reaching its manager at Chicago through the mails. On May 2, 1902, Mr. Reese, appellee's agent at Newark, Ohio, received instructions by mail to cancel the policy on the Newark Paper Company's property, and the paper company claimed the right to the five days' notice provided for in the policy. Before the expiration of the five days the property was burned, and the paper company sued appellee, and recovered a judgment for \$1,636.94, which was afterwards compromised, and \$1,200 paid by appellee in full satisfaction of the judgment. This action was brought to recover the \$1,200 and interest from the time of its payment. The case was tried before the court without a jury, and a judgment rendered in favor of appellee for \$1,365. The Appellate Court for the First District affirmed that judgment, and granted a certificate of importance, upon which the case is brought to this court for review.

West, Eckhart & Taylor (George H. Fearons and Francis Raymond Stark, of counsel), for appellant. Bates, Harding, Edgerton & Bates, for appellee.

FARMER, J. (after stating the facts as above). Appellant contends (1) that its failure to deliver the message was not the proximate cause of the damage sustained by appellee; that the fire was the proximate cause, and, although the failure to transmit and deliver the message to appellee prevented the cancellation of the policy before the fire occurred, such failure is too remote to charge appellant with liability for the loss appellee sustained on account of the fire; (2) the breach of contract to deliver the message not being the proximate cause of the injury, the damages to be recovered are such, only, as according to the usual course of things result from the breach; that the fire could not have been foreseen by or in the reasonable contemplation of the parties to the contract as a probable result of the breach; (3) that the damages not arising in the usual and due course of things as a probable result of the failure to deliver the message, but out of circumstances peculiar to the special case, they are not recoverable, unless the special circumstances were known, or may necessarily be supposed to have been known, to appellant at the time it accepted the message.

In support of the contention that the failure to deliver the message could not in any sense be considered as the proximate cause of the injury, appellant relies upon *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, *Denny v. New York Central Railroad Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645, *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106, and other cases from other jurisdictions. The *Morrison* Case and the *Denny* Case were referred to and commented upon in *Wald v. Pittsburg, Cincinnati, Chicago & St. Louis Railroad Co.*, 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332. The rule announced in those cases is that where, on account of the delay of the carrier in transporting goods delivered to it, they were destroyed or damaged by floods beyond the power of the carrier's control, the proximate cause of the injury is the flood, and the carrier is not liable. The rule announced by those cases was relied upon in this court in the *Wald* Case. In that case *Wald* bought a ticket over the defendant company's railroad from Cincinnati to New York City by the limited express, and checked his baggage for transportation on the same train. The railroad company negligently failed to put the baggage on that train, but sent it on a later train, and it was destroyed by the Johnstown flood. The limited express upon which *Wald* rode, and which should have carried his baggage, reached its destination in safety. This court refused to follow the rule announced in the *Morrison* and *Denny* Cases, and said: "A loss or injury is due to the act of God when it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight; and where property committed to a common carrier is brought by the negligence of the carrier under the operation of natural causes that work its destruction, or is by the negligence of the carrier exposed to such cause of loss, the carrier is responsible." The court quoted and approved the statement of the rule made by the Supreme Court of Missouri in *Wolf v. American Express Co.*, 43 Mo. 421, 97 Am. Dec. 406, in the following language: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause; and where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause he is still responsible." Many authorities are cited holding this to be the rule.

Appellant says the *Wald* Case dealt with the rule as applicable to common carriers, and that a telegraph company is not a common carrier. So, also, were the courts dealing with common carriers in the *Morrison* Case and the *Denny* Case, cited by appellant. While the weight of authority is that telegraph companies are not common carriers, and therefore insurers of the correct and prompt transmission and delivery of mes-

sages, it is held that they exercise a quasi public employment, with duties analogous to those of common carriers, and are required to use a high degree of care and skill in the correct and prompt transmission of messages. *Tyler, Ullman & Co. v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. Rep. 383. The principle of the rule in the *Wald Case* has been applied by this court in other cases not involving common carriers and loss resulting from the act of God. *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *Houren v. Chicago, Milwaukee & St. Paul Railway Co.*, 236 Ill. 620, 86 N. E. 611, 20 L. A. (N. S.) 1110, 127 Am. St. Rep. 309; *City of Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453.

In support of the second and third propositions of appellant's defense, it relies chiefly upon *Hadley v. Baxendale*, 9 Exch. 341; but we are of opinion the facts of this case bring it within the rule of *Postal Telegraph Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55. The message sent by appellee to its agent related to an important business transaction. It disclosed the nature of the business to be the cancellation of insurance on paper mill property. Appellant's agent could not have been ignorant of the fact that the prompt delivery of the message was an important matter. The mere fact that the telegraph was resorted to, instead of the mails, between points in the same state no farther apart than the cities from which and to which it was sent, was sufficient to inform the agent of appellant that it was important to appellee's rights that the message be delivered with all reasonable speed, and that if this was not done it was liable to result in injury to appellee. Appellant had all the information necessary to charge it with damages resulting directly from a failure to deliver the message, and under the rule announced in the cases in this state the appellee's loss is deemed to be the direct result of the negligence of appellant in failing to transmit and deliver to the sendee the message. That appellant was negligent is conceded, and its counsel in their brief assume that if the appellant had performed its duty the message would have been delivered early in the afternoon of the day it was sent, that the insurance would have been terminated before the fire occurred, and that appellee would have sustained no loss by reason of the fire.

Considering the loss of appellee as the direct result of the negligence of appellant, which we think must be done under the decisions in this state, the liability would be the amount of the loss sustained by appellee, and not, as contended by appellant, the difference between the reasonable value of carrying the risk for the additional number of days and the amount of the unearned pre-

mium on the policy. In the *Lathrop Case* the court said (page 586, 131 Ill., page 585, 23 N. E. [7 L. R. A. 474, 19 Am. St. Rep. 55]): "We think the reasonable rule, and one well sustained by authority is that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it, as written, within a reasonable time, unless such negligence is in some way excused." *Hadley v. Baxendale*, supra, was relied upon by the telegraph company in that case as requiring the application of a different rule. In the opinion of the court in the *Lathrop Case* a large number of cases are cited and commented upon, and while the decision is criticised and sought to be distinguished by appellant, in our opinion we could not adopt the rule insisted upon by it without overruling the *Lathrop Case*, and we are not convinced that we would be justified in doing this.

In our opinion, appellant was liable for appellee's loss, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 44)

PEOPLE v. O'FARRELL.

(Supreme Court of Illinois. Oct. 28, 1910.
Rehearing Denied Dec. 8, 1910.)

1. INDICTMENT AND INFORMATION (§ 110*)— LANGUAGE OF STATUTE—"LARCENY" BY EM- BEZZLEMENT.

Hurd's Rev. St. 1909, c. 38, § 75, provides that if any agent embezzles or fraudulently converts to his own use, or takes with intent to do so, without the consent of the employer, any property of the employer which has come to his possession or to his office by virtue of such employment, is to be deemed guilty of "larceny." Held, that an indictment, charging in the language of the statute that defendant was the agent of B., and as such agent collected and embezzled funds belonging to her in the amount of \$7,000, was sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

2. INDICTMENT AND INFORMATION (§ 121*)— BILL OF PARTICULARS.

Where the several counts of an indictment were sufficiently specific to advise defendant of the charges he was required to meet, the court did not abuse its discretion in refusing to direct the state to furnish defendant with a bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

3. CRIMINAL LAW (§ 639*)—TRIAL—COUNSEL FOR STATE.

Where accused was represented on the trial by able counsel, the court did not abuse its

discretion in permitting two other regularly licensed attorneys to assist the state's attorney in the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1487; Dec. Dig. § 639.*]

4. CRIMINAL LAW (§ 1035*)—APPEAL—PRESERVATION OF GROUNDS.

The record on appeal in a criminal case showed that, on the overruling of defendant's challenge to two jurors for cause, they were peremptorily challenged by defendant, that the panel was then filled by jurors apparently satisfactory to both sides, whereupon defendant's counsel stated that he wished to peremptorily challenge another juror, but could not, having been forced to exhaust all his peremptory challenges. The juror to be challenged was not pointed out; nor was any ruling made or asked for. *Held*, that the point that defendant was required to prematurely exhaust his peremptory challenges was not preserved for review, especially in the absence of any showing that any member of the jury was unfair or prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1035.*]

5. EMBEZZLEMENT (§ 14*)—LARCENY—INTEREST IN FUND.

Where accused, as agent of prosecutor, had an interest in certain rent collected by him, he could not be convicted of larceny by embezzlement of such rent under Hurd's Rev. St. 1909, c. 38, § 75, providing that, if an agent fraudulently embezzles or converts property in his hands belonging to his employer, he shall be guilty of larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15; Dec. Dig. § 14.*]

6. EMBEZZLEMENT (§ 14*)—LARCENY—INTEREST IN FUND.

Where accused by a contract in writing was empowered to dispose of certain hotel property as best he could, and when disposed of to pay over the proceeds to prosecutrix, such contract did not confer on accused an interest in the proceeds to the extent of any commissions he might be entitled to for his services; and hence his conversion of a portion thereof constituted larceny by embezzlement, in violation of Hurd's Rev. St. 1909, c. 38, § 75.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 13-15; Dec. Dig. § 14.*]

Vickers, C. J., dissenting.

Error to City Court of Pana; J. C. McNutt, Judge.

Edwin F. O'Farrell was convicted of larceny by embezzlement, and he brings error. Affirmed.

At the February term, 1909, of the Pana city court the plaintiff in error was indicted for the crime of larceny by embezzlement. After a motion to quash had been overruled, a plea of not guilty was entered, and upon a trial before a jury he was found guilty and sentenced to the penitentiary for an indeterminate period, and he has sued out this writ of error to reverse said judgment.

The statute upon which the indictment was based reads as follows: "If any officer, agent, clerk, or servant of any incorporated company, or if a clerk, agent, servant or apprentice of any person or copartnership, or society, embezzles or fraudulently converts to his own use, or takes and secretes with intent so to do, without the consent of his

company, employer or muster, any property of such company, employer, master, or another, which has come to his possession, or is under his care by virtue of such office or employment, he shall be deemed guilty of larceny." Hurd's Rev. St. 1909, c. 38, § 75.

The evidence shows: That in the year 1904 the plaintiff in error was an attorney at law engaged in practicing his profession and in the real estate, loan, and insurance business in the city of Pana. That at that time one Malinda Vickerage, a widow about 50 years of age, resided in the city of Pana. That she owned a farm of about 100 acres situated near Assumption, which was free from incumbrance and was of the value of from \$125 to \$150 per acre. That she had received title to said land from her father. That she was engaged in litigation over a promissory note for \$2,000, claimed to have been executed by her, with the administrator of a deceased brother, Thomas Scott. That she had a son about 23 years of age, who had recently been admitted to the bar, and who was a partner of the plaintiff in error in the law, real estate, loan, and insurance business at Pana. That in 1904 plaintiff in error called upon Malinda Vickerage in company with her son, and it was agreed that Malinda Vickerage would exchange her farm for a hotel property in the city of Pana known as the "Flint Hotel," which hotel was then incumbered by a mortgage for \$7,000, and which was then renting for \$125 per month, and which the plaintiff in error then had for sale or exchange. That the trade of the farm for the Flint Hotel was effected by Malinda Vickerage through the plaintiff in error, said Malinda Vickerage receiving for her farm the hotel, subject to the incumbrance of \$7,000, and a mortgage on the farm of \$1,100. That the title to the hotel was taken in the name of George D. Chaffee, and Chaffee executed and delivered a quitclaim deed to the hotel property to Malinda Vickerage, which quitclaim deed, by an arrangement between the plaintiff in error and Malinda Vickerage and her son, was not to be recorded, the object of said conveyance to Chaffee and the withholding of said quitclaim deed from recording being said by the plaintiff in error to have been conceived by the parties with a view to defeat the claim of the administrator of Thomas Scott against Malinda Vickerage. That the firm of O'Farrell & Vickerage took charge of the hotel, and for about a year the rent of the hotel was handled by Vickerage, after which time, and until the hotel was disposed of, the rents therefrom were paid to the plaintiff in error by the tenants in possession of the hotel. That about one year after the hotel was deeded to Chaffee the \$7,000 mortgage thereon fell due, and Chaffee refused to execute a new note and mortgage thereon. That thereupon, with the consent of Chaffee, Ma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Malinda Vickerage, Richard P. Vickerage, and plaintiff in error, the quitclaim deed from Chaffee to Malinda Vickerage was destroyed, and Chaffee and wife conveyed the hotel property to the plaintiff in error, and he executed a quitclaim deed to Malinda Vickerage for the hotel property, which she was not to record. That thereafter, for about a year and a half, the plaintiff in error handled the hotel property, made improvements thereon, and collected the rent therefrom, and negotiated a new loan thereon for \$7,000, with which he paid off the \$7,000 mortgage thereon at the time the title to the hotel was placed in Chaffee. That in order to effect said new loan to take up said mortgage it was necessary that the tenants of the hotel should agree to sell at the hotel bar beer manufactured by the Reisch Brewing Company, which \$7,000 note was guaranteed by Mr. Reisch, and that the plaintiff in error should agree to pay \$25 per day for each day such beer was not sold at the bar of said hotel. That soon after the second \$7,000 mortgage was placed upon the hotel property Richard P. Vickerage and the plaintiff in error dissolved partnership, and Vickerage moved away from Pana. That the interest and taxes were not paid upon said mortgage and upon said hotel property, and the plaintiff in error became involved in litigation over mechanics' liens upon the hotel property and over the contract providing for the sale of Reisch Brewing Company beer at the hotel bar. That thereafter the plaintiff in error and Malinda Vickerage entered into the following contract in writing:

"Articles of agreement entered into this 19th day of August, A. D. 1907, by and between E. F. O'Farrell, party of the first part, and Malinda Vickerage, party of the second part, witnesseth: That whereas, the said first party now holds title to lots 18, 19, 20 (except eight feet off the west side of lot 20) in Pease's addition to the city of Pana, Illinois, and it being the desire of the parties hereto that the said property be exchanged for other property or sold; and whereas, also, there is now an indebtedness against said property and certain liability of the said first party on a certain contract entered into with George Reisch with regard to said property, and it being the desire of the parties hereto to protect the first party hereto as to said indebtedness and contract: It is therefore agreed by and between the parties hereto that the said first party shall have complete control of said property, and shall have full power to change the incumbrance on the same as shall by circumstances be required for the purpose of the protection, as above mentioned, and to trade or sell the said property to the best advantage the circumstances and his judgment shall permit, and when so disposed of, the proceeds of such disposition shall be conveyed, by proper articles of conveyance, by the said first party hereto to the said second party hereto; and the said first

party agrees to use his best judgment and efforts in the manner of settling indebtedness, liability, and contracts, trade, or sale of said property to procure the greatest value his judgment will permit for the said second party hereto. In witness whereof the parties hereto have set their hands and seals the day and year first above written. E. F. O'Farrell. [Seal.] Malinda Vickerage. [Seal.]"

That soon thereafter the plaintiff in error traded the Flint Hotel property to one Colgrove for a 100-acre farm, Colgrove agreeing to pay all liens and incumbrances upon said hotel property, to give said farm free and clear of all incumbrances and \$1,250 in cash, and to loan the plaintiff in error \$2,000, secured by mortgage upon said farm. That plaintiff in error deeded said hotel property to Colgrove and a Mrs. Long, and Colgrove deeded said farm to the plaintiff in error, and paid plaintiff in error \$1,250 in cash and loaned plaintiff in error \$2,000, secured by a mortgage upon said farm. That plaintiff in error conveyed said farm to Malinda Vickerage subject to said \$2,000 mortgage, but retained said \$1,250 and said \$2,000. That subsequently Malinda Vickerage called upon the plaintiff in error to account for the rents he had collected upon the Flint Hotel and for the \$3,250 he had received from Colgrove, which several amounts he refused to account to her for, claiming he had used all of said rents and the money received from Colgrove to pay his fees and commissions, in making repairs on the Flint Hotel, and in paying taxes and interest upon the mortgages and said hotel property, with the exception of \$350, which he claimed to have paid Malinda Vickerage, and \$200, which he claimed to have paid to Richard P. Vickerage with the knowledge and consent of Malinda Vickerage, in full settlement of all claims which she had against him.

Chaffee & Chew and W. B. McBride, for plaintiff in error. W. H. Stead, Atty. Gen., and Arthur Yockey (John E. Hogan, E. E. Dowell, and B. H. Taylor, of counsel), for the People.

HAND, J. (after stating the facts as above). It is first claimed that the court erred in overruling a motion to quash the indictment. The indictment contained seven counts. The fourth count was nolleed, and the other counts were each in the language of the statute, and charged that the plaintiff in error was the agent of Malinda Vickerage, and as such agent collected and embezzled the funds of Malinda Vickerage to the amount of \$7,000. The indictment was sufficient, and the court did not err in overruling the motion to quash. *Lycan v. People*, 107 Ill. 423; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058.

It is also urged that the court erred in declining to require the prosecutor to furnish

the plaintiff in error a bill of particulars. Whether or not the state's attorney should have been ruled to furnish the plaintiff in error a bill of particulars was a matter which rested in the sound legal discretion of the trial court. The several counts of the indictment were sufficiently specific to advise the plaintiff in error of the charges he was required to meet, and we think the court did not err in overruling his motion for a bill of particulars. *Morton v. People*, 47 Ill. 468; *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842; *People v. Well*, 243 Ill. 208, 90 N. E. 731.

It is next urged that the trial court erred in permitting John E. Hogan and E. E. Dowell, two regularly licensed attorneys, to assist the state's attorney in the prosecution of this case. These attorneys were permitted by the court to assist in the trial of the case upon the motion of the state's attorney. The plaintiff in error was represented upon the trial by able counsel, and we are unable to see, from anything that appears in this record, that the trial court abused the discretion reposed in it in permitting Mr. Hogan and Mr. Dowell to assist the state's attorney in the prosecution of the case. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

It is further urged that the court erred in requiring the plaintiff in error to exercise two of his peremptory challenges by overruling his challenges for cause to Louis Bowersock and J. J. Higginbottom, who were called as jurors. The record shows that when said jurors were called they were severally examined by counsel for plaintiff in error and each was challenged for cause, and upon the challenge for cause to each being overruled they were excused upon the peremptory challenge of the plaintiff in error; that the panel was then filled by other jurors who were apparently satisfactory to both sides; that thereupon the counsel for plaintiff in error stated to the court that he desired to peremptorily challenge another juror, but that he had been prevented by the court from so doing by being forced to exercise all his peremptory challenges. The juror which the plaintiff in error desired to challenge was not designated, and the court made no ruling, nor was it asked to make a ruling; but after the statement of counsel above referred to was made and taken down by the official reporter the jury was sworn and the case proceeded. It does not appear that the plaintiff in error was required to be tried by an unfair or prejudiced juror, and the point that the plaintiff in error was required to prematurely exhaust his peremptory challenges is not properly preserved for review in this court upon this record.

It is further urged by the plaintiff in error that the jury were improperly instructed as to the law upon behalf of the people, and that instructions offered on his behalf were improperly refused or improperly modified

before they were given to the jury. We have examined all of the instructions which were given, modified before they were given, and refused, and, when the given instructions are considered as a series, we think the jury were fairly instructed as to the law of the case.

It is finally contended that the verdict is not supported by the evidence and is contrary to the law, and for these reasons the court erred in declining to instruct the jury, at the close of all the evidence, to find the plaintiff in error not guilty. In support of this contention it is urged that the evidence shows that the plaintiff in error had an interest in the funds collected from the rent of the Flint Hotel to the extent of his commissions, and that he had an interest in the amount collected from Colgrove to the extent of the balance due him for fees and disbursements in representing Malinda Vickerage in the exchange of the Flint Hotel for the Colgrove farm, and in other services performed by him for Malinda Vickerage, and that the law in this state is well settled in *McElroy v. People*, supra, that under the statute of this state, making it larceny by embezzlement for an agent to fraudulently convert to his own use funds which he has received as such agent, a defendant cannot be rightfully convicted of embezzlement and fraudulently converting to his own use a fund in which he has an interest, although such fund came into his hands as agent. The court instructed the jury, upon behalf of the plaintiff in error, that if they believed, from the evidence, that the plaintiff in error was a part owner of any of the funds which he was charged with embezzling or fraudulently converting to his own use, he could not properly be convicted of embezzling or fraudulently converting to his own use such funds. Nevertheless, the jury convicted the plaintiff in error. The evidence shows that Malinda Vickerage agreed to pay the plaintiff in error a commission upon the rent he collected upon the Flint Hotel, and that he should have the right to retain his commissions out of the rents collected by him. Under the authority of *McElroy v. People*, supra, we are of the opinion the plaintiff in error had such an interest in said rent that he could not lawfully be convicted of embezzling the rent, and the jury, under the instructions of the court, doubtless found that the plaintiff in error was not guilty of embezzling or fraudulently converting to his own use such rent.

We think, however, from the evidence, that the plaintiff in error had no interest in the funds received from Colgrove at the time of the exchange of the Flint Hotel for the Colgrove farm. The contract in writing hereinbefore set out in this opinion provides that the plaintiff in error should dispose of the hotel property as best he could, and, "when so disposed of, the proceeds of such disposition" should be paid over to Malinda Vickerage. While it may be that the plaintiff in

error would be entitled to compensation for disposing of the Flint Hotel to Colgrove and for the other services performed by him for Malinda Vickerage, the evidence wholly fails to show that the plaintiff in error had the right to deduct such compensation from the money received from Colgrove; but, on the contrary, the evidence shows that he expressly agreed to turn over to Malinda Vickerage the proceeds arising from the sale of the Flint Hotel, without deductions. In the McElroy Case the plaintiff in error had the right to deduct her commissions from the amount collected by her by express agreement; that is, she was only required to account to her employer for the amount remaining in her hands after she had deducted her commissions. She therefore had, as was held by the court, an interest in the funds in her hands which she had collected. That case, therefore, differs from the case at bar.

It has been held by a number of courts—and we believe that to be the sound rule—that the right to commissions or fees does not constitute a joint ownership in the fund collected unless the terms of the contract which creates the agency expressly provide that the agent collecting the fund has the right to retain from the particular fund his commissions or fees. *Commonwealth v. Jacobs*, 128 Ky. 536, 104 S. W. 345, 13 L. R. A. (N. S.) 511, 15 Am. & Eng. Ann. Cas. 1226, and cases cited. In this case the plaintiff in error, by virtue of the agency which was created by the written contract of August 19, 1907, conveyed to Colgrove the Flint Hotel property and received \$3,250 in cash from Colgrove, which he agreed, by the terms of said contract, to turn over to Malinda Vickerage. This he failed to do, and fraudulently converted the same to his own use. This transaction was clearly a violation of the statute, and the plaintiff in error was properly found guilty by the jury of embezzling and fraudulently converting to his own use the funds which he received from Colgrove, as the agent of Malinda Vickerage.

The plaintiff in error has raised and urged in his brief other grounds of reversal, but we think them without force. The judgment of the city court of Pana will therefore be affirmed.

Judgment affirmed.

VICKERS, C. J., dissents.

(247 Ill. 104.)

MILLER v. BARTO et al.

(Supreme Court of Illinois. Oct. 23, 1910. Rehearing Denied Dec. 9, 1910.)

1. JUDGMENT (§ 405*)—EQUITABLE RELIEF—GROUNDS.

Equity will relieve against a judgment if it is unconscionable, and if defendant was prevented from defending through fraud or accident without any fault in himself or his agents,

and if rights of third persons have not intervened.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 703, 767; Dec. Dig. § 405.*]

2. EQUITY (§ 69*)—RIGHT TO INVOKE—NEGLECT.

Equity will not relieve one from the consequences of his or his agents' negligence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 197-199; Dec. Dig. § 69.*]

3. EQUITY (§ 1*)—JURISDICTION—REVIEW OF LAW COURTS.

A court of equity will not review a decision of a court of law which would be merely sitting as a court of error or appeal.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 1.*]

4. JUDGMENT (§ 436*)—EQUITABLE RELIEF—RIGHT TO.

Equity will not relieve against a judgment, though based on an unfounded claim, where the debtor knew of it in time to have availed himself of his legal remedy, and, after entering an appearance, neglected to pursue that remedy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 823-826; Dec. Dig. § 436.*]

5. BANKRUPTCY (§§ 119, 152*)—TITLE TO PROPERTY—DIVERSITY OF. BANKRUPT—ESSENTIAL.

Appointment of a trustee is essential to divest a bankrupt of title to his property, and, while the title of the trustee would relate back to the commencement of the proceeding, the title of the bankrupt never passes out of him if there is no trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 119, 152.*]

6. BANKRUPTCY (§ 198*)—VACATION OF LIENS—PURPOSE OF STATUTE.

The provision of the bankruptcy act whereby levies, judgments, attachments, or other liens obtained within four months before filing of the petition are deemed void, when the petitioner is adjudged a bankrupt and the property passes to the trustee released from the same is for the benefit of creditors, and liens on the bankrupt's property are not vacated for his benefit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 198.*]

7. BANKRUPTCY (§ 198*)—VACATION OF LIENS—JUDGMENTS.

Bankruptcy proceedings did not divest a judgment lien where the bankrupt's property never passed to a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 198.*]

8. NEWSPAPERS (§ 1*)—NOTICE OF EXECUTION SALE—PUBLICATION—SUFFICIENCY.

Under 2 Priv. Laws 1869, p. 876, authorizing publication of legal notices in the Chicago Legal News, an execution sale may be advertised therein.

[Ed. Note.—For other cases, see Newspapers, Dec. Dig. § 1.*]

9. PARTITION (§ 46*)—NECESSARY PARTIES.

Partition cannot be decreed unless the real owner of an interest is made a party and his rights protected; and hence, on bill by an attorney to partition between himself and one who bought a lot at execution sale under a judgment obtained by the attorney on agreement that the recovery should be divided between the attorney and the judgment creditor, the creditor has a right to be heard for the protection of his rights.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. § 46.*]

10. PARTITION (§ 16*)—WHO MAY BRING.

Under the act authorizing any tenant in common to bring partition, the court cannot

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Reg's Indexes

refuse partition on the ground that complainant's title was acquired through a judgment based on an unfounded claim.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 16.*]

Vickers, C. J., dissenting.

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Bill by Oscar C. Miller against Selena A. Barto and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

Lemuel M. Ackley, for appellant. Ullmann & Hoag, for appellees.

CARTWRIGHT, J. The circuit court of Cook county dismissed for want of equity the bill filed in that court by Oscar C. Miller, appellant, against Selena A. Barto, Mathias Muench, and others, appellees, for partition of a lot in Chicago, and the complainant appealed to this court.

The complainant claimed title to an undivided one half of the lot and that the defendant Selena A. Barto owned the other half, both having derived title by virtue of a sale on an execution issued upon a judgment in favor of Charles Baumann and against Mathias Muench, and the subject of controversy was the validity of that judgment, and whether a court of equity would sustain the sale made under it. Mathias Muench, one of the defendants, filed his cross-bill alleging that the judgment was founded on no consideration and was inequitable; that he was in possession of the premises, and that the complainant and Selena A. Barto had full notice and knowledge of such facts. The abstract does not show that the court made any disposition of the cross-bill. Muench and the holder of a mortgage answered, and the other defendants, including Selena A. Barto, were defaulted and the evidence was heard by the court. The facts on which the court acted are as follows:

Charles Baumann was a sailor on the lakes, and, when not following his occupation, he boarded at the home of Mathias Muench, coming and going from time to time. He was drunk most of the time, and would do some chores about the house, like wiping dishes, and once cleaned up an empty flat. He never paid anything for his board, and was given small sums for services rendered and spent the same for beer. In 1902, after Muench had married a second wife, she would not have Baumann around and turned him out, and, although he had no claim, he made a bargain with the complainant, Oscar C. Miller, an attorney, to sue Muench for services. Baumann and Miller were to each have one-half of what could be recovered after deducting costs and expenses, and Miller made an agreement with Lemuel M. Ackley, another attorney, by which Ackley was

to receive a portion of the amount eventually recovered. Suit was brought in the superior court on July 31, 1902, and Muench was served with summons on August 16, 1902. Muench was ignorant of the English language, and did not know that he was sued or served with process. At the September term of the court Muench was defaulted, and judgment was rendered against him for \$1,050 and costs. He was told of the judgment by a friend, and employed an attorney, who filed a written appearance for him in the cause, and moved the court to vacate the default and judgment. The motion was continued until the next term, when it was stricken from the files for want of "due appearance," from which order Muench prayed an appeal to the Appellate Court, but did not perfect it, being advised to go into bankruptcy and get rid of the judgment in that way. Execution was issued on the judgment on November 8, 1902, and on demand of the sheriff Muench made a schedule showing personal property, consisting of teams, wagons, and harness, subject to a chattel mortgage. On December 8, 1902, he filed his voluntary petition in bankruptcy in the United States court, and on the 11th of that month was adjudged a bankrupt and on the same day the sheriff levied on the lot. On January 2, 1903, the sheriff was enjoined by the bankruptcy court from selling under the execution. But two claims were filed in bankruptcy—one of \$64.48 for groceries and the other was this judgment. Baumann testified before the referee that he had no claim against Muench; that he did a few chores about the house, and would be given five or ten cents, which he would spend for beer; that he was drunk, and the second wife expelled him from the premises; and that he brought suit to get even with Muench. The referee reported that the claim was not meritorious, and it was disallowed. No trustee was ever appointed, and Muench remained in possession of his property and was discharged on November 7, 1904. On May 25, 1906, the sheriff returned the original execution issued in 1902, stating that he had levied on the lot but made no sale, and alias execution was then sued out and a levy made and the property was sold July 17, 1906, for \$1,150 to Selena A. Barto, who was represented at the sale by Lemuel M. Ackley. The costs were paid and a shift was planned by which the plaintiff's attorney received for \$1,108.90 on the judgment; Selena A. Barto not paying anything. At the expiration of the time of redemption, the sheriff made a deed to Selena A. Barto, and on December 30, 1907, she quitclaimed an undivided one-half of the lot to Oscar C. Miller, the attorney. Immediately afterward Miller filed the bill in this case for partition, and the claim for groceries had been assigned to him and he had released the lot from that claim. The rights

of third parties have not intervened, and there was no basis in fact for the judgment.

Courts of equity have so often granted relief against judgments obtained by fraud, accident, or mistake, where there has been no negligence on the part of a defendant, that there can be no question of power or jurisdiction to afford a remedy in such a case. If it is against conscience to execute a judgment and the defendant was prevented from making his defense by fraud or accident unmixed with any fault or negligence in himself or his agents, and the rights of third parties have not intervened, equity will relieve against the wrong. *Hilt v. Helmberger*, 235 Ill. 235, 85 N. E. 304. A court of equity, however, will not give ear to one who merely asks it to relieve him from the consequences of his own negligence or that of his agents. A court of equity is only moved to action by diligence, and does not interpose to protect one who has not exercised proper diligence to protect his own interests and to make a defense which was available to him in a court of law. This court long ago said that the rule is absolutely inflexible, and cannot be violated even when the judgment in question is manifestly wrong in law or in fact, or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe. *Hinrichsen v. Van Winkle*, 27 Ill. 334. Muench knew of the judgment in time to avail himself of his remedy in the court of law, and by filing his appearance submitted himself to the jurisdiction of that court. Under section 39 of the practice act (Hurd's Rev. St. 1905, c. 110, § 40) then in force, the court was authorized, in its discretion, to set aside the judgment upon good and sufficient cause, and upon such terms and conditions as should be deemed reasonable. On the hearing of the motion the court would have considered both the fact that the claim was baseless, and whether the defendant was guilty of negligence or was without fault on account of his inability to understand the summons. The discretion exercised by the court would have been subject to review by the Appellate Court, and the only reason that Muench did not obtain the judgment of the court was the negligence of himself or his attorney in failing to comply with some rule or to do some act which constituted a "due appearance" in that court. If his motion was stricken from the files improperly, he had a right to have that question reviewed, and did not perfect his appeal because he was advised to go into bankruptcy. There was no accident that he could not have foreseen and guarded against, and a court of equity will not review the decision of a court of law, which would be merely sitting as a court of error or appeal. *Hofmann v. Burris*, 210 Ill. 587, 71 N. E. 584. The claim was simply unfounded, and, if it could be set aside in equity on that ground, the same rule must apply to all cases where a judg-

ment has been wrongfully recovered in an action at law. There is no ground upon which a court of equity can relieve Muench from the judgment.

The claim under the judgment was disallowed in the bankruptcy proceeding, so that Baumann was not permitted to participate in any distribution of assets in that court, but the judgment was not disturbed, and no trustee in bankruptcy was appointed. The appointment of a trustee is essential to divest the bankrupt of the title to his property, and, while the title of the trustee would relate back to the commencement of the proceeding, the title of the bankrupt never passes out of him if there is no trustee. *Rand v. Iowa Central Railway Co.*, 186 N. Y. 58, 78 N. E. 574, 116 Am. St. Rep. 530; 9 Am. & Eng. Ann. Cas. 542; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. The provision of the bankruptcy act by which levies, judgments, attachments, or other liens obtained within four months prior to the filing of a petition in bankruptcy are deemed null and void in case the petitioner is adjudged a bankrupt and the property passes to the trustee released from the same is for the benefit of creditors, and liens on the bankrupt's property are not vacated for his benefit. In this case the property never passed to a trustee and nothing ever happened which divested the lien.

The only other ground upon which it is contended that the execution sale was illegal is that it was advertised in the *Chicago Legal News*. By the charter of that corporation, which was declared to be a public act, it was provided that any notice or advertisement required by law should be as good and valid if published in the *Chicago Legal News* as in any newspaper. 2 Priv. Laws 1869, p. 878. This provision has never been repealed or affected by subsequent legislation, and it was regarded in *Kerr v. Hitt*, 75 Ill. 51, as a legislative construction of the fact that the *Chicago Legal News* is such a newspaper as notices may be published in. The facts did not justify the decree.

It appeared on the hearing that Charles Baumann, the plaintiff in the judgment, was declared insane on February 27, 1908, and that he is in the State Insane Asylum at Bartonville. He was not a party to the suit or represented in any manner, and Selena A. Barto, so far as she held any title to the premises, was a trustee for him. Nothing was paid at the sale except some costs which the attorneys were bound to provide under the contract, and with that exception the judgment paid the bid. The court expressed the view that Baumann was a necessary party, and the complainant filed an amendment to the bill setting out his insanity and alleging that the judgment could not now be set aside because Baumann was insane. Baumann is the one who needs protection, but the court denied a motion to make him a defendant, perhaps on account

of a determination to dismiss the bill in any event. As there was no ground for setting aside the judgment in equity, the cross-bill should be dismissed, but the court could not proceed to a partition without the real owner of an interest in the property being made a party and his rights protected. No party to the suit has any beneficial interest except a mortgagee and the attorneys. Ackley testified in the suit to which Baumann was not a party that Baumann was to give Miller one-half of whatever might be recovered, less costs and expenses, but Baumann has a right to be heard about that and to have his rights preserved.

Section 1 of the act (Hurd's Rev. St. 1905, c. 106) to revise the law in relation to the partition of real estate provides that any tenant in common may compel a partition of real estate by bill in chancery or petition. The complainant in the original bill was entitled, as a matter of legal right, to a partition of the lot, and did not ask the court to administer any equitable remedy, and the court could not refuse partition on the ground that his legal title was acquired through a judgment that was based on an unfounded claim.

The decree is reversed and the cause is remanded to the circuit court, with directions to dismiss the cross-bill and permit an amendment making Charles Baumann a defendant, or, on failure to make such amendment and to bring him into court, to dismiss the bill and to proceed further in accordance with the views herein expressed.

Reversed and remanded, with directions.

VICKERS, C. J., dissents.

(207 Mass. 149)

CORLISS v. KEOWN et al. (two cases).
(Supreme Judicial Court of Massachusetts.
Essex. Dec. 2, 1910.)

1. MASTER AND SERVANT (§ 801*)—LIABILITY OF MASTER—ACTS OF SERVANT.

Where an owner of a horse and carriage lent them, with his driver, to a third person, for use by the third person in his business, the care and management of the horse was retained by the owner through his driver, in the absence of any express agreement to the contrary, and the driver for the purpose remained the owner's servant, so as to charge him with the driver's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1210-1216; Dec. Dig. § 301.*]

2. HIGHWAYS (§ 183*)—USE—NEGLIGENCE—INJURY TO PEDESTRIAN—LIABILITY.

Where a borrower of a horse and carriage, with the driver of the owner, for use in conducting his business, is personally negligent, by conducting the business carelessly, whether by the use of the horse and carriage, known to him to be dangerous, or otherwise, he is liable for his negligence, since he may not use in his business a horse that by its dangerous proclivities will expose others to the probability of injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 470; Dec. Dig. § 183.*]

3. MUNICIPAL CORPORATIONS (§ 705*)—USE OF STREETS—INJURY TO PEDESTRIAN—LIABILITY.

A physician and his mother were interested in a hospital maintained by a corporation of which the physician was president and the mother treasurer. The physician lent to his mother his horse and carriage, in charge of his driver, for use by the mother to take money of the corporation to the bank. The horse was an unsafe animal in public streets, and the mother knew it. The horse ran away, and injured a pedestrian. Held, that the mother was negligent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

4. MASTER AND SERVANT (§ 810*)—INJURY TO THIRD PERSON—LIABILITY OF SERVANT.

One who actually participates in a negligent use of property, with full knowledge of danger to third persons, is negligent, and he cannot avoid liability by showing that he merely assisted the negligent owner as servant or agent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 310.*]

5. MASTER AND SERVANT (§ 316*)—INJURIES TO THIRD PERSONS—INDEPENDENT CONTRACTOR.

An owner of property, employing an independent contractor to make repairs on the property as he thinks necessary, is not liable for the negligence of the contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.*]

Exceptions from Superior Court, Essex County; John A. Aiken, Judge.

Actions by Mary I. Corliss and by William H. Corliss against James A. Keown and Annie Keown. There was a finding for plaintiffs against defendant James A. Keown, and a finding for Annie Keown, and plaintiffs except to the ruling in favor of defendant Annie Keown. Exceptions sustained.

F. E. Shaw, for plaintiffs. W. W. Pyne, for defendants.

KNOWLTON, C. J. The first of these actions is by a woman to recover for injuries from being struck by a runaway horse while crossing a public street in the city of Lynn, and the second is by her husband to recover damages resulting to him from her injury. The two defendants are a physician and his mother, who live in the same house, and were both interested in a hospital maintained by a corporation of which the son was the president and the mother was the treasurer. The horse and carriage by which the plaintiff was injured belonged to the son, and were being used by the mother on the day of the injury. They were in charge of a driver hired by the son. The plaintiff contended that the accident was caused in part by the defective condition of the carriage and in part by the bad behavior and dangerous proclivities of the horse. The case was tried before the chief justice of the superior court without a jury and he found against the defendant James A. Keown, and in favor of the other defendant.

The weight of the evidence and the findings of the judge indicate that, on the morning of the accident, Dr. Keown lent his horse and carriage and driver to his mother, to be used for a short time in business of which she had official charge, and that in her official capacity she was the proprietor and manager of the business in which the horse and carriage were then being used. He found expressly that "she had the authority to direct the driver where to go and by what streets, and at what rate of speed." In legal effect it seems to have been an ordinary case of the owner of a horse and carriage lending them, with his driver, to another person, to be used by that person in his business. In such a case it is held that, in the absence of an express agreement to the contrary, the care and management of the horse is retained by the owner through his driver, who for that purpose and in that part of the business remains his servant. *Shepard v. Jacobs*, 204 Mass. 110-112, 90 N. E. 392, 26 L. R. A. (N. S.) 442; *Delory v. Blodgett*, 185 Mass. 128-129, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328. But in such a case the ownership of the business in which the horse is used and the responsibility for conducting such a business rest with the person to whom the horse and driver are lent. If he is personally negligent through conducting the business in a careless way, whether by the use of instrumentalities, known to him to be dangerous, or otherwise, he is liable for the results of his negligence. He would have no right to accept and use in his business a horse, or anything else, that, by reason of its dangerous proclivities or qualities, would expose others to the probability of injury.

The plaintiff asked for the following ruling: "If the court shall find that the horse or mare used by the defendant Annie Keown at the time of the accident was an unsafe and dangerous animal for the use to which it was being put by the defendant Annie Keown at said time, and the said Annie Keown, or her servants, agents or employes knew it, or ought to have known it by the exercise of due care, and the plaintiff Mary L. Corliss, while on a public street in said Lynn, in the exercise of due care, became injured by such use, then the defendant Annie Keown is liable to the said plaintiff for her damages by reason of said injuries." In regard to the horse the judge found as follows: "By reason of the disposition to start suddenly, she was an unsafe animal to drive in a public place such as the square where the accident in this case occurred, and of this both defendants had knowledge. The sudden starting of the horse was a cause contributing to the final break of the fractured portion of the fifth wheel, and on this ground I hold the defendant James Keown liable." He found that the mother was using this horse in driving about the public streets

at the time of the accident. Having also found that the horse was an unsafe animal to drive in a public place like the square where the accident happened, and that she knew it, he should have found that she was negligent in using it there, just as he found that her son was negligent in lending it to her for such a use. This is upon the assumption that she was using the horse in her own business, to take money of the corporation as treasurer and deposit it in bank to the credit of the corporation, and that she asked for the use of the horse for this purpose, all of which was in evidence without contradiction.

Perhaps it ought to be considered whether the use referred to in the request for a ruling could have been of any other kind, that would lead to a different result. The only other view that can be taken of the evidence is that she was carrying the money for her son as his agent and representative, and that he was the proprietor of the business in which the horse and carriage were then being used. If that was the fact, she was the person then in charge of the business, and conducting it for the other defendant. After leaving her son, she had the direction and control of the use of the horse, and the driver was subject to her orders as to where and how to go. If, as the judge found, it was a negligent use of the horse by the owner to permit it to be driven on these streets, by reason of the danger of injury to other travelers, it was negligent for her to actively participate in this use of the horse by taking the business in charge and directing it with full knowledge of its negligent character. One who actively participates in a negligent use of property, with full knowledge of the danger to third persons, is himself negligent, and he cannot avoid liability by showing that he was assisting the negligent owner as his servant or agent. This ruling requested by the plaintiff should have been given.

We see no other error in the proceedings. The evidence well warranted a finding that neither of the defendants was personally negligent in failing to discover the defect in the carriage after it came from the shop. It also warranted a finding that the wagon-maker was not acting as the servant of either of the defendants in repairing the carriage, but was working under an independent contract which gave him entire control of the business of making such repairs as he thought necessary, for which he was to be paid a reasonable price. The judge might find that, after the carriage was left under the agreement, it could not have been taken away, nor the repairer be interfered with, before the completion of the work, without a breach of the contract. An owner of property is not liable for negligence of a mechanic in doing work under such a contract.

Exceptions sustained.

(247 Ill. 243.)

DIBBLE et al. v. WINTER.

(Supreme Court of Illinois, Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

1. WILLS (§ 282*)—ACTION TO DETERMINE VALIDITY—PLEADING—SUFFICIENCY.

A bill to set aside as a cloud on a land title a purported authenticated copy of a foreign will, alleging that the will was obtained through fraud, and that testator died owning certain land, etc., was not demurrable as not alleging that he died intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 282.*]

2. PLEADING (§ 8*)—CONCLUSIONS—NATURE.

An allegation that testator died "leaving him surviving as his heirs at law and next of kin his two sisters" is an allegation of fact, and not a conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-23½; Dec. Dig. § 8.*]

3. WILLS (§ 222*)—CONTEST—MODE.

A will cannot be injected into partition proceedings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

4. WILLS (§ 311*)—CONTEST—MATTERS INVOLVED.

Whether the instrument produced is the will of testator is the only question properly involved in a bill brought to contest a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 738; Dec. Dig. § 311.*]

5. WILLS (§ 222*)—CONTEST—MODE.

The right to contest a will in chancery is restricted to statutory authority.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

6. WILLS (§ 246*)—CONTEST—RIGHT TO RELIEF.

A bill to set aside as a cloud on a land title a purported authenticated copy of a foreign will, alleging that the will was obtained through fraud, is one to contest a will, and complainants are entitled to relief only by setting aside and rendering the entire will void as to land within the state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 582, 583; Dec. Dig. § 246.*]

7. WILLS (§ 222*)—CONTEST—EQUITY SUITS.

When the only relief that can be had in a suit to set aside a will is to declare it void, the same as would a contest under Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 7, it is in effect a contest of the will, and must be governed by the rules controlling such contests.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

8. WILLS (§ 281*)—CONTEST—PLEADING—SUFFICIENCY.

A bill to set aside as being void and as a cloud on a land title a purported authenticated copy of a will, alleging that the will was obtained through defendant's fraud was sufficient as a bill to contest the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 639; Dec. Dig. § 281.*]

9. WILLS (§ 70*)—VALIDITY OF GIFTS—LAW GOVERNING.

The validity of bequests depends on the law of testator's domicile, while the validity of devises rests on the law of the place where the land is situated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 185; Dec. Dig. § 70.*]

10. WILLS (§ 427*)—PROBATE—CONCLUSIVE-NESS.

Generally a decree admitting a will of personality to probate in the proper tribunal is conclusive as to testator's capacity and due execution and validity of the will, but, when the will affects land, the probate establishes nothing beyond the validity of the will where it is probated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 916; Dec. Dig. § 427;* Judgment, Cent. Dig. §§ 1068, 1308.]

11. WILLS (§ 70*)—VALIDITY—OPERATION OF STATUTES.

The validity of a will in other states and jurisdictions as to devises depends on its execution in conformity to their laws.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184-186; Dec. Dig. § 70.*]

12. COURTS (§ 18*)—JURISDICTION—LAND IN OTHER STATES.

The courts of one state have no jurisdiction over the titles to land in another state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 50-68; Dec. Dig. § 18.*]

13. STATUTES (§§ 174, 175*)—OPERATION—EXTRATERRITORIAL FORCE.

A local statute has no extraterritorial force, and can be exercised only on persons and property within the state.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 174, 175.*]

14. WILLS (§ 434*)—PROBATE—OPERATION IN OTHER STATES.

The probate of a will in one state, though conclusive as to personality, if made at the testator's domicile, can have force in establishing a devise of land in another state only through some law of the state in which the lands are situated.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434;* Evidence, Cent. Dig. § 1416.]

15. DESCENT AND DISTRIBUTION (§ 1*)—LAWS GOVERNING—NATURE.

The laws of descent are statutory.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 1-6; Dec. Dig. § 1.*]

16. WILLS (§ 1*)—TESTAMENTARY POWER—LAWS GOVERNING—NATURE.

The laws governing the right to dispose of property are statutory.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. § 1.*]

17. WILLS (§ 222*)—CONTEST—COMMON-LAW RULE.

At common law the validity of devises could be tested only in an action at law, while bequests were established by the ecclesiastical courts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

18. WILLS (§ 222*)—CONTEST—COMMON-LAW RULE.

At common law an heir had no right, independently of statute, to contest a will in chancery.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

19. WILLS (§ 225*)—CONTEST—NATURE OF RIGHT.

A right to contest a will is not a vested one; the Legislature being empowered to abrogate authority for such contests.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 547; Dec. Dig. § 225.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

20. WILLS (§ 426*)—FOREIGN WILLS—"RECORDED IN LIKE MANNER."
 "Recorded in like manner" within Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 9, making a foreign will "recorded as aforesaid" valid in like manner as domestic wills, means recorded with the probate clerk as provided for in section 2.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 915; Dec. Dig. § 426.*]

21. WILLS (§ 426*)—FOREIGN WILLS—PROBATE METHOD OF PROCEDURE.

When a foreign will has been certified and recorded under Statute of Wills (Hurd's Rev. St. 1909, c. 148), §§ 2, 9, the county or probate court grants letters of administration thereon, and further proceedings are had the same as if the will had been originally probated in the state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 915; Dec. Dig. § 426.*]

22. STATUTES (§§ 215, 217*)—AID TO CONSTRUCTION—CONTEMPORANEOUS CIRCUMSTANCES.

In construing a statute, courts may consider the contemporaneous circumstances and historical facts leading to its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 291, 298; Dec. Dig. §§ 215, 217.*]

23. WILLS (§§ 213, 214*)—PROBATE—NATURE OF PROCEEDING.

Before the provision of Hurd's Rev. St. 1909, c. 148, § 21, for notice to parties interested, the ex parte method of proving wills under Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 2, on the testimony of attesting witnesses, was analogous to the probate in England in common form, while the subsequent proceeding in equity to contest the validity of the will is similar to the probate in solemn form by the executor on being cited by the next of kin.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 520, 521; Dec. Dig. §§ 213, 214.*]

24. WILLS (§ 423*)—PROBATE—EFFECT—COMMON-LAW RULE.

At common law the probate of a will was binding, and could not be contested collaterally as to personality, but where the question was as to a devise the probate amounted to nothing, the devisee being required to prove the will as any other paper, as well as the capacity of the testator to devise, on every trial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 911-913; Dec. Dig. § 423.* Judgment, Cent. Dig. §§ 1067, 1068, 1308.]

25. COMMON LAW (§ 12*)—WILL CONTEST—LAWS GOVERNING.

Since the authorities of the Northwest Territory made no specific provisions for contesting wills as authorized by Ordinance of 1787 (Maxwell's Laws of Northwest Territory, p. 3), the common law of England of a general nature and applicable to conditions in the territory and all statutes in aid thereof and to supply defects therein prior to 1807 were in force in the Northwest Territory.

[Ed. Note.—For other cases, see Common Law, Dec. Dig. § 12.*]

26. WILLS (§ 246*)—FOREIGN WILLS—CONTEST.

Under Act Feb. 10, 1821 (Laws 1821, p. 119), § 5, authorizing contest of "any will," and under Act 1819 (Laws 1819, p. 231, § 23), providing for authenticating and filing foreign wills, such wills could be contested as well as domestic wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 582, 583; Dec. Dig. § 246.*]

27. COURTS (§ 7*)—JURISDICTION—LOCAL ACTIONS—DEVISES—CONTEST—NATURE OF RIGHT.

The right to contest the validity of a will of land is not local, and such contest is incidental to the property and the parties in the state where the property is situated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14-31; Dec. Dig. § 7.*]

28. WILLS (§ 426*)—FOREIGN WILLS—PROBATE.

The filing of a copy of a foreign will duly authenticated according to Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 9, for record with the clerk of the probate or county court under section 2, gives the same force and effect to the copy of the will thus recorded as an original will duly filed and probated under section 2, and, after such record, the same proceedings can be taken concerning the one as the other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 915; Dec. Dig. § 426.*]

29. WILLS (§ 203*)—"PROBATE."

The term "probate" when strictly used, relates to proving a will before the officer or tribunal having jurisdiction to determine its validity, but in common usage the word is often used as applying to any of the incidents of administration [citing 6 Words & Phrases 5627, 5628].

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 502, 503; Dec. Dig. § 203.*]

30. JUDGMENT (§ 470*)—COLLATERAL ATTACK.

Generally a judgment or order of court is not subject to collateral attack by any one bound thereby.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.*]

31. WILLS (§ 421*)—PROBATE—COLLATERAL ATTACK.

The general rule that a judgment or order is not subject to collateral attack by any one bound thereby applies to the probate of wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 904-910; Dec. Dig. § 421.*]

32. WILLS (§ 222*)—CONTEST—NATURE OF ATTACK.

A contest of a will is a direct, and not a collateral, attack.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 542-544; Dec. Dig. § 222.*]

33. WILLS (§ 311*)—CONTEST—PRESUMPTIONS—EFFECT OF PROBATE.

In a will contest under the statute of wills (Hurd's Rev. St. 1909, c. 148), the issue to be submitted to the jury is an original question to be determined exclusively from the evidence before them; the trial being de novo without regard to the fact that the instrument had been admitted to probate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 311.*]

34. WILLS (§ 238*)—CONTEST—NATURE OF ATTACK.

A bill to remove a foreign will as a cloud on title, or to partition land on the theory of an invalid foreign will, would be a collateral attack on the foreign probate, whereas a bill to contest would be a direct attack.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 563, 569; Dec. Dig. § 238.*]

35. WILLS (§ 434*)—FOREIGN WILLS—SUCCESSFUL CONTEST—EFFECT.

A successful contest of a foreign will does not affect the will or the probate thereof in the foreign state, and only prevents the will operating on land within the particular state,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

leaving that to be governed by the domestic statute regulating descent of land.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 434.*]

36. WILLS (§ 246*)—FOREIGN WILLS—CONTEST.

Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 7, authorizing will contests, applies to any will, whether domestic or foreign, filed with the clerk as provided for in section 2, and upon which letters of administration may be issued under the latter section.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 582, 583; Dec. Dig. § 246.*]

Vickers, C. J., and Dunn and Cooke, JJ., dissenting.

Appeal from Superior Court, Cook County; Arthur H. Chetlain, Judge.

Bill by Sarah P. Dibble and another against Antoinette Thayer Winter. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

Albert M. Kales, for appellants. Morris St. P. Thomas, for appellee.

CARTER, J. This is a bill filed in the superior court of Cook county on December 7, 1909, by appellants, Sarah P. Dibble and Estella W. Gair, to declare null and void and set aside as a cloud on the title of certain real estate in that county an instrument purporting to be an authenticated copy of the will of Samuel Blair Winter, theretofore filed with the probate clerk of said Cook county in accordance with sections 2 and 9 of the Illinois statute on wills (Hurd's Rev. St. 1909, c. 148). The bill as amended sets forth that the original of the copy so filed is not the last will and testament of said Samuel Blair Winter; that said Winter at the date of said pretended will was, and had been for many years, completely paralyzed from his waist down; and that he was at that time, and for a long time prior thereto, and afterwards until his death, of unsound mind and memory; that owing to his impaired mind and physical condition, he was easily influenced, and at the date of said instrument was entirely in the hands of the appellee, Antoinette Thayer Winter, and dependent for his physical care upon her; that she was a woman of mature and able physical and mental powers and of a strong and aggressive will, possessing more than usual influence over said Winter, and had, owing to the absence of all his friends, relatives, and advisers, and on account of his physical and mental weakness, succeeded in assuming with him the position of confidential agent and adviser in all his business affairs; that, if said instrument was executed by said Winter (which is not admitted), its execution was obtained by fraud of the said Antoinette Thayer Winter and by her taking advantage of said Winter's lack of physical and mental powers, so that it was the result of her will and volition rather than his; that said Antoinette Thayer Winter procured the pretend-

ed execution of said instrument by means of false and fraudulent representations, which she knew to be such and upon which said Winter relied and acted. The bill further alleges that said Samuel Blair Winter died about December 27, 1908, seised of an undivided one-third of certain real estate in Cook county, Ill., and a possible interest (depending upon the construction of the will of his father) in certain other real estate in Cook county; that about April 12, 1909, there was filed in the probate court of Cook county, on behalf of appellee, an instrument purporting to be the will of said Samuel Blair Winter, and the record of the probate thereof in the probate court of Ottawa county, Michigan, on March 29, 1909. This instrument is set out in *hæc verba* in the bill, and provides that, after the payment of just debts and funeral expenses, all of testator's estate, real and personal, shall go to his wife, appellee herein, as her sole property. She is also appointed executrix. The prayer of the bill, after asking for an answer, is that said instrument may be declared null and void and set aside as a cloud upon the title of the orators, and that the record thereof in the office of the clerk of the probate court be removed, set aside, canceled, and expunged from the records of said office, and for such other and further relief as to equity may seem meet. A general demurrer filed by appellee was sustained by the trial court and a decree entered dismissing the bill for want of equity. From that order this appeal was taken.

Counsel for appellee contends that the demurrer was properly sustained because the bill did not allege that the testator died intestate. We think the bill is not lacking on this point.

It is further contended that the allegation in the bill that the testator died "leaving him surviving as his heirs-at-law and next of kin his two sisters," appellants herein, is a conclusion of law, and not a statement of fact admitted by the demurrer. A similar allegation has been held to be a statement of fact in *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167, and *Gfroerer v. Gfroerer* (Ind.) 90 N. E. 757. A like allegation was conceded by all counsel to be sufficient in *Selden v. Illinois Trust & Savings Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180. "Almost any statement of fact may be shown by a refined analysis to depend upon an inference to be drawn from other facts and to require the application of legal rules in making the deduction." *Koch v. Arnold*, 242 Ill. 208, 89 N. E. 1028. Whatever may be the holding in other jurisdictions, we are disposed to hold, on principle as well as under the authorities of this state, that the allegation in question is a statement of fact, and not a conclusion of law. *Foss v. People's Gaslight & Coke Co.*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

241 Ill. 238, 89 N. E. 351; *Bogda v. Glos*, 244 Ill. 575, 91 N. E. 657; *Pease v. Sander-son*, 188 Ill. 597, 59 N. E. 425.

Counsel for appellants suggests that the certificate to this will does not comply with the statute so as to entitle a copy to be re-ordered in this state, the argument being that under section 9 of the statute on wills it is required that it should be certified as executed and proved "agreeably to the laws and usages of that state or country in which the same was executed," and that there is nothing in this record to indicate that this will was executed in the state of Michigan. Without considering or deciding whether appellants' construction of section 9 on this point is correct, we deem it sufficient to say that we think the record shows that the will was executed in the state of Michigan.

Appellants argue that the bill in this cause should be sustained as one to remove a cloud on the title, under *Bale v. Bale*, 242 Ill. 519, 90 N. E. 233, and *Bieber v. Porter*, 242 Ill. 616, 90 N. E. 188. These decisions do not sustain that contention. The case of *Bieber v. Porter*, supra, simply stated, as did *McDonald v. White*, 180 Ill. 493, 22 N. E. 596, that where a party is in possession of the land in dispute claiming to hold the same under a will alleged to be invalid a bill cannot be maintained by another claimant to set aside the will as a cloud upon the title. In each of these cases the only point decided was that a bill to quiet title can only be entertained when it is alleged and proved that the complainant is in possession of the premises or that they are vacant and unoccupied. In *Bale v. Bale*, supra, the will was not declared null and void and set aside as a cloud upon the title. The decision was, in effect, that a provision of the father's will giving to his son a life estate in certain lands which the son already occupied and owned in fee at the time the will was executed could be set aside as a cloud upon the son's title. The will was not thereby declared null and void, but it was held that the father had attempted to devise property which he did not own. This court has decided that a will contest cannot be injected into partition proceedings; that whether the instrument produced is the will of the testator is the only question properly involved in a bill brought under the statute to contest a will. *Hollenbeck v. Cook*, 180 Ill. 65, 54 N. E. 154; *Tagert v. Fletcher*, 232 Ill. 197, 83 N. E. 805; *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; *Calkins v. Calkins*, 229 Ill. 68, 82 N. E. 242. In *Keister v. Keister*, 178 Ill. 106, 52 N. E. 946, it was held that a bill for partition which alleged that the complainant was a tenant in common by inheritance, but that defendants fraudulently procured a will devising the property to them, which was improperly admitted to probate and which constituted a cloud on complainant's title, was plainly one to contest said will by a bill in chancery; that the right to that relief

was purely statutory, and could only be availed of under section 7 of the statute on wills. We have repeatedly held that the right to contest a will in chancery is a right conferred by statute, and independently of the statute no such right has ever been recognized by the courts of this state. *Selden v. Illinois Trust & Savings Bank*, supra; *Waters v. Waters*, 225 Ill. 559, 80 N. E. 337; *Jelev. Lemberger*, 163 Ill. 338, 45 N. E. 279; *Luther v. Luther*, 122 Ill. 553, 13 N. E. 166. In this case, as in *Keister v. Keister*, supra, the bill is one to contest a will by a bill in chancery, and the complainants could only have the relief in question by setting aside and rendering the entire will null and void so far as it affects real estate in this state. When the only relief that can be had is to set aside a will and render it null and void, the same as would a contest under section 7 of the act on wills, it is, in effect, a contest of the will, and must be governed by the rules of law controlling such contests. Sufficient facts were alleged in the bill in this case, and the prayer was so worded, as to sustain it as a bill to contest the will in question. This is practically conceded by counsel for appellee. This brings us to the principal question presented in the briefs.

After the will was probated in Michigan, a copy was filed for record in the office of the clerk of the probate court of Cook county, duly authenticated in accordance with the provisions of section 9 of the act on wills. It is argued by counsel for appellee that the statute as to wills in this state must be strictly construed; that, therefore, only domestic wills, or wills probated in the same way as domestic wills, can be contested under section 7. The validity of bequests of personal property depends on the law of the testator's domicile, while the validity of devises of real property rests on the law of the place where the real estate is situated.

It is therefore the general rule that a decree admitting a will of personal property to probate in the proper tribunal is conclusive as to the capacity of the testator and the due execution and validity of the will, but, when the will affects real estate, the probate establishes nothing beyond the validity of the will where it is probated. Its validity as such a will in other states and jurisdictions depends on its execution in conformity with their laws. *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Wharton on Conflict of Laws*, § 585; *Nelson v. Potter*, 50 N. J. Law, 324, 15 Atl. 375. The statutes on this question in some states have been construed by the courts as holding that the probate of a will in a foreign jurisdiction is conclusive as to its validity in the courts of domestic states, not only as to the personal property, but as to the real estate as well. In other jurisdictions such probate has been held conclusive only as to the personal property. A review of the various decisions from other states on this question

would be of little advantage, for the decisions in each state must depend upon the special wording of its statute. Our attention has not been called to any statute exactly similar in wording to our own. The various decisions are collected and classified in notes to *State v. District Court (Mont.)* 9 Am. & Eng. Ann. Cas. 418, and *Martin v. Stovall (Tenn.)* 48 L. R. A. 180. The courts of one state are without jurisdiction over the titles of land in another state. A local statute has no extraterritorial force, and can be exercised only upon persons and property within the jurisdiction of the state where such statute is enacted. The law of the state where the real estate is situated governs exclusively. *Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403. The probate of a will in one state, though conclusive as to personality if made at the testator's domicile, can have its only force in establishing the devise of lands in another state by virtue of some law of the state in which the lands are situated. *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237. This doctrine is consistent with the clause of the federal Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state. *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924; *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95. Whether this will can be contested depends entirely upon the construction to be placed upon the statutes of this state. Appellants insist that, if our statutes do not permit such a contest, they will be deprived of a right guaranteed by the provisions of the federal and state Constitutions as to due process of law.

The laws of descent and the laws governing the right to dispose of property are statutory, as is also the right to contest a will in chancery. Under the common law, the validity of wills of real estate could only be contested in an action at law, while wills of personal property were established by the ecclesiastical courts. *Luther v. Luther*, supra; 2 *Pomeroy's Eq. Jur.* § 918. No right existed in favor of the heir to go into a court of chancery to contest the validity of a will independently of statute. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Luther v. Luther*, supra; *Harner on Probate Law* (2d Ed.) § 69. The right to contest a will is not a vested one. The Legislature, if it saw fit, could abrogate all of the provisions of our statutes authorizing will contests. *Sharp v. Sharp*, 218 Ill. 332, 72 N. E. 1058; *Selden v. Illinois Trust & Savings Bank*, supra. Can this will, the duly authenticated copy being filed in the office of the probate clerk of Cook county, be contested in this state under the provisions of our statute for the contest of wills? Sections 2, 7, 9, and 10 of our statute on wills must be construed in order to reach a proper conclusion on this question. Those sections read as follows:

"Sec. 2. All wills, testaments and codicils, by which any lands, tenements, hereditaments, annuities, rents or goods and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix, or by some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the county court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit the same to record: Provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which, in the opinion of said county court, shall be deemed sufficient to invalidate or destroy the same; and every will, testament or codicil, when thus proven to the satisfaction of the court, shall, together with the probate thereof, be recorded by the clerk of said court, in a book to be provided by him for that purpose, and shall be good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed."

"Sec. 7. When any will, testament, or codicil shall be exhibited in the county court for probate thereof as aforesaid, it shall be the duty of the court to receive the probate of the same without delay and to grant letters testamentary thereon to the person or persons entitled, and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early day as shall be consistent with the right of the respective persons interested therein: Provided, however, that if any person interested shall, within one year after the probate of any such will, testament or codicil in the county court as aforesaid, appear and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate shall be forever binding and conclusive on all of the parties concerned, saving to infants or non compos mentis the like period after the removal of their respective disabilities. And in all such trials by jury as aforesaid the certificate of the oath of the witnesses at the time of the first probate, shall be admitted as evidence and to

have such weight as the jury shall think it may deserve."

"Sec. 9. All wills, testaments and codicils, or authenticated copies thereof, proven according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this state, accompanied with a certificate of the proper officer or officers that said will, testament, codicil or copy thereof was duly executed and proved, agreeably to the laws and usages of that state or country in which the same was executed, shall be recorded as aforesaid, and shall be good and available in law, in like manner as wills made and executed in this state.

"Sec. 10. All wills, testaments and codicils, which heretofore have been or shall hereafter be made, executed and published out of this state, may be admitted to probate in any county in this state in which the testator may have been seized of lands or other real estate, or in which his personal estate or part thereof shall lie, at the time of his death, in the same manner, and upon like proof, as if the same had been made, executed and published in this state, whether such will, testament or codicil has first been probated in the state, territory or country in which it was made and declared or not. And all original wills, or copies thereof, duly certified according to law, or exemplifications from the records, in pursuance of the law of Congress in relation to records in foreign states, may be recorded as aforesaid, and shall be good and available in law, the same as wills proved in such county courts.
* * *

It is argued by appellee that the provision of section 7 that "when any will * * * shall be exhibited in the county court for probate thereof as aforesaid" means that there shall be a contest only when wills are probated in accordance with the provisions of section 2, and does not refer to the provision for recording wills under section 9, that "aforesaid" in said section 7 means "going before," and that, therefore, said section 7 could not refer to the wills provided for in section 9. The last part of section 9 states that such wills, when they "shall be recorded as aforesaid, shall be good and available in law, in like manner as wills made and executed in this state." "Recorded as aforesaid," etc., means recorded with the probate clerk as provided for in said section 2. *Bliss v. Seeley*, 191 Ill. 461, 61 N. E. 524; *Catholic University v. Boyd*, 227 Ill. 281, 81 N. E. 363. When a will has been so certified and recorded under the provisions of said sections 9 and 2 the county or probate court grants letters of administration thereon, and further proceedings are had the same as if the will had been originally probated in this state.

If there is any doubt as to the meaning of a statute, courts, in order to find its proper construction, may take into consideration the

contemporaneous circumstances and historical facts which led to its enactment. *City of Chicago v. Green*, 238 Ill. 258, 87 N. E. 417; 28 Am. & Eng. Ency. of Law (2d Ed.) p. 632; 2 *Lewis' Sutherland on Stat. Const.* (2d Ed.) 462. In Great Britain, as we have seen, the ecclesiastical courts alone could take proof as to wills bequeathing personal property. As to lands they had no jurisdiction. *Wells' Will*, 5 Litt. 273; *Marriott v. Marriott*, 1 Strange, 666; In re *Payne's Will*, 4 T. B. Mon. (Ky.) 423. In England there were two modes of probate: One ex parte and one inter partes. One was proof of the will in "common form" and the other in "solemn form." By the first method the will was taken before the judge of the proper court of probate and proved by attesting witnesses without citing or giving notice to the parties interested. When, however, it was proved under the second method, it was done upon the petition of proponent for a hearing, and all persons having an interest were cited to be present. The executor of a will proved in common form might, at any time with 30 years, be compelled by any person having an interest therein to prove it in "solemn form." *Luther v. Luther*, supra; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122. Previous to the time when notice was required to parties interested (*Hurd's Rev. St.* 1909, par. 21, p. 2284), the ex parte method of proving wills, under said section 2 (*Claussenius v. Claussenius*, 179 Ill. 545, 53 N. E. 1006) on the testimony of attesting witnesses, was analogous to the probate in England in "common form," while the subsequent proceeding in equity to contest the validity of a will is similar to the probate in "solemn form" by the executor upon being cited by the next of kin. *Luther v. Luther*, supra; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015. Under the common law the probate of the will was held binding and could not be contested collaterally as to personality, but, where the question was as to the devise of lands, the probate of the will as to real estate amounted to nothing. The devisee produced the will, and in such controversies had to prove it as any other paper, as well as the capacity of the testator to devise, on every trial. *Wells' Will*, supra; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; *Toller on Executors*, *50-79; 10 *Bacon's Abridgment* (Wilson's Am. Ed.) p. 540; *Coalter's Ex'rs v. Bryan*, 1 Grat. (Va.) 18; *Luther v. Luther*, supra.

Section 7, as to the contest of wills, was taken, in substance, in 1829 (Rev. Laws [Ill.] 1828-29, p. 193, § 5), from the eleventh and fifteenth sections of the Kentucky law passed February 24, 1797. *Rigg v. Wilton*, 18 Ill. 15, 54 Am. Dec. 419; *Luther v. Luther*, supra. The Kentucky statute was based on the Virginia act of 1785, which was a remodeling of an earlier Virginia act of 1748. 12 *Hening's Laws of Va.*, p. 140; 1 *Littell's*

Laws of Ky. p. 611. Sections 2 and 9 of our act on wills were first adopted in this state in 1819 as sections 22 and 23 of an act to regulate the administration and descent of intestate estates. Laws 1819, p. 231. They were in wording identical with the present statute, with the exception that the then section 23 had a provision that within four years after the recording of such will, if it was proven that it was revoked, any parties aggrieved might have former proceedings as to the probating of the will reversed. Said sections 22 and 23 were substantial copies of sections 1 and 2 of a statute of Ohio on proving wills, adopted in 1805. Stat. of Ohio 1805, p. 173. When the Legislature of this state revised the law on wills, in 1829, it re-enacted said sections 2 and 9 as sections 2 and 7 of said latter act, but omitted the proviso above referred to from said section 7. Rev. Laws Ill. 1828-29, p. 192. Said sections 2, 5, and 7, as adopted in 1829, have remained unchanged in our statute on wills since that date, except as to the numbering of the sections, which are now sections 2, 7, and 9, heretofore set out.

In 1778 Illinois became a county of Virginia. Under the laws of Virginia at that time there was no provision for the probate of wills executed or probated outside of that colony (4 Littell's Laws of Ky., appendix 2, p. 477), but a will executed and probated within Virginia could be contested by a bill in chancery any time within seven years. 12 Hening's Laws Va. 11, p. 142. A law was adopted in that colony with reference to proving foreign wills in 1780, wherein it was provided that such wills should be "contested and controverted in the same manner as the original might have been." 4 Littell's Laws Ky., appendix 2, § 7, p. 484; Abridgment of Public Laws of Va. 1796, § 14, p. 335.

The ordinance of 1787 established the Northwest Territory July 13, 1787. That ordinance provided that the Governor and judges to be appointed should have authority to make laws for the territory, and until they "shall adopt laws as hereinafter mentioned, estates in said territory may be devised or bequeathed by will in writing, signed, sealed and delivered by him or her in whom the estate may be (being of full age) and attested by three witnesses." Maxwell's Laws of the Northwest Territory, p. 8. While Illinois was a part of the Northwest Territory the authorities passed no law providing, in terms, for will contests, but the Governor and judges adopted an act June 19, 1795 (Maxwell's Laws of Northwest Territory, p. 148), copied from the Pennsylvania Code (Read's Digest of Penn. Laws, 1801, p. 384), which, among other things, provided for proving wills in the Northwest Territory on the testimony of two or more credible witnesses and also for foreign wills being recorded in this state for the purpose of conveying title to lands, and further provided

that if any of the wills "whereof copies or probates shall be so as aforesaid produced and given in evidence, shall within seven years after the testator's death appear to be disproved or annulled before any judge or officer having cognizance thereof or shall appear to be revoked or altered by the testator," etc., then parties who may have been aggrieved by the former proceedings might have certain remedies. It is plain from this section that it was understood there was some method of contesting every will. No specific provisions for contesting wills having been made by the authorities of said Northwest Territory, the common law of England, of a general nature and applicable to our condition, and all statutes in aid thereof and to supply defects therein prior to the year 1607, were in force in the Northwest Territory at that time. Lavelle v. Strobel, 89 Ill. 370; Maxwell's Laws of Northwest Territory, p. 175; Laws of Indiana, Aug., 1807, to Nov., 1811, p. 139; 1 Pope's Laws of Ill. Territory, p. 34; 1 Starr & C. St. 1896, § 1, p. 901.

The Northwest Territory was divided into two territories in 1800, one being the eastern division of the territory northwest of the Ohio (the present state of Ohio), and all the rest of the Northwest Territory being formed into the territory of Indiana. The provisions of said act of June 19, 1795, with reference to probating wills and receiving them in evidence, above referred to, were adopted verbatim as sections 32 and 33 of an act concerning the granting of letters testamentary and letters of administration for the settlement of estates in the territory of Indiana, September 17, 1807. Territorial Laws of Indiana, Aug. 1807, to Nov. 1811, pp. 84-88. The territory of Illinois was organized in 1800, and these sections were in 1812 incorporated into the territorial laws of Illinois. Pope's Laws of Ill. Territory, pp. 215, 216.

We find no provision in the territorial laws of Indiana while Illinois was a part of that territory, or in the laws of Illinois while it was a territory by itself, in any way providing for or referring to the contest of wills, except the general reference above quoted as to wills which should be "disproved or annulled," which indicates that all wills could be contested. The first specific provision as to contesting wills in the laws applying to what is now Illinois was a statute passed February 10, 1821 (Laws 1821, p. 119), creating a probate court, and providing among other things (section 5) "that any person or persons interested may contest any will, but in all such cases all such persons interested shall have notice by summons at least twenty days before the day assigned for trial." Section 9, with reference to the authenticating and filing of foreign wills, had already been adopted in 1819 and was then in force in the state. Said section 5 provided for the contest of "any will." Beyond question it included not only domestic wills probated in this state, but foreign wills

that were filed here for record under the provisions of the then section 23 of the act of 1819 (present section 9). Evidently this contest was to be very similar to the probate in "solemn form" as provided for under the common law.

Under the common law, as we have seen, there could be a contest every time the will was offered in evidence. At the time present sections 2, 7, and 9 were incorporated in the act on wills of 1829 (being substantially copies of the statutes of Ohio, Virginia, and Kentucky) in every one of those states a copy of a foreign will, duly authenticated and recorded, could be contested, the same as a domestic will. 22 Stat. of Ohio, 1824, § 12, p. 121; 2 Morehead & Brown's Digest of Ky. Laws 1834, § 13, p. 1544, and section 1, p. 1548; 1 Rev. Code Va. 1819, p. 379. The law with reference to the admission of copies of wills in evidence while Illinois was under territorial government was adopted from Pennsylvania. Foreign wills could be contested in Pennsylvania. As hearing on this question, see *In re Payne's Will*, supra; *Coalter's Ex'rs v. Bryan*, supra; *Opp v. Chess*, 204 Pa. 401, 54 Atl. 354; *Heister v. Lynch*, 1 Yeates (Pa.) 108. Would it be reasonable to construe these sections of the statute (taken literally in 1829 from states where foreign wills could be contested the same as domestic wills) as making such a radical departure from the then general rule and giving to foreign wills greater force and effect as to the title to real estate than to wills executed in Illinois?

The right to contest the validity of a will of real estate is not local. Such a contest is incidental to the property and the parties in the state where the property is situated. *Sneed v. Ewing*, supra. No judgment entered in another state could in any way affect such property without the sanction of the laws of the domestic state. The filing of a copy, duly authenticated according to said section 9, for record with the clerk of the probate or county court under section 2 gives the same force and effect to the copy of the will thus recorded as an original will duly filed and probated under said section 2. After such record the same proceedings can be taken concerning the one as the other.

The substance of present section 10 with reference to the probate of foreign wills here by original proof the same as domestic wills, regardless of whether such foreign wills had been probated in the other jurisdictions, was first incorporated into our statutes in 1855. Laws 1855, p. 44. Counsel for appellee concedes that, if such a foreign will be proved and probated here the same as a domestic will, it can be contested under section 7. To reach this conclusion requires a different meaning to be given to "aforesaid," in section 7, from that contended for by appellee. Appellee's contention as to the proper construction of section 9 would lead to this absurdity: That, if a foreign will were pro-

bated in another state and again probated here, it could be contested here, but, if it were probated in a foreign state and an authenticated copy filed with the clerk of the probate or county court (although this latter would have the same effect on all future proceedings as an original probate here), the will in that case could not be contested here. If section 9 had been inserted in the act on wills as a provision or section preceding section 7, appellee's argument on this question would have no basis. The fact that the provision as to filing authenticated copies of wills follows the provision as to contesting wills does not, we think, put the construction upon the word "aforesaid" in section 7 contended for by appellee. Even if it did, a reading of sections 9 and 2 together, in the light of all the other provisions of the act on wills, clearly includes the wills provided for in section 9 as among those that are "probated" under the provisions of section 2. The term "probate," when strictly used, relates to proving the will before the officer or tribunal having jurisdiction to determine its validity. In common usage, however, the word is often used as applying to any of the incidents of administration. 32 Cyc. 403; 6 Words and Phrases, 5627, 5628.

Counsel for appellee contends that the decisions in *Stull v. Veatch*, 236 Ill. 207, 86 N. E. 227, and *Amrine v. Hamer*, 240 Ill. 572, 58 N. E. 1036, decide the contrary. We think otherwise. Both of those cases were bills to partition real estate. In neither of them was there any question of contesting a will. In *Amrine v. Hamer* it was decided that a foreign will duly probated in another state (a duly authenticated copy having been recorded in this state) need not be probated in Illinois or have the formalities entitling it to probate here in order to enable it to pass the title to land here. In *Stull v. Veatch*, supra, according to the allegations in the bill, no instrument purporting to be a will had been filed in this state or in the recorder's office. The court in that case did not deem the allegations of the bill of such a nature as to allow it to be considered a bill to contest the will. It was decided in that case that it was an attempt by a bill in partition to nullify by collateral attack proceedings by which the will was probated in a foreign jurisdiction, and the opinion stated on page 212 of 236 Ill., on page 229 of 86 N. E.: "Whatever might be the effect of a direct attack, it cannot be attacked collaterally, as is attempted in this case." *Amrine v. Hamer* was also a collateral attack.

It is a general principle of law that a collateral attack is not permitted to be made upon a judgment or order of court by any one bound thereby, and this general rule applies to the probate of wills. Page on Wills, § 440. Modern statutes generally provide for attack upon probate by means of a bill or by an action to contest the will. Page on Wills, § 337. Under our statutes, as constru-

ed by this court, a contest of a will must be held to be a direct attack, and not collateral. *Purdy v. Hall*, 184 Ill. 298, 25 N. E. 645; *Bowen v. Allen*, 118 Ill. 53, 55 Am. Rep. 398; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740. See, also, *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492, and *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772. In a contest as to the validity of a will under said section the issue to be submitted to the jury is a new and original question, to be determined exclusively from the evidence before them. The trial is de novo, without regard to the fact that the instrument has been admitted to probate. *Rigg v. Wilton*, supra; *Craig v. Southard*, 148 Ill. 87, 35 N. E. 361. A bill to remove a cloud on title or to partition land would be a collateral attack upon the foreign probate, whereas a bill to contest the will would be a direct attack. If this contest should be successful, it will have no effect on said will or the probate thereof in the state of Michigan, where it was formerly probated. It will only prevent the will operating on the real estate in this state, and will leave that to be governed by our statute regulating the descent of real property. *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592.

Our conclusion is that the provisions of said section 7 with reference to contests apply to any will, or authenticated copy thereof, filed with the clerk, as provided for in said section 2, and upon which letters of administration are authorized to be issued under the provisions of said section 2.

This bill was filed within one year after the time the authenticated copy of the instrument in question was filed for record with the probate clerk of Cook county. The bill being one to contest a will, under the construction we have placed upon the statute, the superior court should have overruled the demurrer.

The decree of the superior court must be reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

Reversed and remanded.

VICKERS, C. J., and DUNN and COOKE, JJ., dissent.

(247 Ill. 192.)

TACOMA SAFETY DEPOSIT CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 23, 1910.
Rehearing Denied Dec. 9, 1910.)

1. MUNICIPAL CORPORATIONS (§ 668*)—USE OF STREETS BY ABUTTING OWNERS—STREETS OWNED BY CITY IN FEE—SUBWAY UNDER SIDEWALK.

Where the fee in a street belongs to the city, an abutting owner has no right to excavate and use a subway under the sidewalk in the street, and the city may by ordinance exact compensation for such use and a bond holding

the city harmless from claim of damage arising from the use of such subway and for maintenance of the street or sidewalk over such space.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1444; Dec. Dig. § 668.*]

2. EASEMENTS (§ 38*)—MUNICIPAL CORPORATIONS (§ 668*)—HIGHWAYS (§ 80*)—RIGHT OF OWNER OF PROPERTY SUBJECT TO EASEMENT.

The owner of land subject only to an easement may use his property for any purpose he may deem proper, so long as the use does not interfere with the proper enjoyment of the easement; and the rule applies to land devoted to use as a public road or street, as well as to land subject to a private use only.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 38;* *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663;* *Highways*, Dec. Dig. § 80.*]

3. EMINENT DOMAIN (§ 317*)—ACQUISITION OF LAND FOR STREETS—EXTENT OF RIGHT ACQUIRED.

Before a city can acquire the fee to land for street purposes, it must appear that there is a statute in force which by its terms or by necessary implication authorizes the city to take the property in fee for the purpose intended; and, there being in 1851 no such statute authorizing a city to take the fee of land for street purposes, a city condemning a strip adjacent to a street to widen the street acquired only an easement therein, the fee remaining in the abutting owner.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

4. MUNICIPAL CORPORATIONS (§ 661*)—AUTHORITY OVER STREETS.

A city may control its streets, so long as it uses them for the purpose for which they were dedicated; but it exceeds its power if it authorizes their use for other purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1432, 1434-1437; Dec. Dig. § 661.*]

5. EMINENT DOMAIN (§ 2*)—RIGHT TO CONTROL STREETS—FEE IN ABUTTING OWNER—ADDITIONAL SERVITUDE.

Where the fee in a street rests in the abutting owner, the city cannot require such owner to pay rent for use of a subway constructed under the surface of the street by such owner, since it would be the imposition of an additional servitude upon the fee, and amount to a taking of property without due process of law, or without paying the owner due compensation therefor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

6. MUNICIPAL CORPORATIONS (§ 668*)—USE OF STREETS—COMPENSATION FOR USE OF SUBWAYS.

Where the fee in streets is in the city, or in the state, and held for the use of the city, the city may by ordinance require persons who use subways beneath sidewalks adjoining their property to pay for the use of such space.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1444; Dec. Dig. § 668.*]

7. MUNICIPAL CORPORATIONS (§ 668*)—USE OF STREETS—PERMIT TO BUILD SUBWAY—EFFECT.

That a city granted a permit to erect a building adjacent to a street in which the fee was in the city, according to plans providing for subways under the street, would not estop the city from requiring the owner to pay for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

use of such subways; the permit being at most a license, revocable by the city upon refusal of the owner to comply with an ordinance requiring it to pay to the city compensation for use of the space beneath the street, especially where the owner, when it took out the permit, had full knowledge of all the facts, and obviously was not misled by the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1444; Dec. Dig. § 668.*]

8. MUNICIPAL CORPORATIONS (§ 668*)—ORDINANCES—VALIDITY—REASONABLENESS.

An ordinance providing that no person shall use space under a street nor maintain any structure thereunder without a permit from the commissioner of public works of the city, requiring a \$10,000 bond to save the city harmless from claim of damage arising from the use of such space or structure and for maintenance of the street, exacting a rental, when the space so used does not extend more than 15 feet below the surface of the street and the adjoining property is subject to general taxation, of a sum equal to 4 per cent. of the amount determined by multiplying the number of square feet of surface over the space so used by a sum equal to one-tenth of the land value of the average square foot in the lot abutting on such space, as fixed by the last assessment thereof for general taxation, the annual compensation in no case to be less than \$10, providing that the ordinance shall not apply to one using such space at the time under any ordinance theretofore passed requiring payment of compensation for such use, if such person is making such payments, nor so long as such payments are made according to the terms of such ordinance, and providing that, if any person using space underneath a street, sidewalk, etc., shall fail to take out a permit as provided in the ordinance within 90 days after it takes effect, the commissioner of public works shall proceed to remove such structure and close the space therein, as applied to streets in which the fee is in the city, is not unreasonable nor discriminatory.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 668.*]

Dunn, J., dissenting.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by the Tacoma Safety Deposit Company against the City of Chicago. From a decree dismissing the bill in part, and granting partial relief, both parties appeal. Affirmed.

Wilson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellee.

HAND, J. This was a bill in chancery, filed by the Tacoma Safety Deposit Company, a corporation, against the city of Chicago, in the circuit court of Cook county, to enjoin the city from enforcing against the complainant the provisions of an ordinance passed by the common council of said city on February 5, 1906, which provides that no person shall use any space underneath the surface of any street or other public grounds in the city of Chicago, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of the city. An

answer and replication were filed, and the case was tried by the court. The premises of the complainant are situated at the northeast corner of La Salle and Madison streets, and have a frontage of 80 feet on La Salle street and 101 feet on Madison street. A decree was entered by the court dismissing the bill as to the La Salle street frontage, and enjoining the city from enforcing the ordinance as against the Madison street frontage, and each party has prosecuted an appeal.

The premises of complainant have located thereon a building 13 stories high, which is constructed of stone and brick, with interior steel columns and crossbeams. The ground floor of the building is used for stores, and its remaining stories are used for offices. It is heated by steam from a plant located in the basement, and in connection with the building the complainant is using the space located beneath the adjoining sidewalks upon La Salle and Madison streets. The parts of the ordinance material to this controversy read as follows:

"Section 1. No person shall use any space underneath the surface of any street or other public ground in this city, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of the city."

"Sec. 3. Every applicant for such a permit shall file with his application his bond in the penal sum of \$10,000, with surety or sureties to be approved by said commissioner of public works; and such bond shall be conditioned that the person to whom such bond shall be issued, his heirs, successors or assigns, will save and keep the city free and harmless from any and all loss or damage, or claim of damage, arising from or out of the use of the space or structure therein mentioned, and for the maintenance of the street, alley or other public way, or the sidewalk over such space, as the case may be, * * * and for the prompt and full payment of the compensation hereunder required during his ownership of said property so long as said permit shall be outstanding.

"Sec. 4. When the space so used does not extend more than fifteen feet below the surface of the street, alley, way or ground over the same, the person, firm or corporation making, using or maintaining any such structure, or using space underneath the surface of any street, alley, public way or public ground, shall render to the city, as the annual compensation for such use, whenever the adjoining property is subject to general taxation, a sum equal to four per cent. of the amount determined by multiplying the number of square feet of surface over the space so used by a sum equal to one-tenth of the land value of the average square foot in the lot abutting on such space, as fixed by the last assessment thereof for general taxation by the state or county authorities: * * *

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Provided, however, that in every case the annual compensation shall be at least \$10."

"Sec. 6. If any person now using any space underneath any street, public alley, sidewalk or public way shall fail to take out a permit for such use, as herein provided, within ninety days after this ordinance is in effect, then the commissioner of public works shall proceed to remove every such structure and close the space therein."

"Sec. 11. Nothing in this ordinance contained shall be held or construed to apply to any person now using any such space underneath the surface of any street or other public ground according to the terms of any ordinance heretofore passed which requires the payment of compensation for such use if such person is making such payments, nor so long as such payments are made according to the terms of such ordinance."

La Salle street was one of the streets in the original plat of the original town of Chicago. Madison street, as the lots were originally platted, lay wholly within School Section addition to Chicago, but was afterwards widened by condemning 25 feet from the lots now owned by complainant, and the subsidewalk area occupied by the complainant upon Madison street, adjacent to its building, all falls within the 25 feet condemned. The complainant claims to be the owner of the fee in La Salle street to the center of the street, and to be the owner of the fee in the north 25 feet of Madison street adjoining its premises. The trial court overruled complainant's contention as to La Salle street, and sustained its contention as to Madison street.

We think the controlling question in this case is: Where rests the fee to the portion of the streets adjoining complainant's property which it is now occupying as subways, and which lies beneath the sidewalks upon the west and south of its premises? As different principles, in part, control the decision of where rests the title to the subway beneath the sidewalk on La Salle street from what govern the decision of the question where rests the title to the subway beneath the sidewalk on Madison street, we will consider those questions separately.

La Salle street, at the point where appellant's property is situated, is located in the original town of Chicago, and in the case of City of Chicago v. Rumsey, 87 Ill. 348 (which holding was approved in Davenport Bridge Railway Co. v. Johnson, 188 Ill. 472, 59 N. E. 497, and in People v. Chicago & Northwestern Railway Co., 239 Ill. 42, 87 N. E. 946), it was held that the fee to the streets in the original town of Chicago rested in the city of Chicago. The doctrine of the Rumsey Case has been fully considered in an opinion filed at this term in the case of Ryerson v. City of Chicago, 93 N. E. 162, and the doctrine announced in the Rumsey Case limited to plats made by the canal commissioners. It is not, therefore, necessary to discuss the Rum-

sey Case here. Suffice it to say that the fee to La Salle street, upon which appellant's property abuts, is in the city of Chicago, and not in the appellant. The fee to La Salle street adjoining appellant's property being in the city of Chicago, the bill of appellant was properly dismissed.

We think that the law is well settled that the owner of real estate, subject only to a public or private easement, has the right to use his property for any purpose which he may deem proper, so long as the use to which it is put does not interfere with the proper enjoyment of the easement which is held by the public or by a private person therein. Mr. Kent, in his Commentaries (volume 3, 12th Ed. p. 433), says: "The freehold and all profits belong to the owners of the adjoining lands. They may * * * have every use and remedy that is consistent with the servitude or easement of a way over it, and with police regulations." In Perley v. Chandler, 6 Mass. 454, 4 Am. Dec. 159, in passing upon the rights of the owner of the fee of a highway, it was said: "The soil and freehold remain in the owner although incumbered with a way, and every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim." In Tucker v. Tower, 9 Pick. (Mass.) 109, 19 Am. Dec. 350, it was said: "It is too clear to require any discussion that the proprietor of land, over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the Legislature." And in Colgrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 Pac. 1053, 18 L. R. A. (N. S.) 904, the Supreme Court of California said: "One who grants to the public the right to use a strip of land as a highway, retaining in himself the ownership of the soil, parts with an easement, merely. The owner of property subject to an easement may use his property in any manner and for any purpose not inconsistent with the full and free enjoyment of the easement. Hoyt v. Hart [149 Cal. 722] 87 Pac. 569. This rule applies to land devoted to use as a public road or street, as well as to land subject to a private use only."

The south 25 feet of complainant's lots was condemned for the purpose of widening Madison street, and the question must now be determined whether or not the city by that proceeding acquired the fee in the north 25 feet of Madison street upon which the property of complainant abuts. This property was condemned in 1851, and at that time there was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes, and we think the law is clear that before the city could acquire the fee to said real estate for street purposes it must appear there was a stat-

ute in force which, by its terms or by necessary implication, authorized the city to take said property in fee, for the purpose of widening said street.

In *Illinois Central Railroad Co. v. City of Chicago*, 138 Ill. 453, at page 458, 28 N. E. 740, at page 741, this court said: "The taking of property under the right of eminent domain is in derogation of individual right, and therefore the grant is to be strictly construed. *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 456 [6 N. E. 49]; *Reed v. Ohio & Mississippi Railway Co.*, 126 Ill. 48 [17 N. E. 807]; *Cooley on Const. Lim.* 530, 531. It would seem, therefore, to follow that the grant of power must be express, or arise by necessary implication from the language of the grant." This statement of the law is in harmony with all the text-writers and adjudicated cases, so far as we have been able to discover.

In *Elliott on Roads and Streets* the doctrine is thus stated (section 225): "Unless the purpose for which the taking of the land is authorized is in itself such as requires that a fee should be seized, or the statute plainly authorizes that such an estate may be seized, then no more than an easement can be appropriated. This conclusion is founded on sound reason, and receives full support from the adjudged cases." The same author, in section 227, says: "The general rule, as we have said, is that statutes conferring authority to compel an owner to yield his property to the public demand are to be strictly construed, and this rule governs as to the extent of the estate which may be seized. Thus a statute conferring authority to lay out a road imports that an easement only can be appropriated. So a statute providing that the corporation shall be seised and possessed does not authorize the seizure of the fee. Authority to take for an avenue does not confer a right to take a fee, but it does confer a right to acquire a perpetual easement. The principle to be deduced from all the decisions may be thus stated: Where the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred, rather than one which will wrest the fee from him."

Judge Cooley, in his work on *Constitutional Limitations* (7th Ed., p. 808), said: "As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. In the common highways the public have a perpetual easement, but the soil is the property of the adjacent owner, and he may make any use of it which does not interfere with the public right of passage, and the public can use it only for the purposes usual with such ways." And on page 810: "In any case, however, an easement only would be taken, unless the statute

plainly contemplated and provided for the appropriation of a larger interest."

Mr. Lewis, in his work on *Eminent Domain* (section 449), says: "Upon the principle that statutes conferring compulsory powers are to be strictly construed, it follows that, where the estate taken is not defined, only such an estate or interest will vest as is necessary to accomplish the purpose in view, and where an easement is sufficient no greater estate can be taken. Thus, under authority to take land for a highway, railroad, or other like use, only an easement can be acquired, for no greater estate is necessary."

In *Illinois State Trust Co. v. St. Louis, Iron Mountain & Southern Railway Co.*, 208 Ill. 419, on page 422, 70 N. E. 357, on page 358, this court said: "The power of eminent domain is an incident to sovereignty and inherent in the state, and can be exercised only on the occasion, in the mode, and by the agency prescribed by the Legislature. * * * The power to take the property of the individual without his consent is against common right, and all acts authorizing such a taking are to be strictly construed. * * * Unless both the letter and the spirit of the statute relied upon clearly confer the power, it cannot be exercised."

We are of the opinion, in view of what has been said by the text-writers and held by the adjudicated cases, it must be held that the city of Chicago, by the condemnation proceeding whereby it sought to take property for the purpose of widening Madison street, did not acquire a fee, but that the fee in the north 25 feet of Madison street adjoining the property of the complainant is in the complainant.

It is contended by the defendant that the city, regardless of where the fee in the streets adjoining complainant's property is held to rest, under the power of the city to control its streets, had the right to pass the ordinance hereinbefore referred to, and to enforce the same as against the complainant. The right of the city to control its streets cannot be doubted, so long as it uses its streets for the purpose for which they have been dedicated. If, however, the city authorizes the use of its streets for a purpose other than that for which they have been dedicated, it exceeds its power; and the decisions of this court clearly establish that there is a distinction between the interests of the abutter on a street in which the fee rests in the city and on a street in which the fee rests in the adjoining owner. To illustrate: An abutter under a statutory dedication cannot enjoin a steam railroad company from using the street, while an abutter under a common-law dedication and in whom rests the fee of the street may enjoin such use, even though a franchise has been granted by the public authorities to the railroad company. In a case where the fee is in the city, it

would not be an unlawful diversion of the use of a street to permit a vault or other similar underground structure to be erected beneath the street, which structure did not interfere with the purposes for which the street was dedicated, and the city would not be estopped from requiring the space occupied by such structure to be surrendered to the city whenever it became necessary to remove the structure for the uses of the public. *Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496; *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043. To permit, however, such a structure to be erected in a street where the fee of the street rests in the abutting owner, and to require the abutting owner to pay rent for the use of such space, would be to impose an additional burden or servitude upon the fee, and would be unlawful. It is clear, therefore, to provide for the erection of a subway beneath the sidewalk and in a street adjoining the property of the abutter, where the fee in the street is in the abutter, and to require the owner of the fee to pay rent to the city for the use of his own property would be, in effect, to take from the owner his property without due process of law, or without paying him due compensation therefor, under the claim of regulating the use of the streets of the city, which would amount to an unlawful deprivation of the abutter's property, which the law would not permit.

The contention is made by the complainant that the city is without power to pass an ordinance requiring persons who use subways beneath sidewalks adjoining their property to pay compensation for the use of such space. The position of the complainant, we think, is well founded as to subways beneath sidewalks in streets of which such persons are the owners in fee; but as to subways beneath sidewalks in streets in which the fee is in the city or in the state, and which are held for the use of the city, we do not think this is true. In the *Gregsten Case* and in the *Norton Milling Co. Case* the right of the city of Chicago to confer, by contract, upon a private individual or corporation the right to use space beneath the public streets of the city was recognized. If the city has the power to contract for the use of space beneath the public streets of the city, we see no reason why it cannot provide for such use, and regulate the manner of such use, and the compensation that shall be paid for such use, by ordinance, in those streets in which it holds the fee, subject at all times to the right to reclaim the portion of the street then in use when the necessities of the public may require. In the *Gregsten Case* it was held a city, under special legislative authority, as well as its general powers, may grant permits for and regulate the building of vaults under the streets, alleys, and sidewalks, and require such compensation for the privilege

as it may deem reasonable and just, when such permits relate solely to such use of the alleys, etc., as is in no wise inconsistent with their use by the public. And in the *Norton Milling Co. Case* it was held a city has power, in connection with the widening of a river and the building of a new bridge, to acquire an easement consisting of the right to swing the bridge over ground owned by the milling company, and may agree, in consideration of such easement, which will necessitate the removal of the milling company's boiler rooms, to excavate a vault under a street for its use as a boiler room, rent free, and to rebuild the milling company's dock upon the new line of the river bank, and indemnify the company against damages from the city's tortious acts. We think, as applied to a case where the fee of the street is in the city, these cases are controlling.

It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through its building department, have approved certain building plans which were submitted to it by the complainant, and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property, which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its building, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city. We do not think the cases of *Gridley v. City of Bloomington*, 68 Ill. 47, *Gregsten v. City of Chicago*, supra, and *City of Chicago v. Norton Milling Co.*, supra, are in conflict with this view. In each of those cases contractual relations were held to exist between the parties which were binding upon them, while in this case the most that can be claimed by the complainant is that it was granted a permit by the city to erect its building. At the time it took out this permit, it had full knowledge of all the facts, and obviously was not misled by the city. The doctrine of estoppel, we think, has no application to the case at bar.

It is finally urged the ordinance is unreasonable and discriminatory. We are unable to see that the ordinance is subject to attack for those reasons, but are of the opinion the criticisms made upon the ordinance in those particulars are hypercritical.

From a careful consideration of this record, we have reached the conclusion that the trial court did not err in dismissing the bill as to the La Salle street frontage, and in enjoining the city from enforcing the ordinance as against the Madison street frontage, upon which the complainant's property abuts.

The decree of the circuit court will be affirmed.

Decree affirmed.

DUNN, J., dissenting.

(247 Ill. 304.)

SEARS v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 28, 1910.

Rehearing Denied Dec. 9, 1910.)

1. MUNICIPAL CORPORATIONS (§§ 680, 681*)—STREETS—SCOPE OF CITY'S RIGHTS.

A city holds its streets and other public grounds in trust for the public, whether it owns the fee or only an easement; and the city cannot grant away the public rights, nor can they be encroached upon by private individuals, with or without the city's consent, to the detriment of the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1459-1466; Dec. Dig. §§ 680, 681.*]

2. DEDICATION (§ 54*)—STREETS—STATUTORY DEDICATION—INTEREST CONVEYED.

Where title to its streets is acquired by a city by dedication under the statute relating to plats, the acknowledgment and recording of such plat has the effect of conveying a fee to the city of such portions of the premises platted as are noted on the plat as donated to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 96, 97; Dec. Dig. § 54.*]

3. MUNICIPAL CORPORATIONS (§ 665*)—STREETS—FEE IN CITY—RIGHTS OF ABUTTING OWNER.

Where a city owns the fee in a street, the abutting lot owner has the right of ingress and egress and an easement for light and air, in addition to the right to use the street in common with all other persons; but he has neither the possibility of reverter nor any right or interest in law or equity under which he can justify an exclusive appropriation of any portion of the street, either on the surface, or above or below it, without consent of the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1441; Dec. Dig. § 665.*]

4. MUNICIPAL CORPORATIONS (§ 661*)—CONTROL OVER STREETS.

A city may, under the power of exclusive control of its streets, allow any use of them not inconsistent with the public objects for which they are held, and may regulate such use and fix a reasonable compensation to be paid for it; and such power is subject to no limitation, except that its exercise shall be reasonable, and so as to safeguard the paramount right of the public to the free and unobstructed use of the

street for the purpose for which it was dedicated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432-1437; Dec. Dig. § 661.*]

5. EMINENT DOMAIN (§ 817*)—CONDEMNATION—INTEREST ACQUIRED.

Where private property is taken for a public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires; and, where a street is acquired by a city by condemnation, the fee to the center of the street remains in the abutting owners.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

6. DEDICATION (§ 48*)—TITLE ACQUIRED—NOTICE TO LOT PURCHASERS OF CITY'S TITLE.

A landowner, dedicating streets to a city by an acknowledged and recorded plat as provided by statute, may invest the city with a determinable fee; and if such statutory plat is made and recorded, the purchasers of lots according to such plat will be presumed to have notice that they acquire no rights in the streets, except those consistent with the city's fee ownership, while one buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge that a conveyance of the abutting lot carries title to the center of the street, subject only to the public easement therein.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 114; Dec. Dig. § 48.*]

7. MUNICIPAL CORPORATIONS (§ 669*)—USE OF STREETS—ABUTTING OWNER OF FEE IN STREET.

An abutting owner of the fee to the center of a street may make any reasonable use of the street which does not interfere with the full enjoyment of the easement held for use of the public, and he cannot be compelled to pay the city for the privilege of using the street in such a manner.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1445; Dec. Dig. § 669.*]

8. MUNICIPAL CORPORATIONS (§ 668*)—USE OF STREETS BY ABUTTING OWNERS—SUBWAYS—RIGHT OF CITY TO COMPENSATION.

An ordinance provided that no person should use space underneath the surface of a street, or construct or maintain any structure thereunder, without a permit from the city, and that every applicant for such a permit should file a \$10,000 bond to keep the city harmless from any claim of damage arising out of the use of such space or structure, and that a certain compensation should be paid for such use. Held, that the ordinance was valid as to owners of lots located upon streets in which the city owned the fee, but could not be enforced against owners of lots abutting upon streets wherein the city had only an easement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1444; Dec. Dig. § 668.*]

9. CONSTITUTIONAL LAW (§ 278*)—EMINENT DOMAIN (§ 2*)—DEDICATION OF STREET—EFFECT OF CURATIVE ACT.

The plat of School Section addition to the town of Chicago, recorded between 1833 and 1836, did not comply with the law of 1833 (Rev. Laws 1833, p. 699), providing for the recording of plats in force at the time, so that it amounted merely to a common-law dedication; the abutting lot owners taking the fee to the center of the streets marked thereon. The curative act of 1843 (Laws 1842-43, p. 65) directed the recorder to certify upon the maps or plat of such school

district recorded in his office that the same was the plat of such addition, and to make such other certificates thereon as the common council might direct to remedy any omission in the plat or map, and that, when so certified, the plat or map should be valid for all purposes, any omission or defect to the contrary notwithstanding. *Held*, that in view of the fact that the title of the abutting owners to the center of the street, where the city does not own the fee, is not a contingent interest or a mere expectancy, but a present subsisting ownership of the fee, subject to the public easement, which the owners may subject to any private use in connection with their premises consistent with the dominant rights of the public in the easement, so that the rights of the abutting owners became vested, the curative act could not divest them of such rights, since it would be a deprivation of property without due process of law and a taking of private property for public use without compensation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278;* Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by Herbert M. Sears, trustee under the will of Caroline B. Sears, against the City of Chicago. There was a decree dismissing the bill in part, and in part for complainant, and complainant appeals; the city assigning cross-errors. Reversed and remanded, with directions.

Wilson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellee.

VICKERS, C. J. Herbert M. Sears, as trustee under the will of Caroline B. Sears, claiming to be the owner of lots 1, 6, and 7, in block 138, of School Section addition to the city of Chicago, filed a bill in equity in the circuit court of Cook county against the city of Chicago to enjoin said city from enforcing an ordinance, passed February 5, 1906, prescribing the terms and conditions under which abutting property owners might use the subsidewalk space adjacent to their lots for private purposes in connection with the building located on such lots. This case is one of a number brought by different property owners in order to test the validity of the ordinance under the varying facts connected with the different pieces of property involved. So far as the same is necessary to a proper understanding of the questions involved in the present case, the ordinance challenged by the bill is as follows:

"Section 1. No person shall use any space underneath the surface of any street or other public ground in this city, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of the city."

"Sec. 3. Every applicant for such a permit shall file with his application his bond in the penal sum of \$10,000, with surety or sureties to be approved by said commissioner of public works; and such bond shall be con-

ditioned that the person to whom such bond shall be issued, his heirs, successors or assigns, will save and keep the city free and harmless from any and all loss or damage, or claim of damage, arising from or out of the use of the space or structure therein mentioned, and for the maintenance of the street, alley or other public way, or the sidewalk over such space, as the case may be, * * * and for the prompt and full payment of the compensation hereunder required during his ownership of said property, so long as said permit shall be outstanding.

"Sec. 4. When the space so used does not extend more than fifteen feet below the surface of the street, alley, way or ground over the same, the person, firm or corporation making, using or maintaining any such structure or using space underneath the surface of any street, alley, public way or public ground, shall render to the city as the annual compensation for such use, whenever the adjoining property is subject to general taxation, a sum equal to four per cent. of the amount determined by multiplying the number of square feet of surface over the space so used by a sum equal to one-tenth of the land value of the average square foot in the lot abutting on such space, as fixed by the last assessment thereof for general taxation by the state or county authorities: * * * Provided, however, that in every case the annual compensation shall be at least \$10."

"Sec. 6. If any person now using any space underneath any street, public alley, sidewalk or public way shall fail to take out a permit for such use, as herein provided, within ninety days after this ordinance is in effect, then the commissioner of public works shall proceed to remove every such structure and close the space therein."

"Sec. 11. Nothing in this ordinance contained shall be held or construed to apply to any person now using any such space underneath the surface of any street or other public ground according to the terms of any ordinance heretofore passed which requires the payment of compensation for such use if such person is making such payments, nor so long as such payments are made according to the terms of such ordinance."

The property involved in this case is located on the southeast corner of Dearborn and Van Buren streets and is bounded on the east by Plymouth Court. Van Buren street runs east and west. Dearborn street runs north and south, and intersects Van Buren at the northwest corner of lot 1 involved in this case. Upon these lots is located an office building known as the "Old Colony Building," which is 17 stories high, and is 148½ feet on Dearborn street and 68 feet on Van Buren. The building has six elevators and is occupied by about 150 tenants. The space

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under the sidewalk on Van Buren street is used for the elevator machinery, while that under Dearborn street and Plymouth Court is used for fuel and ashes, and as a means of bringing fuel into the building and conveying ashes and other refuse out of the same.

The contentions of the parties may be briefly stated, as follows: The complainant below contends that he is the owner of the fee to the center of the streets and to the center of Plymouth Court, subject to the easement in the public, and that as such owner he has the right to use the subsidewalk space for private purposes in connection with his building, and that the ordinance imposing upon him a tax for the use of such space is illegal and void. On behalf of the city it is contended that it owns the fee in the streets adjacent to complainant's property and in Plymouth Court; and in the second place, it is contended by the city that, whether it has a fee or only an easement in the said streets, it has the power, under the statute, to pass the ordinance in question.

The circuit court sustained the bill, and granted an injunction against the enforcement of the ordinance in so far as it affected the Dearborn street side of the complainant's property, but held, as to Van Buren street and Plymouth Court, the city owned the fee, and that the ordinance was a valid exercise of its power of control over highways. The complainant below has appealed from the decree dismissing his bill as to Van Buren street and Plymouth Court, and the city has assigned cross-errors, calling in question that portion of the decree below which granted the relief prayed for as to Dearborn street. Since the rights of the city in each of these streets and in Plymouth Court were acquired at different times and in different ways, it will be necessary to briefly state the manner in which the city's rights were acquired in each place.

Appellant's premises were originally a part of section 16, township 39 N., range 14 E. of the third principal meridian, and were granted by the United States to the state of Illinois, for the use of the inhabitants of the township in which the same were situated, for the use of schools. The proposed grant was accepted by the state of Illinois by ordinance duly passed August 23, 1818. Said section 16 was platted by a school commissioner appointed pursuant to an act of the Legislature of Illinois adopted January 22, 1829 (Rev. Code Laws 1829, p. 150), which plat was recorded in the recorder's office of Cook county some time between 1833 and 1836. That portion of the city of Chicago which was originally section 16 is known as School Section addition to Chicago. The school commissioner's plat of section 16 divided said section into 142 blocks, leaving open spaces, presumably for streets; but there is nothing on the plat to

indicate what the spaces are intended for, except figures indicating the width, which in some instances is 40 feet, and in others 66 feet. Block 138 in the School Section addition is 396 feet north and south by 387 feet and 9 inches east and west. North of block 138 is an open space 66 feet wide, running east and west the entire length of said addition. East of said block there is also an open space indicated by the plat; but there is nothing to show its width, or the purpose for which it was left. Truman G. Wright, having acquired title to block 138, made a subdivision thereof, dividing the same into 24 lots, in 1836, a plat of which was filed for record in Cook county February 16, 1836. Lots 1, 6, and 7 in block 138, as shown by Wright's subdivision, are the premises belonging to the appellant. By Wright's subdivision of block 138 a street 70 feet wide is designated on the plat east of the property in question, and one 66 feet wide north of said premises. The 70-foot space on the east is referred to in this record as Plymouth Court, and the 66-foot street on the north is known as Van Buren street, and occupies the same place that was left open north of block 138 by the school commissioner's plat. Dearborn street, opposite the premises of appellant on the west, was opened by the city by condemnation proceedings in July, 1837, the eastern half of which was so located on appellant's lots.

So far as the right of the city in Plymouth Court is concerned, it rests entirely upon the plat made by Truman G. Wright; but as to Van Buren street the city's right may rest upon either the plat made by the school commissioner or that made subsequently by Wright. If the plat of the school commissioner for any reason failed to vest the fee in Van Buren street in the city, the fee passed by the conveyance of block 138 to Wright to the center of the street; and he, having such fee, had the power to dedicate it, so far as his title extended, to the public by a properly executed plat when he subdivided block 138.

Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true, whether it owns the fee or only an easement. The interest of the public, which is the primary object of the trust, must always be paramount to all other interests. The city cannot grant away the rights of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public. *Elliott on Roads and Streets*, § 17; *State v. Murphy*, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515; *Matthiessen & Hegeler Zinc Co. v. City of La Salle*, 117 Ill. 411, 2 N. E. 406, 8 N. E. 81. Where the title to its streets is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and recording

of such plat have the effect, both in law and in equity, of conveying a fee-simple title to the city of such portions of the premises platted as are noted on the plat as donated to the public. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25. Where the city owns the fee in a street, the abutting lot owner has the right of ingress and egress and an easement for light and air, in addition to the right to use the street in common with all other persons. *Jones on Easements*, § 489. The owner of an abutting lot upon a street which has been dedicated to the public in accordance with the statute has neither the possibility of reverter, nor any title, right, or interest, in law or equity, under which he can justify an exclusive appropriation of any portion of the said street, either on the surface, or above or below it, without the consent of the municipality. *Union Coal Co. v. City of La Salle*, 136 Ill. 119, 28 N. E. 506, 12 L. R. A. 326.

Whatever may be the rule in other jurisdictions, the law is settled in this state that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held. *Nelson v. Godfrey*, 12 Ill. 20; *Gridley v. City of Bloomington*, 68 Ill. 47; *Chicago & Northwestern Railway Co. v. People*, 91 Ill. 251; *City of Quincy v. Bull*, 106 Ill. 337; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426, 36 Am. St. Rep. 496; *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327; *Dillon on Mun. Corp.* 541-551. And it is equally well settled that the city may regulate such use and fix a reasonable compensation to be paid for the same. *McCarthy v. City of Chicago*, 53 Ill. 38; *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1043; *Lobdell v. City of Chicago*, 227 Ill. 218, 81 N. E. 354. The power of the municipality in this regard in cases where it owns the fee in its streets is subject to no limitation, except that its exercise shall be reasonable and in a manner to safeguard the paramount right of the public to the free and unobstructed use of the street for the purpose for which it was dedicated. In cases, however, where the municipality only has an easement in its streets and the fee remains in the abutting lot owners, the relative rights of the municipality and the abutting lot owners are to be determined under entirely different rules of law. When private property is taken for public use, the general rule is that it can only be taken to the extent that the public use to which it is to be applied requires. A law could not be sanctioned which would permit a corporation to condemn private property for the sole purpose of applying such property to a purely private use. The law provides a method by which the owner of real estate which is platted into town lots

may, if he so desires, convey a determinable fee to the municipality by the execution of a properly acknowledged and recorded plat. When this course is adopted, the owner, having the power to make any disposition of his property he sees fit, can invest the municipality with the fee. If such statutory plat is made and recorded, all persons who subsequently purchase lots according to such plat will be presumed to have notice that they acquire no rights in the public streets except those already referred to. On the other hand, one buying a lot abutting upon a street in which the city has only an easement must be presumed to purchase with knowledge of the fact that a conveyance of the abutting lot carries the title to the center of the street, subject only to the easement of the public therein. The abutting lot owner, thus being the owner of the fee to the center of the street upon which his lot is located, has the right to make any reasonable use of the same which does not interfere with the full enjoyment of the easement which is held for the use of the public. 3 Kent's Com. (12th Ed.) 433; *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Tucker v. Tower*, 9 Pick. (Mass.) 109, 19 Am. Dec. 350. It is as unreasonable as it is illogical to say that the abutting lot owner, who owns the fee in a street, subject only to the easement of the public, must pay the city for the privilege of using his own property in a manner that in no way interferes with or disturbs the full enjoyment of the easement.

It follows, we think, from the foregoing principles of law, that the validity of the ordinance involved cannot be questioned when applied to the owners of lots located upon streets in which the city owns the fee, and it is equally clear that the ordinance cannot be enforced against the owners of lots abutting upon streets wherein the city has only an easement. In accordance with these views, the holding of the court below in regard to Dearborn street was correct. As we have already seen, that street was acquired by condemnation, which, under the law, left the fee to the center of the street in the abutting owners. *Illinois Central Railroad Co. v. City of Chicago*, 138 Ill. 453, 28 N. E. 740; *Reed v. Ohio & Mississippi Railway Co.*, 126 Ill. 48, 17 N. E. 807; *Cooley's Const. Llm.* 550.

The rights of the city in Van Buren street and Plymouth Court were acquired under plats, neither of which was executed in accordance with the statute. So far as the plat made by the school commissioner is concerned, counsel for the city admit that it does not comply with the law of 1833 providing for the recording of plats, which was in force at the time the plat was recorded. This plat was before this court in the case of *Sanitary District v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 216 Ill. 375, 75 N. E. 248, and it was there held that the plat of School Section addition, not having been executed according to the statute then in force,

amounted merely to a common-law dedication, and that the abutting lot owners took the fee to the center of the streets marked thereon. The city contends that the curative act of 1843 (Laws 1842-43, p. 65) removes all legal objections to this plat, and gives it the same effect it would have had if the law of 1833 (Rev. Laws 1833, p. 599) had been complied with in the first instance.

The curative act relied on, so far as it concerns this plat, is as follows: "That the recorder of the county of Cook is hereby directed to certify upon the maps or plat of the school section recorded in his office in Book A, page 315, that the same is the plat of the School Section addition, an addition to the town of Chicago, and to make such other certificates upon said maps as the common council of Chicago shall direct to remedy any omission or defect in the same, and the said plat or map, when so certified, is hereby declared and made good, valid and legal for all purposes whatever, any omission or defect in the same to the contrary notwithstanding, and the same shall hereafter be deemed good, valid and legal and all omissions and defects in the same cured by this law, and the common council of such city are hereby authorized to cause said school section to be re-surveyed and the same run out so as to correspond with said plat."

This act is relied on by the city, and it is strenuously contended that it had the effect of vesting the fee in the streets in the city. To this we cannot assent. The title of the abutting lot owners who purchased lots in the School Section addition prior to the passage of the act of 1843 had become vested to the center of the streets, and to give the act of 1843 the effect contended for would be to deprive such abutting owners of their property without due process of law, and would be a taking of private property for public use without compensation. The title of the abutting owner to the center of the street, where the city does not own the fee, is not a contingent interest or a mere expectancy, but is a present subsisting ownership of the fee, subject to the easement of the public, which he may subject to any private use he sees fit, in connection with his premises, which is consistent with the dominant rights of the public in the easement. Any statute which, acting retroactively, would deprive one of property rights thus vested would be unconstitutional and void. *McGhee on Due Process of Law*, p. 153 et seq., and cases cited in notes. Appellant's lots had been sold and patents issued thereto fully five years before the act of 1843 was passed; hence that act could not disturb the vested rights acquired to the center of the streets by deed from the owner.

What has already been said disposes of all legal questions arising on this record.

The plat made by Truman G. Wright in 1836, on which Plymouth Court and Van Buren street appear as public grounds, was not executed in conformity to the statute of 1833. This is admitted by counsel for the city. Appellant being the owner in fee of all of the sidewalk space which he is using in connection with his building, and there being no pretense that he is in any way interfering with the rights of the public, his bill for an injunction against the enforcement of said ordinance against him should have been sustained. The court below therefore erred in dismissing the appellant's bill as to Van Buren street and Plymouth Court. The decree in this regard is reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded, with directions.

(247 Ill. 185)

RYERSON v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 13, 1910.)

1. DEDICATION (§ 23*)—PLATS.

A plat as a mode of conveyance was unknown to the common law, and can have such effect only by virtue of statute.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

2. DEDICATION (§§ 23, 28*)—PLATS.

A plat will not convey the fee of the streets therein, unless made out, certified, acknowledged, and recorded in strict conformity with the statute, but will operate as a common-law dedication, creating an easement only in the streets.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 55, 56, 60, 61; Dec. Dig. §§ 23, 28.*]

3. DEDICATION (§ 53*)—STATUTORY AND COMMON-LAW DEDICATIONS.

The difference between a statutory dedication and a common-law dedication is that the former vests legal title to the grounds set apart for public purposes in the municipal corporation, while the latter leaves the legal title in the original owner.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.*]

4. BOUNDARIES (§ 20*)—STREETS.

Rev. Laws 1833, p. 599, giving a plat, which before had no such effect, the effect of a conveyance, and providing that a plat made out, certified, acknowledged, and recorded as required by the act should be deemed in law and in equity a sufficient conveyance to vest the fee simple of all lands marked on such plat as donated or granted to the public for the uses and purposes intended, embracing almost every conceivable authority, other than the state, by which a town or addition thereto could be laid out, did not change the rule of construction as to conveyances made by the state, so that the conveyance by the state of a lot bounded by a street would carry title to the lot line only, and not to the center of the street, as had been the case before the act, and is still the case in conveyances made by individuals.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. § 20.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. DEDICATION (§ 23*)—PLATS BY CANAL COMMISSIONERS.

Rev. Laws 1833, p. 599, provided that a plat made out, certified, acknowledged, and recorded as required by the act shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all lands marked on such plat as donated or granted to the public for the uses and purposes intended. Laws 1836, p. 150, § 32, authorized the Illinois and Michigan canal commissioners to examine the whole canal route, and select such places thereon as might be eligible for town sites, and cause them to be laid off into town lots. Section 33 directed them to lay off and subdivide Fractional Section 15 addition to Chicago into town lots, streets, and alleys as in their best judgment would best promote the interest of the canal fund. *Held*, that a plat made by the canal commissioners under the act of 1836 had the same effect as statutory plats under the statute of 1833, though not made or certified by the county surveyor, as required by section 4 of the act of 1833, but certified only by the assistant engineer of the commissioners, and conveyed the fee in the streets to Chicago.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 23.*]

Dunn, J., dissenting.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by Martin A. Ryerson against the City of Chicago and others. Decree of dismissal, and complainant appeals. Affirmed.

Willson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellees.

PER CURIAM. The council of the city of Chicago passed an ordinance prohibiting the use of any space or the construction or maintenance of any structure under any street or other public ground in the city without a permit from the commissioner of public works, and requiring compensation for the use of any such space. The appellant, being the owner of a building at the corner of Adams street and Wabash avenue, and having occupied the space under the sidewalk adjoining his premises, filed his bill for an injunction restraining the city and its officers from forcibly compelling the observance of the ordinance. Upon a hearing the bill was dismissed, and the complainant appeals.

The appellant's premises are a part of Fractional Section 15 addition to Chicago, and he claims to be the owner of the fee to the center of Adams street and Wabash avenue, where they adjoin his premises. The said fractional section 15 was granted by the United States to the state of Illinois to aid in the construction of the Illinois and Michigan Canal. A subdivision thereof was made by the canal commissioners on June 13, 1836, pursuant to the authority of an act of the General Assembly approved January 9, 1836. Laws 1836, p. 145. A plat showing Adams street and Wabash avenue was filed and recorded, and appellant's premises were, under the same authority, afterwards sold and patented to the purchaser, through whom, by

mesne conveyances, the appellant derives title. Section 32 of the act in question authorized the commissioners to "examine the whole canal route and select such places thereon as may be eligible for town sites and cause the same to be laid off into town lots." Section 33 directed them to lay off and subdivide fractional section 15 into town lots, streets, and alleys, as in their best judgment would best promote the interest of the canal fund; but the act contained no further provision regarding such subdivision. The effect, if any, of such subdivision upon the title, was not declared, but was left to be determined by existing rules.

The making of a plat did not, at common law, convey the fee of the streets. It could have effect as a conveyance only by virtue of a statute, and the statute under which the subdivision was made did not purport to give such effect to the subdivision, and did not, indeed, direct that any plat thereof should be made or recorded. The only statute then in force in regard to plats was that of February 27, 1833 (Rev. Laws 1833, p. 599), which provided that a plat made out, certified, acknowledged, and recorded as required by the act should be deemed, in law and in equity, a sufficient conveyance to vest the fee simple of all lands marked on such plat as donated or granted to the public for the uses and purposes intended. We have held many times that a plat will not convey the fee of the streets, unless made out, certified, acknowledged, and recorded in strict conformity with the statute, but will operate as a common-law dedication, creating an easement only in the streets. *City of Belleville v. Stookey*, 23 Ill. 441; *Gosselin v. City of Chicago*, 103 Ill. 623; *Gould v. Howe*, 131 Ill. 490, 23 N. E. 602; *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Davenport Bridge Railway Co. v. Johnson*, 188 Ill. 472, 59 N. E. 497; *Birge v. City of Centalla*, 218 Ill. 503, 75 N. E. 1035. The difference between a statutory dedication and a common-law dedication is that the former vests the legal title to the grounds set apart for public purposes in the municipal corporation, while the latter leaves the legal title in the original owner. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25; *Gosselin v. City of Chicago*, *supra*. The commissioners' plat was not made or certified by the county surveyor, as required by section 4 of the act of 1833, but was certified only by the assistant engineer of the commissioners, and, if made by private owners, would therefore have been of no effect as a conveyance of the streets. *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Wilder v. Aurora*, *De Kalb & Rockford Electric Traction Co.*, 216 Ill. 493, 75 N. E. 194. The legal title would have remained in the proprietors, unaffected by the plat, though subject to the public ease-

ment in the streets, and a conveyance of any lot included in the plat would have carried with it the fee in the soil to the center of the street on which such lot abutted. *Wildner v. Aurora, De Kalb & Rockford Electric Traction Co.*, supra; *Davenport Bridge Railway Co. v. Johnson*, supra; *Owen v. Village of Brookport*, 208 Ill. 35, 69 N. E. 952; *Brewster v. Cahill*, 199 Ill. 309, 65 N. E. 233; *Thompson v. Maloney*, 199 Ill. 278, 65 N. E. 236, 93 Am. St. Rep. 133; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373.

It is not contended by the appellees that the plat of fractional section 15 is in conformity with the act of 1833, so as to vest the fee of the streets in the city by the terms of that act. They contend that the effect of that act was to change the rule of construction as to conveyances made by the state, so that the conveyance by the state of a lot bounded by a street carries title to the lot line only, and not to the center of the street, as had been the case before that act and is still the case in conveyances made by individuals; and this contention is sustained by the case of *City of Chicago v. Rumsey*, 87 Ill. 348. In that case the plaintiff sued to recover damages to his premises abutting on La Salle street, caused by the construction of the tunnel under the Chicago river and the obstruction thereby of the street in front of the premises. The case was determined under the Constitution of 1848, and it became material to determine whether any part of the plaintiff's property was actually taken. The obstruction was entirely in the street, more than 20 feet from the lot line, and therefore, unless the plaintiff owned an interest in the street, no part of his property was taken and he had no cause of action. The deed under which he derived title described the premises as follows: "Beginning at a point on the east line of lot 1, in block 33, original town of Chicago, 140 feet from the northeast corner of said lot; running thence south along the line of said lot to the alley; thence west 72 feet; thence north 40 feet, more or less, to a point, and west of the point of beginning; thence east to the place of beginning." This description fixed by express terms the east line of the lot as the boundary of the plaintiff's premises, and the court held that it did so and conveyed no interest in the soil of the street. But the court went further. The premises were in the plat of the original town of Chicago, which was made by the commissioners, and the court entered upon a consideration of the effect of that plat, and of the various statutes in regard to the disposition of the canal lands by the commissioners, and of the acts of the commissioners under such statutes, and announced that the statute of 1833 showed that it was the policy of the state to so vest the fee of streets in cities, towns, etc., that it should be under the paramount control of the Legislature for the public use, divested of all claims of

private ownership, from which the conclusion was drawn that the conveyance by the state, after the adoption of that statute, of a lot bounded on a street, could not be presumed to, and did not, carry title in the soil to the center of the street. These statements in the opinion were not obiter dicta, but were reasons given by the court for the conclusion reached, and bore directly on that conclusion.

We do not assent to the reasoning of that opinion as to the effect of the plat or the public policy announced. The plat, as a mode of conveyance, was unknown to the common law. It was unknown to the law of Illinois prior to the statute of 1833. So far as streets or other public grounds were concerned, a plat was merely evidence of an intention to dedicate to the public. The act of January 4, 1825 (Laws 1825, p. 53), contained nothing giving a plat the effect of a conveyance. The plat was not necessary to a dedication, but was evidence of it. Dedication was the ordinary method by which the public right in streets was acquired. The act of 1833 did not restrict the power of an owner to dedicate land for a street or other public purpose, or of a municipality to receive such dedication, nor did it change the effect of such dedication. It gave the plat the effect of a conveyance when made, certified, acknowledged, and recorded according to law, but only when so made, certified, acknowledged, and recorded. It simply enabled the municipality to take a fee-simple title when the statute was complied with; but it expressed no policy applicable to other circumstances. If the Legislature had intended to adopt a general policy requiring the vesting of the fee of the streets in the various municipalities of the state, it would not have been left to vague inference; but it might very easily have been enacted that the same circumstances which would at common law constitute a dedication of land to public use should thereafter operate to transfer the fee in such land to the municipality. How can such a public policy be shown by this act as should reverse an established rule in the law of conveyancing, when the courts of the state have always held that a very slight failure to conform to the statute will prevent the fee in the streets from vesting in the municipality, as if the plat is acknowledged before an officer not named in the act, is not certified by the county surveyor, is signed by an attorney in fact, is not recorded, or if the dimensions of the streets are not shown? If such has been the fixed policy of the state since 1833, why has the Legislature, during all the years such policy has prevailed, failed to provide that in the exercise of the right of eminent domain a city may take the fee of land for its streets, instead of a mere easement? Or, if the public policy is so clearly declared as to require the abrogation of an established rule of conveyancing so far as the state is

concerned, why should we not hold, on the same ground, that a municipality does take the fee in the land condemned for a street?

The Rumsey Case has, however, been cited with approval in many subsequent decisions, and has been regarded as holding that plats made by the canal commissioners have the same effect as statutory plats under the statute of 1833. That decision has become a rule of property, which has been relied on for many years, and which we should not now disregard. In the case of Fractional Section 15 addition to Chicago the situation is precisely the same as in the original town of Chicago. This subdivision was also made by the canal commissioners, and, although we do not think the doctrine of the Rumsey Case should be extended beyond its precise facts, no distinction exists which furnishes a reason for refusing to apply it to the Fractional Section 15 addition, as well as to the original town of Chicago. We are therefore constrained to hold that the title of the appellant is limited to the lot lines, and does not extend to the center of the streets adjoining his premises.

Appellant contends that the city has no power, even though it owns the fee of the streets, to authorize the use of the space beneath the streets and charge compensation for it. This contention has received consideration at the present term, and has been decided adversely to the appellant, in the cases of Tacoma Safety Deposit Co. v. City of Chicago, 93 N. E. 153, and Sears v. City of Chicago, 93 N. E. 153.

The decree of the circuit court will be affirmed.

Decree affirmed.

DUNN, J., dissenting.

(247 Ill. 240)

WILLIAMS v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

DEDICATION (§ 54*)—MUNICIPAL CORPORATIONS (§ 668*)—PLATS.

The plat of Ft. Dearborn addition to the city of Chicago, made by the United States in substantial compliance with the statute of Illinois then in force, vested in the city of Chicago the fee to the streets, alleys, and public grounds designated on the plat as completely as if made by an unconditional conveyance in the ordinary form, so that the city could charge owners of lots abutting upon streets within the addition for the use of subsidewalk space in the streets.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 54;* Municipal Corporations, Cent. Dig. § 1444; Dec. Dig. § 668.*]

Dunn, J., dissenting.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by George J. Williams against the City of Chicago. Decree of dismissal, and complainant appeals. Affirmed.

Wilson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellee.

COOKE, J. This is one of a number of cases brought by different property owners, each raising for decision the right of the city of Chicago to adopt and enforce an ordinance requiring property owners to pay compensation for the use of the space underneath the sidewalks adjoining their premises. George J. Williams, appellant in this case, is the owner of a leasehold estate for 99 years in lot 1, block 2, Ft. Dearborn addition to Chicago, upon which there is a building with a frontage of 79 feet on River street and 106 feet on Dock street. The major part of the space under the adjacent sidewalks in Dock street and River street is used by appellant in connection with the operation of his building. Appellant filed his bill in the circuit court of Cook county, seeking to enjoin appellee from enforcing an ordinance which required him to pay compensation for the use of this subsidewalk space. Upon answer and hearing the court entered a decree dismissing the bill for want of equity.

That portion of the ordinance necessary to a proper understanding of the questions involved is found in Sears v. City of Chicago, 93 N. E. 153, and in Tacoma Safety Deposit Co. v. City of Chicago, 93 N. E. 153. In those cases the principles of law here involved were fully discussed, and we there held that the ordinance in question is valid, when applied to the owners of lots located upon streets in which the city owns the fee, but cannot be enforced against the owners of lots abutting upon streets wherein the city has an easement only. It is unnecessary to repeat in this opinion what was there said in reaching this conclusion.

It is contended on the part of appellant that the plat of Ft. Dearborn addition to the city of Chicago was not a statutory plat, and that it operated as a common-law dedication only, and that the purchasers of lots therein which abutted upon a street took title in fee to the center of the street. Ft. Dearborn addition was platted by the United States, and was composed of land which had been used by the government for military purposes. By this plat a large tract was dedicated for public grounds, concerning the title to which and the use to which the same should be put there has been considerable litigation in both the federal and state courts. The first of these cases decided by the United States Supreme Court was that of Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018. In that case the people of the state of Illinois, the Illinois Central Railroad Company, and the city of Chicago were parties, and it was there held that the fee to such public grounds was in the city of Chicago.

Appellant urges that this holding should not be considered binding, for the reason that counsel on both sides, in their arguments, conceded that the fee to these public grounds was in the city; but later, in the case of *United States v. Illinois Central Railroad Co.*, 154 U. S. 225, 14 Sup. Ct. 1015, 38 L. Ed. 971, wherein the United States sought to prevent the alleged encroachments made or threatened by the railroad company upon property in this addition claimed by the United States, the question of where lies the fee to the streets, alleys, and public grounds dedicated by the plat of Ft. Dearborn addition was before the court, and it was there held that the plat of Ft. Dearborn addition was made in substantial compliance with the statute of Illinois then in force, and that it vested in the city of Chicago the fee to the streets, alleys, and public grounds designated on the plat as completely as if made by an unconditional conveyance in the ordinary form. These decisions of the United States Supreme Court have been recognized by us as determining the question of title to the streets, alleys, and public grounds in this addition, in *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185; *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705, and *Ward v. Field Museum*, 241 Ill. 490, 89 N. E. 731, in all of which were involved questions as to what use could be made of the public grounds designated on the plat of Ft. Dearborn addition.

The question of the character of this plat having been twice passed upon by the Supreme Court of the United States, and those decisions having been recognized by us as determining the question here presented, we do not feel disposed to enter into any discussion of the merits. Recognizing those decisions as binding, we hold that the fee to the streets involved in this appeal is in the city of Chicago.

There being no error in the record, the decree of the circuit court is affirmed.

Decree affirmed.

DUNN, J., dissenting.

(247 ILL. 267.)

SHELDON v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

MUNICIPAL CORPORATIONS (§ 658*)—STREETS—TITLE.

The fee in all of the streets in the original town of Chicago rests in the city of Chicago.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1430; Dec. Dig. § 658.*]

Dunn, J., dissenting.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by Edwin B. Sheldon against the City

of Chicago and others. Decree for complainant, and defendant city appeals. Reversed and remanded.

This was one of eight bills in chancery severally filed in the circuit court of Cook county by property owners in the city of Chicago whose property abuts upon the public streets of said city against the city of Chicago to enjoin the city from enforcing as against their respective properties the provisions of an ordinance passed by the common council of the said city on February 5, 1908, which ordinance provides no person shall use any space underneath the surface of any street or other public grounds in the city of Chicago, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of said city. The complainant is the owner of the northwest corner of Lake and La Salle streets, which has a frontage of 60 feet on Lake street and a frontage of 90 feet on La Salle street, which premises are improved with a five-story and basement brick and stone building, and adjoining the said building, and beneath the sidewalks upon both frontages, are situated subways, which complainant uses in connection with his building. It also appears from the record that the premises of the complainant are situated in the original plat of the original town of Chicago. The trial court, upon a hearing, entered a decree enjoining the city from enforcing said ordinance against the complainant as to said property, and the city has prosecuted an appeal.

Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellant. Wilson, Moore & McIlvaine, for appellee.

PER CURIAM. The principles involved in this case are fully discussed in the opinions filed in the cases of *Ryerson v. City of Chicago*, 93 N. E. 162, and *Tacoma Safety Deposit Co. v. City of Chicago*, 93 N. E. 153, and according to the holdings in those cases the city is the owner of the fee in the streets adjoining the appellee's property, and the city should not have been enjoined from enforcing the ordinance against the appellee.

It is sought to distinguish this case from the *Ryerson Case* and the *Tacoma Safety Deposit Co. Case*, on the ground that the lots of appellee were conveyed to him prior to the passage of the act of 1833, concerning plats. We think there is no valid distinction as to where the fee to the streets in the original town of Chicago rests, by reason of the date when the canal commissioners conveyed the abutting lots, but that it must be held that the fee in all of the streets in the original town of Chicago rests in the city of Chicago.

The decree of the circuit court will be reversed, and the cause remanded to the circuit

court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

DUNN, J., dissenting.

(247 Ill. 264)

**ILLINOIS TRUST & SAVINGS BANK et al.
v. CITY OF CHICAGO.**

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

1. DEDICATION (§ 53*)—MUNICIPAL CORPORATIONS (§ 668*)—STREETS—USE BY ABUTTING OWNERS.

The plat of School Section addition to Chicago being a common-law plat, not having been certified, signed, or indorsed as required by the statute in force at the time, the fee to Monroe street therein is in the abutting owners, and the city cannot require them to obtain a permit to use the space underneath sidewalks adjoining their property in such street in a manner not interfering with the public easement.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53; * Municipal Corporations, Cent. Dig. § 668; Dec. Dig. § 668.*]

2. EMINENT DOMAIN (§ 317*)—MUNICIPAL CORPORATIONS (§ 668*)—STREETS—USE BY ABUTTING OWNERS.

Where a city condemns property for a street, it acquires only an easement therein, the fee remaining in the abutting owners, and they cannot be required to obtain a permit to use the space underneath the sidewalks adjoining their property on such street in a manner not interfering with the public easement.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317; * Municipal Corporations, Cent. Dig. § 1444; Dec. Dig. § 668.*]

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by the Illinois Trust & Savings Bank and others against the City of Chicago. From the decree, both parties appeal. Affirmed in part, reversed in part, and remanded.

This was one of eight bills in chancery filed in the circuit court of Cook county, by property owners in the city of Chicago whose property abuts upon the public streets of said city against the city of Chicago to enjoin the city from enforcing as against their respective properties the provisions of an ordinance passed by the common council of said city on February 5, 1906, which ordinance provides no person shall use any space underneath the surface of any street or other public grounds in the city of Chicago, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works of said city. Complainants are the owners of the southwest corner of La Salle and Monroe streets, which has a frontage of 190 feet on La Salle street and a frontage of 95 feet on Monroe street, which premises are improved by a 13-story building; and adjoining said building, and beneath the sidewalks on both frontages, are subways which complainants

are using in connection with their building. It also appears from the record that the premises of the complainants are situated in the original plat of School Section addition to Chicago; that the School Section addition to Chicago is a part of section 16, township 39 N., range 14 E. of the third principal meridian, which was granted by the United States to the state of Illinois, for the use of the inhabitants of the township in which the same is situated for the use of schools. The plat of School Section addition to Chicago contains no certificate, signature, or indorsement by the said commissioner. Monroe street was one of the original streets of said School Section addition to Chicago. La Salle street, however, in that subdivision, was not laid out by the original plat, but was laid out in the year 1858 by virtue of a condemnation proceeding. The trial court held that complainants were the owners of the fee in the La Salle street frontage, and enjoined the city from enforcing the ordinance as against that frontage, but held that the city had the right to enforce the ordinance upon the Monroe street frontage, and dismissed the bill as to that frontage. From this decree the complainants prosecuted an appeal as to the Monroe street frontage, and the city as to the La Salle street frontage.

Willson, Moore & McIlvaine, for appellants. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellee.

PER CURIAM. It was held by this court in *Sanitary District v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 216 Ill. 575, 75 N. E. 248, that the plat of School Section addition to Chicago was a common-law plat. Under the doctrine announced in the case of *Sears v. City of Chicago*, 93 N. E. 158, the fee to Monroe street is in appellant, and the court should have enjoined the city from enforcing the ordinance against that frontage.

The city, by the condemnation proceedings, only acquired an easement in the property taken for La Salle street, leaving the fee in the property taken in the grantor of the complainants. As to that frontage the court properly held complainants to be the owners of the fee, and enjoined the city from enforcing the ordinance against that frontage.

The principles involved in this case are fully discussed in the opinions filed in the cases of *Sears v. City of Chicago*, supra, and *Tacoma Safety Deposit Co. v. City of Chicago*, 93 N. E. 153.

The decree of the circuit court as to the La Salle street frontage will be affirmed, but as to the Monroe street frontage it will be reversed, and the cause will be remanded to the circuit court, with directions to enter a decree in accordance with the views herein expressed.

Affirmed in part, and reversed in part, and remanded.

(247 Ill. 235)

FARWELL v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

1. DEDICATION (§§ 28, 53*)—MUNICIPAL CORPORATIONS (§ 668*)—TITLE TO STREETS—INVALID STATUTORY DEDICATION.

The plat of School Section addition to Chicago, containing no certificate, signature, or indorsement of the school commissioner, as required by the statute in force at the time, operated only as a common-law plat; the city acquiring merely an easement in the streets therein, and the fee remaining in the abutting owners, so that the city cannot require such owners to obtain a permit before using space beneath the surface of the streets adjacent to their premises in a manner not interfering with the public easement.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 61, 96; Dec. Dig. §§ 28, 53;* Municipal Corporations, Cent. Dig. § 1444; Dec. Dig. § 668.*]

2. DEDICATION (§ 53*)—MUNICIPAL CORPORATIONS (§ 668*)—TITLE TO STREETS—INVALID STATUTORY DEDICATION.

Where a Chicago street was opened by a plat made in 1851 and recorded in 1852, which plat was acknowledged before a county clerk in Connecticut, who was not authorized by statute to take acknowledgments of plats, the title to the street did not pass to the city; and the maker of the plat, when he subsequently conveyed lots abutting on the street, conveyed to the center of the street, so that the city could not require abutting owners to obtain a permit before using space beneath the surface of the streets adjoining their premises in a manner not interfering with the public easement.

[Ed. Note.—For other cases, see Dedication, Dec. Dig. § 53;* Municipal Corporations, Cent. Dig. § 1444; Dec. Dig. § 668.*]

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by Francis C. Farwell and another against the City of Chicago and others. Decree of dismissal, and complainant Farwell appeals. Reversed and remanded.

This was one of eight bills in chancery severally filed in the circuit court of Cook county by property owners in the city of Chicago whose property abuts upon the public streets of said city against the city of Chicago to enjoin the city from enforcing as against their respective properties the provisions of an ordinance passed by the common council of the city of Chicago on February 5, 1906, which ordinance provides that no person shall use any space underneath the surface of any street or other public grounds in the city of Chicago, or construct or maintain any structure thereunder, without first obtaining a permit so to do from the commissioner of public works in said city. The complainant Farwell is the owner of the northwest corner of Fifth avenue and Congress street, which has a frontage of 80 feet on Fifth avenue and 100 feet on Congress

street, and has located thereon an eight-story building of brick and mill construction. The complainant the Board of Trustees of Beloit College owns a frontage of 50 feet on Fifth avenue, upon which it has erected an eight-story building. The premises of the complainant are situated in the original plat of School Section addition to Chicago. That plat is a part of section 16, township 39 N., range 14 E. of the third principal meridian, which was granted by the United States to the state of Illinois, for the use of the inhabitants of the township in which the same is situated, for the use of schools. The plat of School Section addition to Chicago contains no certificate, signature, or indorsement by said commissioner. Fifth avenue was one of the original streets in School Section addition to Chicago. Congress street was opened in 1851 by plat made by Samuel Russell, which was recorded in September, 1852, and which plat was acknowledged by Russell before the county clerk of Middlesex county, Conn., who was not authorized by statute to take acknowledgments of plats. The trial court dismissed the bill for want of equity, and Farwell has appealed.

Wilson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellees.

PER CURIAM. It was held by this court in *Sanitary District v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 216 Ill. 575, 75 N. E. 248, that the plat of School Section addition to Chicago was a common-law plat. Under the doctrine announced in the case of *Sears v. City of Chicago*, 93 N. E. 158, the fee to Fifth avenue is in appellant, and the court should have enjoined the city from enforcing the ordinance against this frontage. The plat of Congress street was not properly acknowledged, and the title to that street remained in Russell, and, when he conveyed, he conveyed to the center of the street. The complainant Farwell was therefore the owner to the center of Congress street adjoining his property, and the city should have been enjoined as to the enforcement of the said ordinance as to the Congress street frontage.

The principles involved in this case are fully discussed in the opinions filed in the cases of *Sears v. City of Chicago*, supra, and *Tacoma Safety Deposit Co. v. City of Chicago*, 93 N. E. 153.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(247 Ill. 232.)

NORTHWESTERN SAFE & TRUST CO. v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 28, 1910. Rehearing Denied Dec. 9, 1910.)

1. DEDICATION (§ 53*)—STREETS—TITLE.

Quincy street, in Chicago, being laid out in 1854 by plat not certified and acknowledged as required by the statute then in force, the city acquired only an easement, and not the fee therein, which remained in the abutting owners.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.*]

2. DEDICATION (§ 53*)—TITLE IN STREETS.

The plat made by the school commissioner of School Section addition to Chicago did not vest the title of the streets in the city; but only an easement therein; the abutting owners owning the fee, subject to the easement.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.*]

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by the Northwestern Safe & Trust Company against the City of Chicago and others. From the decree, complainant appeals. Reversed and remanded, with directions.

Wilson, Moore & McIlvaine, for appellant. Edward J. Brundage, Corp. Counsel, and William D. Barge, for appellees.

PER CURIAM. This is one of eight cases brought by different parties in Chicago owning property abutting upon the public streets of said city to enjoin the enforcement of the provisions of the ordinance set out in Tacoma Safety Deposit Co. v. City of Chicago, 93 N. E. 153. The property here involved is described as lot 2 and the west 10 feet of lot 1, block 97, School Section addition to Chicago. It is covered by a ten-story building, and abuts 165 feet on La Salle street, 60 feet on Adams street, and 60 feet on Quincy street.

The part of La Salle street upon which the property here involved abuts was acquired by the city, by condemnation, in 1858. Adams street is one of the original streets in School Section addition. Quincy street is in School Section addition, but was not one of the original streets in said addition. It was laid out by plat, in 1854, made by Peter Pruyn and Edward S. Kimberly. The plat was not certified and acknowledged in the manner required by statute then in force. The circuit court held the city of Chicago owned only an easement in La Salle and Quincy streets, that the Northwestern Safe & Trust Company owned the fee to the center of said streets subject to the easement of the city, and granted the relief prayed as to those streets. The court held the city of Chicago is the owner of the fee in Adams street opposite the premises of the Northwestern Safe & Trust Company, and denied the relief prayed as to that street. The cor-

rectness of this decree as to La Salle and Quincy streets is sustained by Tacoma Safety Deposit Co. v. City of Chicago, supra, and Sears v. City of Chicago, 93 N. E. 158. In the case last cited, and also in Sanitary District v. Pittsburg, Ft. Wayne & Chicago Railway Co., 216 Ill. 575, 75 N. E. 248, it was held the plat made by the school commissioner of School Section addition did not vest the fee of the streets in the city; that the city owned only an easement, and the abutting property owners owned the fee to the center of the streets, subject to the easement. Adams street being one of the streets platted by the school commissioner in School Section addition, the city has only an easement in the street; the fee, subject to the easement, being in the abutting owner.

The circuit court, therefore, erred in not sustaining the bill and granting the relief prayed by appellant as to all the streets mentioned, and for that error the decree is reversed and the cause remanded, with directions to sustain the bill as to all three of the streets mentioned and grant the relief prayed.

Reversed and remanded, with directions.

(174 Ind. 743)

WOODWARD v. STATE. (No. 21,759.)

(Supreme Court of Indiana. Dec. 8, 1910.)

1. CRIMINAL LAW (§ 1144*)—DISCHARGE OF ACCUSED FOR DELAY—EVIDENCE NECESSARY.

One seeking the benefit of Burns' Ann. St. 1903, § 2091, providing that no person shall be held by recognizance to answer an indictment without trial for a period embracing more than three terms of court, must show that he was "held by recognizance to answer an indictment," and an appeal bond made on appeal from a city court to the circuit court cannot be considered a continuing recognizance in the absence of proof; there being no presumption of that fact, as against the action of the county court in overruling accused's application for discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2738-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

2. PLEADING (§ 63*)—PROOF NECESSARY.

One seeking the benefit of a statute must by allegation and proof bring himself clearly within its terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 183; Dec. Dig. § 63.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTION.

Rulings of the court below are presumed on appeal to be correct unless the contrary is affirmatively shown by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2738-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

4. INDICTMENT AND INFORMATION (§ 110*)—STATUTORY OFFENSE—LANGUAGE OF STATUTE.

An affidavit or indictment under Burns' Ann. St. 1903, § 2357, prohibiting the keeping of a house of ill fame, is sufficient if it substantially follows the language of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 280-294; Dec. Dig. § 110.*]

Appeal from Circuit Court, Greene County; Chas. E. Henderson, Judge.

Jacob S. Woodward was convicted of keeping a house of ill fame, and he appeals. Affirmed.

W. Ray Collins, for appellant. Jas. Birmingham, E. M. White, A. G. Cavins, and W. H. Thompson, for the State.

MONKS, J. Appellant was convicted in the city court of Linton of the offense of keeping a house of ill fame in violation of section 2357, Burns' Ann. St. 1908. Appellant appealed from said judgment to the court below, where the transcript was filed on February 6, 1909. Afterwards, at the February term, 1910, of said court appellant filed a motion for a discharge on account of delay, under the provisions of section 2091, Burns' Ann. St. 1908. The court ruled against appellant on said motions to discharge him. A trial of said cause resulted in a verdict of guilty and judgment thereon against appellant.

Appellant first insists that the court erred "in overruling his motion or application for a discharge" under said section 2091, Burns' Ann. St. 1908. Said section provides that: "No person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than three terms of court, not including the term at which a recognizance was first taken thereon, if taken in term time; but he shall be discharged unless a continuance be had upon his own motion, or the delay be caused by his act, or there be not sufficient time to try him at such third term; and, in the latter case, if he be not brought to trial at such third term he shall be discharged, except as provided in the next section." It is well settled that when any one seeks the benefit of a statute he must by allegation and proof bring himself clearly within its term. *Town of Windfall City v. State ex rel.*, 92 N. E. 57, 58, and cases cited. It will be observed that no one is entitled to the benefit of said section unless he "has been held by recognizance to answer an indictment or affidavit" for the period mentioned in said section. The evidence given at the hearing of said application is in the record by a bill of exceptions, and it nowhere appears therein or in the record proper that appellant was held by recognizance for a period more than that allowed by said section. On the contrary, it appears from the evidence that no recognizance whatever was given by or for appellant in the court below. True it is recited in the "agreed statement of facts," set out in the bill of exceptions, that appellant "completed said appeal from the judgment of the city court by filing his appeal bond, which said bond was duly approved by the mayor of the city of Linton, ex officio judge of the city court," but it is

not shown or stated that the same was a continuing recognizance, and there is no presumption that it was, as against the action of the court in overruling said application to discharge appellant, for the reason that all rulings of the court are presumed to be correct unless the contrary is affirmatively shown by the record. *Ewbank's Manual*, § 5; *Gillett's Crim. Law* (2d Ed.) p. 35, § 993.

It is clear, therefore, that there is nothing in the record showing that the action of the court in overruling said application was erroneous. In the absence of such a showing the presumption is that the court did not err in overruling said application. *Ewbank's Manual*, § 5; *Elliott's App. Proc.* § 710.

It is assigned as error and insisted by appellant that the affidavit is insufficient because it does not charge a public offense. It has been held by this court that an affidavit or indictment under section 2357, supra, is sufficient if it substantially follows the language of the statute. *Betts v. State*, 93 Ind. 375, 376; *Graeter v. State*, 105 Ind. 271, 273, 4 N. E. 461, and cases cited. See, also, *Donovan v. State*, 170 Ind. 123, 126, 127, 128, 83 N. E. 744, and cases cited; *State v. Bridgewater*, 171 Ind. 1, 85 N. E. 715, and cases cited. Under this rule the affidavit was sufficient.

Finding no error in the record, the judgment is affirmed.

(174 Ind. 746)

STATE v. MALONE. (No. 21,655.)

(Supreme Court of Indiana. Dec. 7, 1910.)

1. PERJURY (§ 21*)—PROSECUTION—INDICTMENT—REQUISITES.

An indictment for perjury recited that defendant made a false affidavit as cashier of a bank to a report required by the state auditor, as provided by law, which report was required to be verified by the oath of the president, cashier, or other managing agent in the bank, etc. Burns' Ann. St. 1908, § 3408, under which this indictment was drawn, provided that such banks should furnish two reports each year with the proper verification, and that the auditor should have power to call for special reports, etc. Held, that such indictment was not defective in failing to show that this was one of the regular reports, for all reports required by the section must be verified.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 21.*]

2. PERJURY (§ 21*)—PROSECUTION—INDICTMENT—REQUISITES.

This indictment was claimed to be defective in failing to allege that it was made by the cashier as managing officer. Held sufficient, for Burns' Ann. St. 1908, § 3408, provides that such report shall be verified by the oath of the president, cashier, or other managing agent, etc.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 21.*]

3. PERJURY (§ 21*)—PROSECUTION—INDICTMENT—REQUISITES—STATUTES.

An indictment under Burns' Ann. St. 1908, § 2376, for voluntarily making a false affidavit for any purpose, is sufficient, although it fails to set up the specific purpose of making the affi-

davit, but does set out the affidavit and the oath, which shows that the affidavit was made voluntarily.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 21.*]

Appeal from Circuit Court, Vermillion County; Charles W. Ward, Judge.

Frank M. Malone was indicted for perjury and the indictment was quashed, and the State appeals. Reversed and remanded.

James Bingham, E. M. White, Alex. G. O'vins, Wm. H. Thompson, and Clarence G. Powell, for the State. Jump, Cooper & Bogart and Conley, Conley & Conley, for appellee.

MONTGOMERY, J. Appellee was charged with perjury by indictment in two counts.

The first, omitting the formal parts, charged that at Vermillion county on the 2d day of March, 1908, and for more than five months continuously immediately prior thereto, appellee and other persons named composed a partnership and as such "were then and there and during all of said time engaged in a banking business at Cayuga, in said county and state, under a certain banking act enacted by the General Assembly of the state of Indiana, and approved March 8, 1907, and as such then and there and during all of said time owned and operated a bank in and under the firm name and style of Malone & Son, bankers; that said defendant was then and there acting as cashier of said bank; that on or about the 2d day of March, 1908, the auditor of the state of Indiana, who was then and there duly qualified and acting as such auditor, ordered and required said partnership and firm to make out and transmit to said auditor a report upon and according to a certain form then and there prescribed and furnished by said auditor as provided by law; that the law then and there required said report to be verified by the oath or affirmation of the president, cashier, or other managing agent of said bank; that the law and said form then and there required said report to exhibit in detail the resources and liabilities of said bank, and said auditor then and there ordered and required that said report exhibit in detail the resources and liabilities of said bank at the close of business on the 14th day of February, 1908, as provided by law. That said partnership and firm did then and there, on said 2d day of March, 1908, make out and transmit to said auditor a statement according to and on said form, which then and there purported to exhibit in detail the resources and liabilities of said bank at the close of business on said 14th day of February, 1908; that said report did then and there purport to show the true condition of resources and liabilities of said partnership at the close of business on said day. That said defendant did then and there, on said

2d day of March, as cashier of said bank, duly make, take, and subscribe a lawful oath to said statement and did then and there solemnly swear that said statement was then and there true, and did then and there swear that the liabilities of said partnership on and for deposits in said bank were forty-nine thousand eight hundred and ninety-two dollars and eighty-two cents (\$49,892.82) at the close of business on said 14th day of February, 1908; that said defendant did then and there, at and in the county of Vermillion, in the state of Indiana, duly make and take said oath before one Milton W. Coffin, who was then and there a duly commissioned, qualified, and acting notary public in and for said county and state, and as such, then and there had full authority to administer said oath, and as such did then and there duly administer said oath to said defendant; that said verified statement and said oath and the jurat thereto are in the following words and figures, to wit:" The report is here set out in full with the oath and jurat. Under the head of liabilities, demand deposits are stated to be \$48,714.85 and demand certificates \$177.90. Appellant made oath that the statement is true, and that the schedules in the report fully and correctly represent the true state of the several matters therein contained. It is further charged that at the close of business February 14, 1908, said partnership was indebted and liable to depositors for deposits made in said bank in the sum of \$71,313.37, which fact appellant well knew and then and there feloniously, wilfully, corruptly, and falsely swore and made oath that the liability of said partnership to depositors upon deposits made in said bank was only \$49,892.82.

The second count avers the conduct of the banking business as in the first, and alleges that appellant made oath to the statement set out, voluntarily, and that the same was false, and made wilfully, corruptly, and feloniously.

We are advised by the briefs of counsel that the first count was quashed, because it did not appear therein whether the alleged false statements were contained in one of the two reports which the auditor is required to exact annually of private banks, or in a special report which it is assumed need not be verified. It is further stated that the court intimated an opinion that this count was probably faulty for other reasons not announced.

The pertinent part of the statute relating to reports by private bankers reads as follows: "Every partnership, firm or individual transacting a banking business under the provisions of this act shall make to the auditor of state two reports during each and every year according to the form which may be prescribed by him, verified by the oath or affirmation of the president, cashier or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

other managing agent of such bank, which report shall exhibit in detail the resources and liabilities of the bank at the close of business on any past day to be by him specified; and shall transmit such report to the said auditor within five days after the receipt of a request or requisition therefor from him; * * * And the said auditor shall have power to call for special reports from any particular bank whenever, in his judgment, the same shall be necessary in order to arrive at a full and complete knowledge of its condition." Section 3408, Burns' Ann. St. 1908.

This statute unconditionally requires two reports annually, verified by the oath or affirmation of the president, cashier, or other managing agent of the bank. It further authorizes the auditor to require additional special reports, deemed by him necessary to a full and complete knowledge of the condition of any such bank. This statute was enacted to regulate private banking in the interests of the public welfare. The provisions of this section were designed to enforce a disclosure of the true financial condition of the banks embraced in the act at all times. Keeping in view the purposes of the law it would be absurd to assume that only certain reports were to be made in due form, and under oath by designated officers or agents, while others quite as vital might be made in any form, by any person, and without responsibility as to accuracy. It is provided in the section of the act under consideration that any bank failing to make and transmit any report required, within five days after request therefor, shall be subject to a prescribed penalty. It is our conclusion, therefore, that every report, whether regular or special, called for by the state auditor under the provisions of this section, is alike required by law, and must be verified by the president, cashier, or other managing agent of the bank. It seems clear to us that the report identified and set out in the first count of the indictment was one required to be verified; and hence the oath alleged to have been made by appellee was one required by law.

Appellee's counsel argue that the indictment should allege that appellee was not only cashier, but was then and there "the managing agent of the bank," and cite *Hewett v. State*, 171 Ind. 288, 86 N. E. 63. In the cited case the prescribed duty was to be performed in the future by "the owner, operator, lessee, superintendent, or other person in charge." The penalty was personal and could not be enforced without showing that the alleged offender was in such relation to the coal mine as to bring him within the requirements of the act. In this stat-

ute the report is required of the banking firm, and the penalty for nonperformance is imposed upon it. The act directs the verification to be by the president, cashier, or other managing agent—in short, by some one who either knows or ought to know the true state of the bank's affairs. It is alleged that appellee was acting as cashier and in that capacity made the oath charged to be false. He is shown to be such an officer as might be called upon to verify the report, and, having assumed to do so, must be held accountable for the accuracy of his statements. Other cases relating to a charge of embezzlement are cited in this connection; but they are not in point, and need not be distinguished. The first count of the indictment is not subject to the criticisms urged against it, and the court erred in quashing the same.

The second count made no allusion to any requirement of the law or of the state auditor, and purports to charge the commission of perjury by a voluntary affidavit, under the provisions of section 2376, Burns' Ann. St. 1908. This section provides that whoever willfully and corruptly "voluntarily makes any false certificate, affidavit, or statement of any nature, for any purpose, shall be deemed guilty of perjury." It is contended that this count is insufficient because the specific purpose in making the affidavit is not charged. In the case of *Smith v. State*, 125 Ind. 440, 443, 25 N. E. 598, 599, this court incidentally said: "The indictment in this case fails to allege any purpose in making the affidavit alleged to be false." The gravamen of the offense defined by this section is the corrupt and willful making of a false and voluntary oath with respect to any matter, and without regard to the purpose in mind. The specific purpose or object in mind at the making of the affidavit or oath is immaterial, and an indictment need only show the oath alleged to be false with such certainty and particularity as to apprise the accused fairly of the charge he is called upon to meet. The exact affidavit and oath alleged to have been falsely made by appellee is fully set out in this indictment, and if made as charged, his intent and purpose in making the same are no constituent elements of the offense. The verification of the matter set out in this count of the indictment appears to have been wholly voluntary, and the allegations are sufficient to constitute the offense of perjury under the statute above mentioned.

The judgment is reversed, with directions to overrule appellee's motion to quash as to each count of the indictment, and for further proceedings not in conflict with this opinion.

(47 Ind. App. 249)

TOWN OF NEW CASTLE et al. v. HUNT et al. (No. 6,985).¹

(Appellate Court of Indiana, Division No. 1. Dec. 9, 1910.)

1. ESTOPPEL (§ 62*)—EQUITABLE ESTOPPEL—PARTIES WHO MAY BE BOUND — PUBLIC STREETS.

While, as a rule, title to streets and alleys cannot be acquired by a private owner by adverse possession, where the boundaries of a street have not been actually located by monuments, and abutting landowners have marked the boundaries thereof for a long period by permanent improvements, the public is estopped to assert a claim to the street beyond the boundaries so established.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 62.*]

2. MUNICIPAL CORPORATIONS (§ 632*)—STREETS—BOUNDARIES—PROCEEDINGS TO ESTABLISH—PARTIES.

In an action by persons owning land adjacent to an alley to establish the boundaries of such alley, other abutting owners were properly made parties, the determination of such boundaries necessarily affecting their rights.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 632.*]

3. MUNICIPAL CORPORATIONS (§ 648*)—STREETS—ALLEYS—BOUNDARIES.

The monuments marking the initial point for the only plat of defendant town which was ever made were destroyed so that no accurate survey can now be made. The lines of an alley abutting plaintiff's property were marked by permanent improvements as they now exist from the time the property was first occupied, and at two different times the city engineer marked the boundary lines in conformity with such improvements, and the town's claim that such improvements encroached upon the alley, was first made over 75 years after the property was originally occupied. The improvements marking the alley line consist of a hedge fence, houses, etc., and a \$4,000 residence. *Held*, that the town could not now claim that the lines of the alley as marked by the improvements were not the true lines.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 648.*]

Appeal from Circuit Court, Henry County; Edl. Jackson, Judge.

Action by Clay C. Hunt and others against the Town of New Castle and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Beach & Mikels and Barnard & Jeffrey, for appellants. Forkner & Forkner and Clay C. Hunt, for appellees.

HADLEY, P. J. This is an action brought by appellees against appellants to establish the boundary lines of a certain alley in the town of New Castle, and to enjoin appellants from tearing up or in any way interfering with said alley as established.

The complaint is in one paragraph, and avers in substance that appellees own lots 5, 6, 7, and 8 in block 17 of said town; that said town was platted about the year 1823; that at the time said town was platted and said lots laid off, there was platted an alley running east and west along the south end

of said lots abutting thereon, which was and is the extreme southern limit of the plat of said town; that shortly thereafter there was laid off and platted an addition to said town abutting on the south side of said alley; that appellants Bunch and Adams are the owners of lot 1 in block 3 in said addition, which lot abuts on said alley on the south; that immediately upon the laying off of said town and of said addition said lot was located, and the grantors and predecessors of appellees and appellants took possession of their several properties up to the line of said alley as actually located, and appellees and their grantors and predecessors in title built and have maintained for more than three-quarters of a century fences, houses and permanent buildings and structures on and up to the northern line of said alley as actually located, as above stated, continuously under a claim of title and of right, and appellants Bunch and Adams and their grantors for a like period have erected fences, buildings and permanent structures on the south side of said alley as actually located, claiming right and title up to the same; that said occupancy and said claim have been continuous and uninterrupted for and during the period aforesaid; that said town has during said period recognized said lines as the true lines of said alley and has improved both Main and Elm streets upon the west and east side of said block, with reference thereto, at least twice; that about the year 1854, in the construction of the Pan Handle Railroad, the corner stone and witnesses marking the original and permanent corner of said town were destroyed and ever after have been lost, by reason of which no actual survey can be made of said town so as to definitely fix the lines of the same as indicated by the original field notes and plat thereof; that the only and best evidence of the actual location of said alley is its actual location and occupancy from the time said town was laid out until the present time.

The complaint then avers that the true lines of said alley are as they now exist and as they have existed during the period aforesaid, and that said town in improving Elm street is about to and is threatening to extend the south line of said alley four feet north into said alley and the north line that distance north of the true line, and to extend the north line four feet into and upon the premises and private property of appellees. Prayer that the boundaries of said alley be fixed by order of court upon the lines as they now exist and as shown by the improvements along said alley, and that the town and construction company be enjoined from in any way interfering with the alley as it now exists. To this complaint each of appellants demurred separately. The demurrers were overruled. Appellants Bunch and Adams then filed separate answers in two

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

²Rehearing denied.

paragraphs; the first being a general denial, the second setting up in detail the various plats and acts of the town. Bunch and Adams also filed cross-complaints in two paragraphs averring substantially the same facts as are set up in the answer. No issue was joined on the cross-complaints. Upon trial the court found for the appellees and fixed the lines for the alley to be as now located and marked by the hedge fence, buildings, and improvements along said line, and the monument fixed on the northwest corner of said alley and South Main street by Omar Minnesinger, city engineer, and that appellants be enjoined from encroaching upon said alley as thus fixed.

It is insisted by appellants that the complaint is bad, in that it seeks to obtain title to a public alley by adverse possession. It is true that the doctrine of adverse possession does not apply, as a rule, to the occupancy of streets and alleys. There is, however, a principle recognized by the authorities, that where landowners abutting on a highway or street, which is not actually located by monuments, have for a long period of years marked the boundaries of such highway by permanent improvements, the public will afterwards be estopped to assert a claim to such highway to the injury of such abutting landowners. *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Anderson v. City of Huntington*, 40 Ind. App. 130, 81 N. E. 223; *Brooks v. Riding*, 46 Ind. 15. The complaint seeks to fix and definitely determine the boundary lines of said alley, and shows that the same cannot be fixed and determined any other way. As such it is sufficient, and, as Bunch and Adams are abutting landowners on such alley, they were properly made parties, as the determination of said lines would necessarily affect their rights.

It is also shown by the evidence that the first plat of the town was never recorded; that afterwards another plat had been made. It is also shown that the monument marking the initial point for said plat has been destroyed, and that no actual, accurate survey of said town could now be made. It was also shown that from the beginning of the occupancy of the premises the lines of this alley were marked out by permanent improvements as they now exist and are maintained. This line is uniform throughout the block. It was also shown that on two different occasions the city engineer of said town, in making public improvements, marked the boundary lines of said alley as they now exist; and at one time one Omar Minnesinger, city engineer, set an iron pin at the northwest corner of said alley as a monument, marking the north line of the alley as shown by appellees' improvements. It appears that the survey out of which this controversy arose, made in 1907, over three-quarters of a century since said occupancy

began, is the first intimation to the property owners along said alley, that their buildings and improvements encroached upon the same. It is shown that a hedge fence, belonging to one of the appellees, of several years' growth is along the alley and marking his property line; that barns, coal houses and other out-houses are built all along the north side of said alley, and that a \$4,000 residence is constructed on the south side of said alley, in conformity to the lines as generally accepted and understood. To now declare that said improvements should be destroyed and said lines changed would be an act of injustice to the abutting property owners disproportionate to the advantage to the public. The conditions here designated bring this case clearly within the rules of special circumstances laid down in the cases of *Anderson v. City of Huntington*, *supra*, *Brooks v. Riding*, *supra*, and *Hamilton v. State*, *supra*.

The judgment of the court below is not contrary to the law, and is supported by the evidence.

Judgment affirmed.

(46 Ind. A. 550)

TELL CITY CANNING CO. v. WILBUR.
(No. 7,151.)

(Appellate Court of Indiana, Division No. 2.
Dec. 6, 1910.)

1. APPEAL AND ERROR (§ 525*)—RECORD—INSTRUCTIONS.

To bring the instructions given by the court on its own motion into the record on appeal, under *Burns' Ann. St. 1908*, § 561, the instructions must be authenticated by the signature of the judge.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 525.*]

2. APPEAL AND ERROR (§ 525*)—RECORD—INSTRUCTIONS.

To bring instructions given by the court on its own motion into the record on appeal, under *Burns' Ann. St. 1908*, § 691, the record must disclose an order of the court that the instructions be made a part of the record, and a mere recital that they are made a part of the record without any order authorizing it is insufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 525.*]

3. APPEAL AND ERROR (§ 1078*)—QUESTIONS REVIEWABLE—WAIVER OF ASSIGNMENTS OF ERROR.

Assignments of error not discussed are waived.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from Circuit Court, Perry County;
C. W. Cook, Judge.

Action between Tell City Canning Company and Charles B. Wilbur. From a judgment for the latter, the former appeals. Affirmed.

Norman E. Patrick, for appellant. John W. Ewing and Wm. H. Roose, for appellee.

RABB, J. The only question attempted to be raised by this appeal involves the correctness of certain instructions given by the court upon its own motion to the jury. The instructions complained of are not brought into the record by a bill of exceptions. They are not properly in the record under the provisions of section 561, because they are not authenticated by the signature of the judge, as required by the provisions of this section. *Strong v. Ross*, 36 Ind. App. 174, 75 N. E. 291. They are not properly in the record under the provisions of section 691, under which section it is manifest they are attempted to be brought into the record, because the record fails to disclose an order of the court that the instructions be made a part of the record. There is a recital that they are made a part of the record, but no order of the court authorizing the same appears. The question upon which a reversal is sought is therefore not presented.

Other errors are assigned but are not discussed, and are waived.

Judgment of the court below affirmed.

(47 Ind. App. 161)

McKEE et al. v. McKEE et al.¹ (No. 7,603.)
(Appellate Court of Indiana, Division No. 2
Dec. 6, 1910.)

1. JUDGMENT (§ 713*) — CONCLUSIVENESS — MATTERS CONCLUDED.

An owner of land executed a deed to appellee in consideration of the latter keeping her during life, and after she came to live with plaintiff, upon being driven from appellee's home, the owner sued appellee to have the deed declared void, but judgment went against her. In a subsequent action she recovered judgment against appellee for possession and damages, but did not take possession, and both judgments remain unreversed. *Held*, in a subsequent action by plaintiff against the owner's estate on her death, and against appellee, to recover for services performed for decedent, and to have a lien declared on the realty conveyed, in which the executor asked that the estate be subrogated against the land conveyed to the extent of any judgment obtained against the estate, that the former judgments concluded plaintiff and the executor as to all matters which were or could have been adjudicated therein, so that there could be no subrogation in their favor against the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

2. WITNESSES (§ 175*)—COMPETENCY—PARTIES IN REPRESENTATIVE CAPACITY — MATTERS HAPPENING IN DECEDENT'S LIFETIME.

Under the direct provisions of Burns' Ann. St. 1903, § 521, where a decedent has previously testified as to matters occurring in his lifetime, the adverse party, in a suit in which the executor is a party involving such matters, where a judgment may be rendered against the estate, is a competent witness as to such matters.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 711-721; Dec. Dig. § 175.*]

Appeal from Probate Court, Marion County; Frank B. Ross, Judge.

Action by Laura McKee and others against

James McKee, executor, and others. From a judgment for plaintiffs against the executor, and in favor of the other defendants, the executor appeals. Affirmed.

Jas. C. Mathews, for appellant. Doan & Orbison, Henry Clay Allen, and Jesse D. Hamrick, for appellees.

COMSTOCK, J. Appellee, Laura McKee, filed her complaint in two paragraphs against the estate of Rhoda Rairden, deceased. In the first she alleged that said estate was indebted to her in the sum of \$1,005.50 on account of services rendered decedent by said appellee during a period of two years and for boarding and caring for her during said term. That said services were rendered at the request of said decedent and under the agreement that she would recompense said claimant for them; that there are no claims or set-offs, etc. It is further alleged that on the 22d day of April, 1903, the decedent transferred to appellee Julia F. Caplinger certain real estate by warranty deed, which deed reserved to said decedent a life estate in said property; that as a part of the consideration for said real estate the said Julia was to care for and keep the decedent during the remainder of her life and to provide her a decent burial at her death. A copy of said deed is made a part of each paragraph of complaint. It is further alleged that said Julia drove decedent from her home and compelled her to seek other places to board at a time when she was about 83 years of age; that she afterwards made her home with claimant, and that claimant cared for, boarded, and kept said decedent during the remainder of her natural life; that said Julia refused to pay any part of said board or of the expense incidental to the care of said decedent; that all of the board and care herein mentioned by claimant was rendered after the execution of said deed, and after said Julia had accepted said property and entered into possession of the same. Each paragraph asks that a lien be declared against the real estate transferred to said Julia.

The second paragraph is based on a written statement of indebtedness as follows:

"October 16, 1907. There is due Laura McKee the sum of \$4.50 per week for my board from October 28, 1905. Also the sum of \$150.00 for nursing in my two spells of sickness.

her
"Rhoda X Rairden.
mark

"Witness: Winnie Sharkey."

It also contains the averments as to the execution of the deed, the failure of said Julia F. Caplinger to provide for her, etc. substantially as set out in the first paragraph. It is also alleged that decedent left no estate whatever except her interest in said property as set forth in said deed. To

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied.

this complaint the executor, James McKee, filed an answer in two paragraphs, first, general denial. In the second said executor set up the transfer by Rhoda Bairden, deceased, to Julia F. Caplinger, of the whole of her estate upon the 22d day of April, 1903, and asks that said estate be subrogated to the extent of any judgment that might be rendered in favor of the claimant, Laura McKee, and that said real estate be ordered sold for the payment of the same and the other debts of said estate. Appellee Caplinger answered in three paragraphs (1) general denial; (2) former adjudication; and (3) payment. To the second and third paragraphs of said answer appellee Laura McKee replied by general denial. Appellee Caplinger also replied to the second paragraph of the executor's answer (1) general denial; and (2) former adjudication. Appellee Laura McKee was given judgment against the estate of decedent for \$621.93, of which amount \$90 was declared to be a preferred claim. The court found in favor of appellees Caplingers and denied appellant's and appellee Laura McKee's prayers for subrogation and lien against the real estate so transferred by appellant's decedent to appellee Julia F. Caplinger. Appellant's motion for a new trial was overruled, and for this action of the court appellant asks for a reversal.

Under this assignment appellant presents five propositions: (1) The decision of the court is contrary to law; (2) the court erred in permitting the appellee Julia F. Caplinger, to testify as a witness over the objection of appellant to matters occurring during the lifetime of appellant's decedent, the said Julia F. Caplinger being a party to said cause and a necessary party, and said cause being one in which her interests were adverse to the estate; (3) the court erred in overruling appellant's motion to strike out the testimony of the said Julia F. Caplinger; (4) the court erred in permitting the appellee James B. Caplinger to testify as a witness over the objection of appellant to matters occurring during the lifetime of appellant's decedent, the said James B. Caplinger being a party to said cause and a necessary party to said cause, and said cause being one in which his interest was adverse to said estate; and (5) the decision of the court is clearly against the weight of the evidence.

It appears from the record that the decedent during her lifetime, after she came to the home of plaintiff Laura McKee, brought suit against the appellees Caplingers. In her complaint in that suit decedent set up substantially the same facts as to the execution of the deed and the failure of the defendants to care and provide for her as are

alleged in the complaint before us and asked that said deed be set aside and declared null and void. Upon the hearing of said cause judgment was rendered against her. The deed stood. The life estate remained. It also appears that a few days before her death decedent in another action against the Caplingers recovered judgment for possession of the land in controversy and for damages, but that she did not take possession. These judgments still stand unreversed and unappealed from, and all matters which might or should have been adjudicated in either of said causes must be deemed settled. The claimant and appellant are bound by these judgments, and there were no rights in the real estate to which either could be subrogated.

There was no error in the admission of the testimony of which complaint is made. The record shows that upon the trial of the case of Rhoda Bairden v. Caplinger the testimony of Rhoda Bairden as to the same matters there involved was taken. Section 521, Burns' Ann. St. 1908. See, also, Coble v. McClintock, Ex'r, 10 Ind. App. 562, 38 N. E. 74; Hatton v. Jones, 78 Ind. 466.

Appellees Caplingers question the sufficiency of the answer of appellant, and deny that he has any standing in court, and ask that the assignment of cross-errors filed by appellee Laura McKee and not supported by any brief be stricken out. Upon these matters we have taken the view most favorable to appellant, but without passing upon them we conclude, after an examination of the whole record, that the cause was fairly tried and a correct conclusion reached.

Judgment affirmed.

ILLINOIS CENT. R. CO. v. FAIRCHILD.¹ (No. 6,734.)

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1910.)

On petition for a rehearing. Overruled.
For former opinion, see 91 N. E. 836.

ROBY, C. J. The questions argued on this petition are substantially disposed of by the ruling in *American Car Co. v. Smock*, 93 N. E. 78. The statement of facts heretofore made is believed to be sufficient to show the applicability of the legal propositions involved. The principle which prevents the appellant from holding the written release and refusing to pay to the appellee the consideration upon which it had been obtained is not a "new question of law," but a very ancient and well-settled one.

The petition is overruled.

¹ Transfer denied.

(# Ind. App. 16)

LOUISVILLE & S. I. TRACTION CO. v. SNEAD. (No. 7,102).¹

(Appellate Court of Indiana, Division No. 2, Dec. 9, 1910.)

1. WITNESSES (§ 210*)—PRIVILEGED COMMUNICATION—PHYSICIAN.

The result of the personal examination of one injured in a street car accident by the company's physician in the performance of his duties was privileged, so that he could not testify as to the result of such examination in an action for such injuries.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 772; Dec. Dig. § 210.*]

2. DAMAGES (§ 130*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where plaintiff endured great mental suffering from the fright received in a street car accident, and her body was badly cut and bruised, two of her ribs and her collar bone fractured, causing severe pain, and she was liable to continue to suffer more or less pain and was under a physician's treatment for a considerable period, a verdict for her for \$3,000 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367; Dec. Dig. § 130.*]

3. EVIDENCE (§ 505*)—OPINION EVIDENCE—CONCLUSION.

A question to a civil engineer whether, from the curb of a street at the grade, and being an ascending grade, there should have been a guard rail for the protection of street cars operated around and over the grade, did not call for witness' conclusion, merely requiring his opinion as an expert.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2308; Dec. Dig. § 505.*]

4. EVIDENCE (§ 506*)—OPINION EVIDENCE—EXPERT TESTIMONY—MATTERS IN ISSUE.

An action for injuries from the derailment of a street car, where the complaint alleged that the company constructed its road along a steep hillside with dangerous curves which should have been protected by guard rails, which it neglected to provide at the point of the derailment, a question to a civil engineer as to whether, from the curve of the street at the grade, there should have been a guard rail for the protection of cars operated around the grade, was not objectionable on the ground that it called for an opinion upon the very questions which the jury were to decide, and was proper.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2309; Dec. Dig. § 506.*]

5. CARRIERS (§ 315*)—PASSENGERS—ACTIONS—INJURIES—ALLEGATIONS OF COMPLAINT—NEGLIGENCE—SPECIFIC ALLEGATIONS.

In a street car passenger's action for injuries caused by a derailment, the complaint alleged specifically the manner in which the derailed car was operated, and that by reason thereof the car was derailed, after which it alleged that plaintiff was by such accident, and because of defendant's carelessness and negligence, violently thrown from her seat to the ground where the car left the rails, and that by reason of such accident, caused by defendant's negligence as aforesaid, plaintiff was injured, etc. *Held*, that the gist of the allegations was that plaintiff was negligently thrown from a car and injured, so that plaintiff was not required to prove the specific averments as to the manner in which the car was operated.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

Appeal from Circuit Court, Clark County; Harry O. Montgomery, Judge.

Action by Martha Snead against the Louisville & Southern Indiana Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Voigt and Chas. D. Kelso, for appellant. B. F. Gardner and Alex. Dowling, for appellee.

RABB, J. The appellant is a common carrier of passengers. Appellee was a passenger on one of its cars at a time when the car in which she was riding ran off the track, and was wrecked, resulting in personal injury to the appellee. For the injuries so received, this action was brought by her against the appellant, claiming that the accident was the result of negligence on part of appellant. Her complaint was in two paragraphs; appellant's demurrer to each being overruled. The case was put at issue, submitted to a jury for trial, and resulted in a verdict in favor of appellee, assessing her damages at \$3,000. Appellant's motion for a new trial being overruled; judgment was rendered upon the verdict.

It is insisted by appellant as grounds for reversal of the judgment: First, that the court erred in refusing to permit Dr. Weathers, a witness called by appellant, to testify as to the appellee's physical condition at the time he treated her; second, because the damages assessed are excessive; third, because the court permitted appellee's witness, an expert civil engineer, to give his opinion regarding what was claimed to be a defect in the construction of appellant's road, at the point where the car left the track; and, fourth, that the evidence failed to establish the specific acts of negligence charged in the complaint as the cause of the accident.

The physician, whose testimony was excluded, was the appellant's physician, who upon the happening of the accident was sent by the appellant to attend those injured in the wreck, and in the performance of this duty he made an examination of the appellee's injuries. To permit the witness to testify as to the result of his examination would be a clear breach of the rule excluding privileged communications. This is well settled in *Indianapolis v. Hall*, 165 Ind. 557, 76 N. E. 242; *Penn. Railway Co. v. Wyler*, 100 Ind. 92, 50 Am. Rep. 769; *Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872; *City of Warsaw v. Fisher*, 24 Ind. App. 48, 55 N. E. 42.

The evidence shows that the accident out of which the action grew was one which threatened the life of the appellee, and was of a very terrifying character, and justified the jury in finding that the appellee endured great mental suffering from the fright; that her body was badly cut and bruised, and at least two of her ribs and her collar bone were fractured; that she suffered severe physical pain, and was under the care of a

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 93 N.E.—12. ²Rehearing denied. Transfer to Supreme Court denied.

physician for a considerable period of time, and was liable to continue to suffer more or less pain from her injuries received in the wreck. Under this state of the evidence, this court cannot say that the damages assessed by the jury are either the result of prejudice or malice.

A civil engineer experienced in railroad construction was called as a witness by appellee, and, after testifying to having made an examination of the appellant's track where the accident happened, was asked this question: "As a civil engineer, I would ask whether from the curve at the grade, and being an ascending grade, there should have been a guard rail for the protection of cars propelled around and over that grade." The question was objected to on the ground that it called for a conclusion, and was a question for the jury. The witness was permitted to answer, which he did as follows: "I should say there should have been a guard rail or some other protection to that rail; if not a guard rail, the rail should certainly have been braced; the outer rail should have rail braces." It was charged, among other things, in the complaint, that the appellant constructed its road along a steep hillside, with sharp and dangerous curves, which should have been protected by guard rails, and that it had neglected to provide this safeguard. The objection that the question called for a conclusion of the witness is without force. The question does not purport to call for a fact, but for the opinion of an expert, on a matter about which he is qualified to express an opinion. The objection that the question calls upon the witness to express an opinion in reference to the very question to be determined by the jury is worthy of more consideration. The jury were called upon to determine many questions: First, was the road built around sharp and dangerous curves; second, was it built upon an ascending grade; third, would reasonable care require that a guard rail should have been put in at the point where the accident happened; and fourth, as a matter of fact, was such rail there? While an expert witness may not give a general opinion concerning the precise ultimate question the jury is to decide, it is always permissible to take the opinion of an expert witness upon an assumed state of facts in reference to which the opinion of an expert will presumably enlighten the jury. *Bonebrake v. Board of Commissioners*, 141 Ind. 62, 40 N. E. 141; *New Jersey, etc., v. Tutt*, 168 Ind. 205, 80 N. E. 420, and cases cited. No error intervened in the admission of this testimony.

The first paragraph of appellee's complaint, after averments showing the relation of the appellant to appellee as a common carrier of passengers, contains many averments descriptive of the manner in which the car in which she was riding was operated by the

appellant, and avers that, by reason of these things, the car was caused to run off the track, and with all of its passengers pitched down an embankment and wrecked. It then avers "that the plaintiff was by the accident aforesaid, and because of the carelessness and negligence of the said defendant, its agents and servants, violently thrown from her seat out of said car onto the ground 25 feet below the track, where the car left the rails; that, by reason of said accident aforesaid so occasioned by the negligence and carelessness of the defendant aforesaid, the plaintiff was then and there cut," etc. The second paragraph of the complaint contains like averments descriptive of the accident, and setting forth the certain specific causes therefor, and concludes with the general averment "that the plaintiff was then and there by the accident aforesaid, and because of the carelessness and negligence of the defendant, its agents and servants, violently thrown from her seat out of said car on the ground 25 feet below the track where the car left the rails, and, by reason of the accident aforesaid so occasioned by the carelessness and negligence of the defendant, the plaintiff was then and there injured."

It is claimed by appellant that, in making out her case, the appellee is confined to the specific acts of negligence which the complaint describes as the cause of the car leaving the track, and that these facts are all dependent upon one another, and it is claimed that the evidence failed to establish all of the concurring acts of negligence charged, and that appellee's case is not aided by the rule "*res ipsa loquitur*."

The gravamen of the appellee's action is the injury caused by the wrongful act of the appellant. The alleged act of the appellant that injured the appellee was throwing her from the car to the ground, and not the running of the car off the track. There is the general charge in the complaint that this was negligently done by appellant. It is said in *Indianapolis v. Marschke*, 168 Ind. 490, 77 N. E. 945: "The specific characterizations of the complaint may give a more vivid idea of the manner in which it was claimed the accident occurred; but, after all, the whole thing in substance is a charge that the defendant negligently ran its car into the plaintiff's buggy." So here, the substance of the charge in this case is that the defendant negligently threw the plaintiff from its car and injured her. The particular manner in which it was done is not material. Whether it was by reason of faulty construction of the track, or the negligent manner in which the car was operated, or an improper manner of loading the car is not material. They are not subjects which are presumed to be within the knowledge of the passenger injured, nor is she confined in her proof to these specific charges. *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600;

Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; **Fisher v. Golladay**, 38 Mo. App. 531.

Other questions are raised by appellant's brief that are not urged in argument as grounds for a reversal. We have carefully examined them all, and conclude that no reversible error is presented by the record. Upon the undisputed facts as they appear in the record, there is no question of appellant's liability to appellee for a very serious injury. The only possibly meritorious question presented by the record is that affecting the measure of damages, and, as already stated, this must be decided against appellant.

Judgment of the court below affirmed.

(47 Ind. App. 175)

LUND v. BOARD OF COM'RS OF NEWTON COUNTY. (No. 6,871.)¹

(Appellate Court of Indiana, Division No. 1.
Dec. 9, 1910.)

1. COUNTIES (§ 152*)—FISCAL MANAGEMENT—CONTRACTS.

The county reform law (Acts 1899, c. 154, § 25; Burns' Ann. St. 1908, § 5942) provides that no board of county commissioners, or other county officers, shall have power to bind the county by any contract beyond the amount of money at the time appropriated for the obligation to be incurred, and all contracts beyond such existing appropriation shall be void. *Held*, that a contract for services and material, made without an existing appropriation to pay therefor, was void.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 152.*]

2. CONSTITUTIONAL LAW (§§ 213, 254*)—RIGHT TO CONTRACT.

The statute, when so construed, does not abridge rights under any private contract, nor violate Const. U. S. Amend. 14, nor Const. Ind. art. 1, §§ 12, 21, 23, relating to due process of law and the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. §§ 213, 254.*]

3. EMINENT DOMAIN (§ 2*) — PROPERTY RIGHTS—TAKING WITHOUT COMPENSATION.

The statutes, as so construed, do not take private property without just compensation, in violation of Const. art. 1, § 21.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 2.*]

4. OFFICERS (§ 103*)—POWERS—LIMITATION—NOTICE—KNOWLEDGE OF LAW.

Persons dealing with public officers must know the law governing their powers, and act in ignorance thereof at their peril.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 163-175; Dec. Dig. § 103.*]

Appeal from Circuit Court, White County; Jas. P. Wason, Judge.

Action by Erick Lund against the Board of Commissioners of Newton County. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Affirmed.

Wm. J. Whinery, for appellant. Wm. Darroch and John Higgins, for appellee.

WATSON, J. Appellant brought this action to recover the sum of \$3,500, with interest due for work and labor done and material furnished by appellant for appellee at its special instance and request, in the erection and construction of a courthouse building, in the town of Kentland, Newton county, Ind. The appellant filed an amended complaint in three paragraphs, and afterwards two additional paragraphs were filed. The first paragraph of the amended complaint was a common count for work and labor done, and for material furnished at the special instance and request of appellee, including a bill of particulars, and alleging that the appellee had received and accepted said work, labor, and materials; also, the presentation of the claim to the board of commissioners, and its disallowance. The second paragraph was likewise a common count for work and labor done, and material furnished at the special instance and request of the appellee, alleging also that the work, labor, and material had been received, accepted, and enjoyed by appellee; that appellant had presented his claim to appellee, the board of commissioners, and the same had been disallowed; that he had requested the said board to request the county council of said Newton county to make an additional appropriation for the payment of appellant's claim—all of which had been refused. The third paragraph set forth the facts, showing the adoption of plans and specifications by the board, the solicitation of bids by advertising, the presentation of appellant's bid with others, the awarding of the contract to appellant, the work done by him under said contract, the suit to enjoin the board from proceeding under said contract, the appeal to the Supreme Court, and the reversal of said judgment, the request made by appellee that appellant stop work, after the reversal of said judgment, the submission of an estimate by the appellee to the county council of Newton county for a new appropriation of money with which to complete said building, the appropriation thereof, the adoption of new plans and specifications for the completion of said building from the point appellant had been compelled to stop work thereon, the letting of a new contract, and the erection and completion of said building by appellee; likewise, the presentation of appellant's claim for allowance and its disallowance by appellee, also the request for an additional appropriation for the payment thereof. The fourth paragraph was a common count for money paid by appellant for the use and benefit of appellee, at its special instance and request, for work and labor and material used in the erection and construction of the courthouse in the town of Kentland; alleging, also, the presentation of the claim to the board, and the disallowance

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹Rehearing pending.

thereof. The fifth paragraph sets forth the facts similarly to the third paragraph, except that it is more specific in its allegations, and is upon the theory of money paid at the special instance and request of appellee in carrying on the work under the contract for the erection and construction of the courthouse, a copy of which contract is made a part thereof. It also alleges the new appropriation by the county council, the adoption of new plans and specifications by appellee, the completion of the building, and the refusal to pay appellant for the work and labor done and materials appropriated by it and furnished at the special instance and request of appellee. A demurrer was filed to each paragraph of the amended complaint and was sustained by the court, which ruling is assigned as error on appeal. There is no allegation in any of the paragraphs that an appropriation was made by the county council and existed with which to pay on the contract at the time the same was entered into, or for work done and material furnished, for the value of which appellant sues.

In order that abuses of public trust and extravagances in the expenditure of public money which had grown up all over the state be stopped, the Legislature of 1899 passed what is known as the "county reform law." Acts 1899, p. 343. The part applicable to the case under consideration is as follows: "No board of county commissioners, officer, agent or employé of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriation are declared to be absolutely void." Section 5942, Burns' Ann. St. 1908. "Hereafter the board of county commissioners * * * shall have no power whatever to make any allowance for voluntary services, or for things voluntarily furnished, and no power to pay, or cause the same to be paid for, out of the county treasury. * * * All laws or parts of laws conferring power upon any authority to make payment out of the county treasury for any of the matters mentioned in this section, are hereby repealed." Section 5950, Burns' Ann. St. 1908. "No warrants shall be drawn and no funds shall be paid out of the county treasury in payment of any claim on any contract with the commissioners for the execution of any public undertaking except said contract has been let pursuant to the provisions of this act, nor unless said claim has been filed and allowed by the commissioners in the manner herein required." Section 5956, Burns' Ann. St. 1908. In fact, the tenor of the whole act is to curtail and control the power of public officers in the expenditure of public funds.

The vital and only question in this case is: Can the appellant recover under the averments of his complaint, where no appropriation is alleged to have been made to cover the expenditure for which he brings this action?

The board of commissioners, like other statutory officers, are without power to make contracts for the expenditure of money, except such as are conferred upon them by statute.

Appellant, in his brief and in oral argument, challenges the construction of the county reform law as construed by the Supreme and this court, in that such constructions are in violation of sections 12, 21, and 23 of article 1 of the Constitution of the State of Indiana, and of the fourteenth amendment to the Constitution of the United States. The provisions of the statute under consideration are plain and unambiguous, and admit of no different construction; neither is such construction of the law an attempt to in any manner limit or abridge the right of any private contract, take private property without just compensation, nor does it deny a person remedy by due process of law or the equal protection of the law common to all. Nor was the constitutionality of the county reform law in question, duly presented, or argued. If it had been, this court would be without jurisdiction; but only the construction thereof was challenged. This statute, as said, was enacted in the interest and welfare of the general public, and the restrictions and safeguards which it throws around the public treasury are no hardship to persons contracting and dealing with a public officer, for it defines the duties of the officers, and not only specifically defines their several duties and limits their official capacity and power, but denies to them in express and positive terms the right to exercise powers beyond those given them by statute. So that all men must know, when they deal with public officers, the law governing their powers, and, if they deal with them unadvisedly or recklessly, they do so at their peril. Moreover, the Supreme Court, in *State ex rel. Davis v. Board*, 165 Ind. 262, 74 N. E. 1091, has fully determined the rights of appellant and appellee with reference to the contract attempted to be made, the material furnished, and work done, for which this action is brought, as averred in the third and fifth paragraphs of his complaint. So that, at the time this action was brought, appellant was no stranger to the rulings of the court with reference to this statute. Whatever hardship, if any, befalls him, is of his own choosing, with full knowledge of the situation and surrounding circumstances.

It is the well-settled law of this state that, when county commissioners attempt to contract for the county in disregard of the plain letter of the law, such contract is void, and no recovery can be had against the county

for material furnished or labor performed under such contract.

It was necessary to allege and prove that the county council had appropriated money necessary to pay the expenditure to be made by the commissioners on account of and at the time the supposed contract was made and for which this action is brought.

We find no error in the record, and the judgment is therefore affirmed.

(46 Ind. A. 550)

FOLLEY et al. v. THOMAS. (No. 6,806.)
(Appellate Court of Indiana, Division No. 1.
Dec. 9, 1910.)

1. ADVERSE POSSESSION (§ 13*)—NATURE AND REQUISITES—HOSTILE CHARACTER OF POSSESSION—NECESSITY.

Possession alone will not ripen into title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

2. ADVERSE POSSESSION (§ 16*)—ACTUAL POSSESSION—ACTS OF OWNERSHIP—WILD LANDS.

For actual possession, without color of title, to ripen into prescriptive title it must be such possession as is consistent with the character of the land in question; thus, where one disregarding any right or claim of others took measures to protect wild lands from trespassers, and as soon as the same was drained began to use the land for pasture and to cut hay therefrom, and remained in open possession without disturbance for longer than the statutory period, he acquired a perfect prescriptive title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

3. ADVERSE POSSESSION (§ 110*)—PLEADING EVIDENCE IN TRIAL—ADMISSIBILITY OF EVIDENCE.

Evidence of adverse possession was properly admitted under a pleading which set up that the pleader had openly, notoriously, and adversely, for more than the statutory period, remained in actual possession, etc., of certain lands, although it might not have alleged facts showing color of title.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 110.*]

4. ADVERSE POSSESSION (§ 85*)—OPERATION AND EFFECT BY GRANTOR AND PRIVIES—PRESUMPTION.

The possession of a grantor and privies will not be presumed to be adverse to the purchaser or his grantees, but if there is clear and unmistakable evidence to the contrary, such possession will ripen into title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 656; Dec. Dig. § 85.*]

Appeal from Circuit Court, Starke County;
A. L. Courtright, Special Judge.

Action by Benjamin F. Thomas against William V. Folley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Jas. A. Pritchard, Peters & Peters, Chas. C. Kelley, and Henry M. Dowling, for appellants. Otis E. Gulley, for appellee.

MYERS, J. In the court below the appellee commenced an action which he prosecuted

to judgment against the appellants quieting his title to certain real estate in Starke county, Ind. The complaint was in one paragraph, answered by a general denial. The appellants' cross-complaint in one paragraph was answered by the appellee in five paragraphs, to all of which except the first, which was a general denial, a reply in denial was filed.

The errors relied on for a reversal of that judgment are based upon the overruling of appellants' demurrer to appellee's amended fifth paragraph of answer to appellants' cross-complaint, and the overruling of appellants' motion for a new trial.

In the cross-complaint it is alleged that Eliza E. Folley, a person of unsound mind, and in this action represented by a guardian, and Elmer E. Folley, are the sole heirs of William V. Folley, deceased, who derived title to the real estate in controversy by a deed from one Parr and wife, February 15, 1877, which deed was recorded April 12, 1877, in the office of the recorder of Starke county; that said Eliza E. and Elmer E. are the absolute owners of said real estate, and that the interest therein claimed by the appellee is inferior and junior to their title, and they ask to have their title quieted.

In substance said fifth paragraph of answer shows that on July 20, 1878, the sheriff of Starke county duly sold said real estate to the appellee for \$355.42; that said sale was made upon a decree foreclosing a mortgage executed by Milton R. Bailey to the appellee; that on April 5, 1880, the sheriff executed to the appellee a sheriff's deed for said real estate, which deed was duly recorded on the day of its execution; that appellee on April 5, 1880, believing the said sheriff's deed vested in him the absolute fee-simple title to said real estate, thereupon in good faith entered upon said land and for more than 20 years continuously remained in open, public, notorious, adverse, peaceful, and exclusive possession of the same, claiming to be the sole and absolute owner thereof, and exercising sole authority and dominion over the same, and during said period of time performed acts of ownership following: (1) Conveyed to the National Transit Company by deed dated June 15, 1888, the right to lay a pipe line and operate the same across the land, which deed was recorded on the same day in deed record No. 31, in the office of the recorder of said county; (2) paying sundry drainage assessments against the land as they accrued between January 5, 1899, and May 21, 1908, aggregating \$481.60; (3) fencing said real estate on May 28, 1900, and August 8, 1903, at a cost to him paid of \$131.82; (4) renting said real estate for pasturing purposes and cutting wild grass since May 28, 1900, and collecting rents therefor and using the same; (5) paying all taxes from April 5, 1880, aggregating \$236.59; (6) procur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing decree at October term of the Starke circuit court for the cancellation of a mortgage executed by William V. Folley to John C. Parr, in a suit brought by the appellee against William V. Folley and wife and John C. Parr and wife; (7) visiting the land between April 5, 1880, and the commencement of this suit; looking after the land and guarding timber thereon by his agents, who publicly announced their authority from him so to do. That said possession and dominion exercised by the appellee since April 5, 1880, was the only possession practicable to exercise over said land; that said land was and is not now capable of any other possession or of being put to any other uses than as aforesaid, and is what is known as Kankakee marsh land, and before said drainage proceedings were had, was mostly under water, and unfit for cultivation as farming land or human habitation; that since said drainage proceedings it has been practicable to use it for pasture purposes and cutting grass to make wild hay, but remains unfit for general farm use or human habitation. That appellee never knew William V. Folley, deceased, nor never heard or knew of said Folley nor any of the cross-complaints until about November, 1903. That since April 5, 1880, and for several years prior thereto, said William V. Folley, who died on or about the ——— day of ——— 190—, resided in Indianapolis, Ind.; that during all of said time appellee lived at Danville, Ind., 20 miles from Indianapolis, and, notwithstanding easy and convenient railroad, mail, and telegraph communications between said places, it never came to the knowledge of the appellee that William V. Folley claimed any interest whatever in the land, nor that said Folley ever disputed plaintiff's claim to possession or absolute ownership in fee simple thereto.

The only objection urged against this answer is that, it does not show that appellee had color of title to the land, nor that his occupancy was actual, visible, and continuous for more than 20 years; that constructive possession without color of title is insufficient as a basis of acquiring title.

Appellants have furnished us with an ingenious argument tending to show that the sheriff's deed to the appellee herein furnishes no basis for a claim of color of title. It must be kept in mind that appellee's claim of title is not based alone on the sheriff's deed. The facts set forth in the answer are to be taken as true, and if we are not mistaken, appellants have failed to correctly interpret it. They assume that the answer shows only constructive possession of the land by appellee, and then proceed to argue that constructive possession without color of title is insufficient to uphold title or ownership, although such possession may have continued for the full term of 20 years. The decided cases are well agreed that possession alone will not dislodge the rightful owner, or vest title in the possessor. Such is the hold-

ing of *Bonan v. Meyer*, 84 Ind. 390; *Henry, Adm'r, v. Stevens*, 108 Ind. 281, 9 N. E. 356; *Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560. But as we read the answer, an entirely different case is here presented. When drawing this answer the pleader evidently had before him the case of *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779. For in the case at bar, as in that case, the five indispensable elements to show title by adverse possession appear. All of these elements are directly averred in the answer in question, except it may be said that actual possession is not averred in so many words, nor in a strict and limited sense was occupancy for 20 years shown in the case last cited; but there, as here, it appeared that the lands were not available for any productive use, and in speaking of what is meant by possession, the court said: "It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands, or of a mining camp, a nonnavigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot, would not answer as to a lot in the business center of a populous and thrifty city. As said in *Ewing v. Burnet*, 11 Pet. 41 [9 L. Ed. 624] 'So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases.' And, as said in the early case of *Robison v. Swett*, 3 Me. 316, where 'lands being wild and uncultivated, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them.'"

From what is thus said we must infer actual possession is such possession as is consistent with the character of the land in question, its locality, and its suitable uses. The facts disclosed by this answer show that the subject-matter of this action, until about the year 1890, was wild marsh land, and for most of the time under water, then and now unfit for cultivation or human habitation. That appellee asserted every possible act of ownership and assumed such dominion as the quality of the land would permit, to the exclusion of all others and put the same to every use to which it was adapted, and that, too, without asking permission, and in disregard of all other conflicting claims. It appears from the cross-complaint that William V. Folley received a deed for the land in 1877, and the answer shows that up to the time of his death, more than 20 years since April, 1880, he never did anything indicating a claim of ownership of the land, nor did any other person deny the unconditional claim of ownership appellee during all that time asserted. The sufficiency of the answer is supported by *Worthley v. Burbanks*, *supra*; *Collett v. Board*, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321; *May v. Dobbins*, 166 Ind. 331,

77 N. E. 353; Webb v. Rhodes, 28 Ind. App. 393, 61 N. E. 735; Wood v. Ripley, 27 Ind. App. 356, 61 N. E. 608; Burr v. Smith, 152 Ind. 469, 53 N. E. 469.

In support of the motion for a new trial, it is insisted that the decision of the court is not sustained by sufficient evidence, and that the court erred in admitting, over appellants' objection certain testimony tending to show adverse possession of the land by the appellee. In support of these assignments the appellants have directed our attention to certain special findings, which, it is claimed, are not sustained by the evidence. We have carefully read the evidence disclosed by the record, keeping in mind appellants' contention, and we think it sufficient to say that it would be a waste of time and space to take up each finding separately and quote evidence of which there is an abundance to support each material finding. This conclusion is reached on the theory that all of the evidence before the court was properly admitted.

Appellants objected to all evidence tending to show title in appellee by adverse possession. The question of the admissibility of this evidence is before us. We are convinced that the fourth and the amended fifth paragraphs of answer proceed upon the theory of title to the land in appellee by adverse possession, continued for more than 23 years. Under these paragraphs, we are inclined to the opinion that all evidence which tended to show actual, open, and notorious possession by appellee, under a claim of ownership, to the exclusion of all others, and continuing for the statutory period of 20 years, was clearly admissible.

The doctrine of adverse possession is as effectual to pass title to the occupant, as though he had acquired it from the true owner by a conveyance at the time of the commencement of his possession, and it is not essential, where it is shown that such possession was actual, that it should have been under color of title. Wood v. Ripley, *supra*; Wood v. Kuper, 150 Ind. 622, 50 N. E. 755; Dyer v. Eldridge, 136 Ind. 654, 36 N. E. 522. Each of the parties to this action are able to trace, by regular line of convey-

ances, their title back to Robert P. Rankin, and as Robert P. Rankin, the common source of title, executed a deed in the line under which the appellants claim, prior to the deed in the chain through which the appellee claims, it is argued that those claiming under the second conveyance of Robert P. Rankin were estopped, by the first deed, from asserting adverse possession, on the theory that the possession of Robert P. Rankin after the first deed was that of tenant or trustee of the grantee, and that the same rule applied to his subsequent grantees. As a general rule, the contention of appellants in this particular, is supported by reason and authority, for, as said in the early case of Fite v. Doe, 1 Blackf. 127, 129: "The presumption always is, that the possession is in accordance with the regular title, until there is clear and positive evidence to the contrary." While this doctrine is preserved in the decisions and text-books, another principle, equally well settled, and referred to in the case last cited, extends the rule and allows the inquiry as to whether that possession was hostile to the title of the grantor, and if such possession is found to be really adverse for the full statutory period, the presumption of possession in accordance with the regular title will yield to that shown by the proof. 1 Cyc. 1040; Stevens v. Whitcomb, 16 Vt. 121; North v. Barnum, 12 Vt. 205; Abbett v. Page, 92 Ala. 571, 9 South. 332; Knight v. Knight, 178 Ill. 553, 53 N. E. 306; Watson v. Gregg, 10 Watts (Pa.) 289, 36 Am. Dec. 176; Reynolds v. Cathens, 50 N. C. 437; Pipher v. Lodge, 4 Serg. & R. (Pa.) 310; Burkhalter v. Edwards, 16 Ga. 593, 60 Am. Dec. 744; Smith v. City of Osage, 80 Iowa, 84, 45 N. W. 404. 8 L. R. A. 633; Waltemeyer v. Baughman, 63 Md. 200; Schwallback v. Chicago, etc., Ry. Co., 69 Wis. 292, 34 N. W. 128, 2 Am. St. Rep. 740; Id., 73 Wis. 137, 40 N. W. 579; Proprietors of Kennebeck Purchase v. Springer, 4 Mass. 416, 3 Am. Dec. 227; Mannix v. Rioridan, 75 App. Div. 135, 77 N. Y. Supp. 357; Pittsburgh, etc., Ry. Co. v. Stickley, 155 Ind. 312, 58 N. E. 192; Davis v. Waggoner, 42 Ind. App. 115, 83 N. E. 381, 84 N. E. 1105.

Judgment affirmed.

(200 N. Y. N.)

SMITH v. MILLIKEN BROS., Inc.

(Court of Appeals of New York. Nov. 15, 1910.)

1. APPEAL AND ERROR (§ 501*) — QUESTIONS REVIEWABLE—EXCEPTIONS.

Questions argued, but not presented by any exception in the record on appeal will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.*]

2. APPEAL AND ERROR (§ 909*) — PRESUMPTIONS—INJURY TO SERVANT—NOTICE—SUFFICIENCY.

A notice under the employer's liability act (Consol. Laws, c. 31) produced by the servant on the trial of his action is sufficient to create a presumption that it was signed by him or in his behalf within the meaning of the statute, and the objection that it was not signed by the servant or any one in his behalf, but was signed in typewriting will not be considered where the notice has not been presented on the argument.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 909.*]

3. MASTER AND SERVANT (§ 252*)—EMPLOYER'S LIABILITY ACT—NOTICE OF INJURY—SUFFICIENCY.

A notice of a personal injury to a servant which sets forth with necessary completeness the time, place, and nature of the injuries, and which avers that the injuries were caused solely by the master's negligence in that his foreman, exercising superintendence, negligently conducted himself in connection with acts of superintendence and negligently started a machine, injuring the servant, is sufficient under the employer's liability act (Consol. Laws, c. 31) to apprise the master of the cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 242*)—ASSIGNMENTS OF ERROR—QUESTIONS REVIEWABLE.

Where, by consent of defendant, rulings were reserved on motions at the close of plaintiff's case and at the close of the entire case to dismiss the complaint and for a nonsuit on grounds going to the merits, and the case was submitted to the jury, and after verdict defendant's counsel moved to set it aside on the grounds provided in Code Civ. Proc. § 999, and renewed his motion to dismiss the complaint, and the court entertained the motion and reserved its decision, and later made an order denying the motion to set aside the verdict and ignoring the motion to dismiss, defendant had no exceptions resulting from his motion to dismiss, but he was confined to such exceptions as might be argued under the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 242.*]

5. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—NEGLIGENCE—ACTS OF SUPERINTENDENCE.

In an action under the employer's liability act (Consol. Laws, c. 31) for injuries to a servant, evidence held to support a finding of negligence of a co-employee while exercising acts of superintendence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-980; Dec. Dig. § 279.*]

6. MASTER AND SERVANT (§ 189*)—INJURY TO SERVANT—NEGLIGENCE—ACTS OF SUPERINTENDENCE—"SUPERINTENDENT."

The mere presence of a superior employee does not necessarily prevent a subordinate em-

ployé from acting as a superintendent within the employer's liability act (Consol. Laws, c. 31).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 189.*]

For other definitions, see Words and Phrases, vol. 7, p. 6792.]

7. TRIAL (§ 253*) — INSTRUCTIONS — IGNORING EVIDENCE.

An instruction in an action for injuries to an employé caught in machinery which seeks to charge the employé with the absolute duty of getting away from the machinery between the time he heard a co-employé giving an order to start the machinery and the time when the machinery was started, and which makes no allowance for the possibility that the employé could not act quickly enough to escape injury as indicated by the evidence, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by James Smith against Milliken Bros. From a judgment entered on an order of the Appellate Division (133 App. Div. 903, 117 N. Y. Supp. 285), affirming by a divided court a judgment for plaintiff, defendant appeals. Affirmed.

Frank V. Johnson, for appellant. Thomas J. O'Neill, for respondent.

HISCOCK, J. The action is brought under the employer's liability act (Consol. Laws, c. 31) by the respondent against the appellant, his employer, to recover for personal injuries. The latter, at its plant on Staten Island, was engaged in installing and adjusting a large machine with rollers and cogwheels, designed for straightening iron beams. One Miller was the superintendent having general charge of the work, and one Smith was his assistant, having power to give directions to plaintiff and other employes. On the occasion of the accident Smith directed the respondent to readjust a certain screw for the purpose of perfecting the operations of the machine, and while he was engaged in this work, and standing in whole or part on a cogwheel, Smith directed Miller, who was manually operating the lever by which the machine could be set in motion, to "go ahead." The result was that Miller, obeying this direction or signal, set the machine in motion and respondent was injured.

Counsel for the appellant has advanced several reasons for the reversal of the judgment, to which reply at length has been made by the learned counsel for the respondent, when an inspection of the record discloses that many of them are not presented for our consideration by any exception.

The first of those requiring consideration involves the sufficiency of the notice served under the act in question. When this was offered in evidence no objection was made as now argued that it did not properly state the place of the accident. The only objec-

tions which were made, and which require any attention were that the notice was not signed by the plaintiff or any one else in his behalf, but signed in typewriting, and that it did not "comply with the requirements as laid down in the decisions, the cause being stated as a general one and not specifically." The notice itself has not been presented on the argument and, therefore, we are unaware whether it was signed in typewriting or otherwise, and, furthermore, I do not regard that as material. The fact that the notice was produced by and in behalf of the respondent on the trial of the action is sufficient at least to create a presumption that it was signed by him or in his behalf within the meaning of the statute. The second objection presents a closer question. The notice is not a model in form, and is subject to some of the criticisms which were expressed in *Finnigan v. N. Y. Contracting Co.*, 194 N. Y. 244, 87 N. E. 424, 21 L. R. A. (N. S.) 233. I think, however, that on the whole, it is our duty to uphold it. So far as this appeal is concerned it must be regarded as stating with all necessary completeness the time and place and the nature of the injuries received. Then, after considerable circumlocution and allegations of various legal defaults, it does finally state the actual cause and manner of the injury—"that said injuries were caused * * * solely by your (the appellant's) negligence, * * * in that your foreman having and exercising superintendence over and in connection with me, negligently conducted himself in connection with said acts of superintendence and negligently and without warning started the machine in connection with which I was working, as a result of which I was caught in the gears and received the injuries aforesaid." This, I think, apprised the employer with reasonable certainty of the real cause of the accident. The material thing least identified is the machine on which respondent was working and in which he was caught. But with the other details which are given of time and place, I do not regard this lack of definiteness as sufficiently serious to invalidate the notice, within the cases of *Bertolami v. United Engineering & Contracting Co.*, 198 N. Y. 71, 91 N. E. 267; *Hurley v. Olcott*, 198 N. Y. 132, 91 N. E. 270; *Logerto v. Central Building Co.*, 198 N. Y. 390, 91 N. E. 782.

Both at the close of the plaintiff's case and at the close of the entire case a motion was made to dismiss the complaint and for a nonsuit on various grounds going to the merits of the action. With the consent of the defendant in each instance the ruling on the motion was reserved and the case was generally submitted to the jury. The questions whether Miller, the superintendent who worked the lever, and Smith, the assistant, who gave the directions which resulted in setting the machine in motion, were exercising acts of superintendence within the meaning of the statute were left as questions of

fact to the jury and no exceptions were taken to such disposition. Subsequently when the verdict of the jury had been rendered, appellant's counsel moved to set aside the verdict on the various grounds provided in section 999 of the Code of Civil Procedure, and also stated: "I * * * renew my motion to dismiss the complaint as previously made and undetermined." The court entertained the motion and again reserved its decision and later an order was made denying the motion to set aside the verdict and for a new trial and ignoring the motions for a nonsuit on which decision had been reserved. Under these circumstances, the appellant has no exceptions resulting from his motion to dismiss the complaint, and is simply confined to such exceptions as may be argued under the motion for a new trial.

There are two of these which perhaps present a considerable portion of the questions which were argued on the motion for a nonsuit. The court was asked to charge "that the act of C. E. Smith, whether foreman or assistant foreman, in giving the signal to start the machine while the work of adjusting the same was in progress, was the act of a coservant and not the act of the defendant." Also "that the defendant is not liable for the negligence of C. E. Smith in signaling to Miller to start the machine, as he was not at the time performing acts of superintendence within the employer's liability act, but a mere detail of the work." Exception was taken in each instance to the refusal of the court so to charge and thereby is fairly presented the inquiry whether Smith was or by the jury could be said to have been exercising superintendence when he gave the directions to start the machine which resulted in respondent's injuries. I think that a jury could have been permitted to say that he was exercising such acts of superintendence, and that therefore the requests were properly denied.

There was evidence that Miller, the superintendent, directed respondent to obey the orders of Smith, and that he had been doing so for some time. While Miller had charge of a large number of men, Smith also had charge of a considerable number who were subject to his orders, and some or all of whom were engaged at the time in work upon this machine. He directed the respondent what to do at the time he was injured, and he was occupying a position on the machine where he could observe the work which was being done and give directions in connection therewith, while Miller, who, generally speaking, was his superior, was on this occasion engaged in performing part of the manual labor connected with adjusting the machine, and was not giving any orders.

Smith, who was called as a witness by the defendant, gave some testimony which is important in determining his status at the time of the accident. After testifying that he was assistant foreman he stated, referring to

the time of the accident: "At that time I had twenty-five to thirty men under me on this job. I received my orders from Mr. Miller and handed them to them. If I saw anything to be done I would not go and ask Mr. Miller about it. I was their boss. * * * I was standing up on top of the machine between the housing; directly back of me was Mr. Evans, and Mr. Smith was on the other side of the machine adjusting one of the rolls. * * * I was stooping down in between the housing watching a roll as it was being shoved over. When it got far enough, I told Mr. Evans, who was directly back of me, that it was far enough, and I also told Mr. Miller to start up; * * * that the roll was all right to go ahead and straighten the bar. * * * He (Mr. Evans) then got off and I gave the command again, and Mr. Miller started the machine one point." In my opinion this evidence, with other testimony, permitted the jury to say that although, generally speaking, Miller was the superior, on this occasion and for the time being he had abdicated his position of command and was devoting himself to purely manual work, while the man who was ordinarily his assistant and subordinate was acting as superintendent in overseeing the work which was going on and determining when one step in the adjustment of the machine had been completed, and when the next one should be taken. It permitted the jury to take the view that this was superintendence rather than the one urged by the appellant that Miller was acting as superintendent, and that Smith's directions were merely a signal to be passed on by Miller. *Guilmartin v. Solvay Process Co.*, 189 N. Y. 490, 82 N. E. 725; *Gallagher v. Newman*, 190 N. Y. 444, 83 N. E. 480.

The mere presence of a superior does not necessarily prevent a subordinate from acting as a superintendent. This is apparent, and the principle was practically involved and settled in *Andersen v. Penn. Steel Co.*, wherein a judgment for the plaintiff was affirmed. 197 N. Y. 606, 91 N. E. 1100. In that case the intestate was killed through the alleged negligence in superintendence of one Lannon, who was a mere "pusher" or foreman of a gang of men in removing some steel work in connection with Blackwell's Island bridge, while one Wright was foreman in general charge. The court was asked to charge "that if they find Wright, the foreman, was present at the time of the accident, Lannon cannot be treated as superintendent within the meaning of the law." It declined so to do, and instead charged: "If Wright was present and engaged in superintendence of this particular work upon which the decedent was engaged at the time of the accident, then they cannot find that Lannon was there acting as superintendent." This was

excepted to, and, of course, approved by the affirmance of the judgment.

Complaint is also made because the court refused to charge "that if the words 'All right, go ahead,' or similar ones, were always used to start the machine, plaintiff having heard these words shouted by C. E. Smith, and knowing that immediately thereafter the machine would be started, was bound to step off the gearing to a place of safety, and if he failed to do so, and as a result of such failure he was injured, he cannot recover, as he was guilty of contributory negligence." One trouble with this request is that it sought to charge the respondent with the absolute duty of getting off the gears between the time he heard Smith give the order to go ahead and the time when the machine was started. It makes no allowance for the possibility that he could not do this quickly enough to escape injury, and the evidence indicates that the latter was the fact.

I recommend that the judgment be affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

(200 N. Y. 41)

VON BREMEN et al. v. MacMONNIES et al. (Court of Appeals of New York. Nov. 22, 1910.)

1. GOOD WILL (§ 6*)—SALE—CONSTRUCTION OF CONTRACT.

Where the law gives the term "good will," as used in an instrument transferring a business, a definite meaning, it must be presumed that that meaning was intended in the contract of sale.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6; Contracts, Cent. Dig. § 920.]

2. GOOD WILL (§ 6*)—RIGHT TO CARRY ON BUSINESS.

Though a business is transferred, together with the good will thereof, the assignor may carry on a similar business in the same locality, in the absence of an express agreement not to do so.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6; Contracts, Cent. Dig. § 920.]

3. GOOD WILL (§ 6*)—TRANSFER—EFFECT.

Where the good will of a business is transferred by the assignor's voluntary act and not by operation of law, the vendor may not thereafter compete with the purchaser, by soliciting trade from the customers of the old business, though he may sell to such customers without soliciting, though they were on a list of customers compiled by the old firm and abstracted by the vendor.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6; Contracts, Cent. Dig. § 920.]

4. GOOD WILL (§ 6*)—TRANSFER—VOLUNTARY TRANSFER.

The fact that the transfer of a business, together with its good will, by a copartnership

was made only a few weeks before the actual termination of the partnership, and to prevent the liquidation of the business, would not make the sale of the good will compulsory and not voluntary, within the rule that the voluntary sale of the good will of a business excludes the vendor from soliciting trade from the customers of the old business.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6;* Contracts, Cent. Dig. § 920.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry Von Bremen and another against Frank MacMonnies and another. From a judgment of the Appellate Division (188 App. Div. 819, 122 N. Y. Supp. 1087), affirming, as modified, a judgment for plaintiffs, they appeal, by permission, on certified questions. Questions answered.

See, also, 139 App. Div. 905, 123 N. Y. Supp. 1146.

The order granting leave to appeal certified the following questions:

First. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from soliciting the trade of the customers and the persons, firms, and corporations who purchased merchandise from the firm of Von Bremen, MacMonnies & Co., of which the plaintiff Von Bremen and the defendants were copartners. Second. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from soliciting the trade of the persons, firms, and corporations named on the list of trade established by the firm of Von Bremen, MacMonnies & Co., and abstracted by the defendants, as found by the court in its decision. Third. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the customers and the persons, firms, and corporations purchasing merchandise from the firm of Von Bremen, MacMonnies & Co., of which the plaintiff Von Bremen and the defendants were copartners. Fourth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations mentioned on the list of trade, compiled by the firm of Von Bremen, MacMonnies & Co., and abstracted by the defendants as found by the court in its decision. Fifth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations who were customers of or purchased merchandise from the firm of Von Bremen, MacMonnies & Co., of which the plaintiff Von Bremen and the defendants

were copartners, and whose trade was solicited by the defendants since selling their interests in the said firm to the plaintiff Von Bremen. Sixth. Whether, upon the facts found in this case, the plaintiffs are entitled to an injunction against the defendants restraining them from dealing with, or selling merchandise to, the persons, firms, and corporations mentioned on the list of trade compiled and established by the firm of Von Bremen, MacMonnies & Co., abstracted by the defendants, as found by the court in its decision, whose trade has been solicited by the defendants.

Gustav Lange, Jr., for appellants. George W. Titcomb, for respondents.

WILLARD BARTLETT, J. (after stating the facts as above). On May 10, 1904, one of the plaintiffs, Henry Von Bremen, and the defendants Frank MacMonnies and William Von Elm entered into a copartnership under the firm name of Henry Von Bremen & Co., subsequently changed to Von Bremen, MacMonnies & Co., for the transaction of an importing and commission business in buying, taking on commission, and selling all sorts of fancy groceries, which copartnership by the terms of the agreement was to continue until the 30th day of April, 1909. On February 10, 1909, the defendants sold to the plaintiff Henry Von Bremen "all their right, title, and interest in all the assets, good will, trade-marks, and other property of every name and nature wheresoever located of the firm of Von Bremen, MacMonnies & Co., together with all debts and things in action due or owing by or from any person or corporation to said firm." The consideration for this transfer was the payment of \$44,000, which was \$1,500 more than the book value of the property transferred. There was no specific valuation of the good will. The plaintiffs Henry Von Bremen and Herman T. Asche, under the firm name of Von Bremen, Asche & Co., have succeeded to the business thus purchased by the plaintiff Henry Von Bremen individually. Shortly after his purchase, the defendants formed a partnership under the firm name of MacMonnies & Von Elm for the transaction of a similar business in fancy groceries. In the competition which thus arose the defendants have done or threatened to do various acts which the plaintiffs contend have a tendency to lessen or destroy the good will of the business which they acquired from the defendants by means of the transfer which has been mentioned. The present suit was brought to enjoin such acts. The trial court, by its interlocutory judgment, granted a portion but not the whole of the relief for which the plaintiffs prayed. It enjoined the defendants from using the cable address of the old firm, which was "MacMonnies;" from using a list of 2,200 dealers in fancy groceries which had been compiled by the old

firm; and from using labels, brands, trade-marks, bottles, tins, and other packages, such as were exclusively owned or controlled by the old firm. The interlocutory judgment also directed an accounting for the profits realized by the defendants and an assessment of the damages sustained by the plaintiffs.

Upon their appeal to the Appellate Division, the plaintiffs obtained some additional relief, but still not as much as they desired. The injunction granted at Special Term was extended so as to enjoin the defendants from soliciting the agency for the sale of articles of which the old firm had the exclusive agency and from soliciting orders for goods packed under special labels, trade-marks, and brands devised for the old firm for special customers. One member of the Appellate Division thought that the defendants should also be restrained from soliciting any of the customers of the old firm, but a majority of the court refused to go as far as this. The principal question presented by the plaintiffs' appeal to this court is whether the injunction should be thus extended.

The answer to this question depends upon the meaning to be given to the term "good will" in the transfer of the business of the old firm of Von Bremen, MacMonnies & Co. to the plaintiff Henry Von Bremen on February 10, 1909. If the law assigns a definite meaning to the term as used or implied in the voluntary transfer of a business, it must be presumed that such was its signification in this contract. We have to inquire, then, what are the restraints which the law imposes upon the assignor of the good will of a business, who transfers the same voluntarily, and not as the result of bankruptcy proceedings or under like compulsion.

The principal definitions of good will were fully stated and discussed by Judge Vann in *People ex rel. A. J. Johnson Co. v. Roberts*, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126, and it is not necessary to repeat that statement or discussion here. Of all the noteworthy definitions the narrowest is probably that of Lord Eldon, who, in 1810, defined good will as "the probability that the old customers will resort to the old place." *Crutwell v. Lye*, 17 Vesey, Jr., 335, 346. On the other hand, one of the broadest definitions is that suggested in 1859 by Vice Chancellor Page-Wood, who declared that good will included "all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it." Again, he said: "Good will must mean either advantage * * * that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on or with the name of the late firm or with any other matter carrying with it the bene-

fit of the business." *Churton v. Douglas*, 2 M., D. & De G. 294.

Whatever definition of good will may be adopted, however, it appears to have been uniformly held that in case of a transfer thereof, the assignor, in the absence of an express agreement to the contrary, may carry on a similar business in the same locality. The question which has given most trouble to the courts in such cases has related to the right of the vendor of the good will to solicit business from the customers of the old firm. In England the controversy on this subject extends from the case of *Labouchere v. Dawson* (Law Reports [13 Equity] 322), decided by Lord Romilly, Master of the Rolls, in 1872, to *Trege v. Hunt* (Law Reports, 1896 [Appeal Cases] 7), decided by the House of Lords in 1895. *Labouchere v. Dawson* was the case of a sale of a brewery business upon the death of one of two partners. The surviving partner set up business as a brewer—there being no stipulation to prevent him from so doing—and solicited orders from customers of the old firm. Lord Romilly held that although he might go into the brewing business himself and publicly advertise that business, he could not lawfully apply to any customer of the old firm, "either privately by letter, personally, or by a traveler, asking such customer to deal with the defendant and not with the plaintiffs." Another distinguished Master of the Rolls, Sir George Jessel, laid down the same rule in *Ginesi v. Cooper & Co.* (14 Chancery Division, 593), decided in 1880, and went still further, declaring that he was prepared to hold, if the question had been raised, that the assignor of the good will could not even deal with the customers of the old firm, although they came to him unsolicited. The same learned judge carried this view of the law into effect in a subsequent case (*Leggott v. Barrett*, 15 Chancery Division, 306), where he granted an injunction which forbade the vendor of a business not only from soliciting trade from the customers of the former firm, but also from dealing with such customers at all. The Court of Appeal, however, vacated the latter part of the injunction. Shortly afterward the same court held that the doctrine of *Labouchere v. Dawson*, supra, against the solicitation of business from customers of the former concern did not apply and should not be extended to cases of compulsory alienation, so that "if the assignees of a bankrupt sell his business and good will the purchaser cannot restrain the bankrupt either from commencing a similar business himself or from soliciting his old customers to deal with him in his new business." *Walker v. Mott-ram*, 19 Chancery Division, 355.

Although the decision last cited apparently sanctioned the rule laid down in *Labouchere v. Dawson*, the doctrine of that case was distinctly overruled by two out of the three judges of the Court of Appeal (*Baggallay and Cotton, L. JJ.*, against Lind-

ley, L. J.) in *Pearson v. Pearson* (27 Chancery Division, 145), decided in 1884. The rule that the vendor of a partnership business may not solicit trade from the customers of the old firm was rejected and an injunction which had been granted prohibiting such solicitation was dissolved upon appeal. The law as thus declared remained unquestioned for more than 10 years. It was during this period that the case of *Marcus Ward & Co. v. Ward*, 15 N. Y. Supp. 913,¹ was decided by the General Term of the Supreme Court in the First Department, expressly following *Pearson v. Pearson* as the latest expression of judicial opinion in England on the subject. The question does not appear ever to have reached this court until now. It finally went to the House of Lords in 1895, in the case of *Trego v. Hunt* (Law Reports, 1896 [Appeal Cases] 7), where it received elaborate consideration in opinions by Lord Herschell, Lord Macnaghten, and Lord Davey, resulting in a disapproval of the decision of the Court of Appeal in *Pearson v. Pearson* and a restoration of the doctrine of *Labouchere v. Dawson*.

The substance of the decision of the House of Lords in *Trego v. Hunt* may be briefly stated. The sale of the good will of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. The obligations imposed upon the vendor in the case of the sale of the good will are not necessarily the same under all circumstances. Lord Herschell conceded it to be the settled law that whenever the good will of a business was sold the vendor did not, by reason only of that sale, come under a restriction not to carry on a competing business. In cases where a partnership has been dissolved by effluxion of time or death, he thought it would be absurd to hold that those who formerly constituted the firm or their survivors should be restrained from carrying on what trade they pleased. But it does not follow "that because a man may by his acts invite all men to deal with him, and so amongst the rest of mankind invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. * * * It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable and does not result from any act of his. * * * But when he specifically and directly appeals to those who were customers of the previous firm he seeks

to take advantage of the connection previously formed by his old firm and of the knowledge of that connection which he has previously acquired to take that which constitutes the good will away from the persons to whom it has been sold and to restore it to himself." Lord Herschell deemed it immaterial to consider whether, on the sale of a good will, "the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor." He was satisfied that the obligation existed and that it ought to be enforced by a court of equity.

Lord Macnaghten, in his opinion in *Trego v. Hunt*, thus summarizes the various ways in which the doctrine of *Labouchere v. Dawson* may be supported: "A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of good will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different terms and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale; to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

The good will, which the owner thereof parts with in invitum, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination pursuant to the articles of copartnership, is a lesser property than the good will which is the subject of a voluntary sale and transfer by the owner for a valuable consideration. In the first class of cases the former owner remains under no legal obligation restricting competition on his part in the slightest degree; in the second class of cases the former owner, by his voluntary act of sale, has excluded himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from customers of the old business. To this extent this good will is a more valuable property than the good will of a business which goes to a trustee in bankruptcy or a receiver or survivor of a partnership in liquidation. The good will which is the subject of a voluntary sale is, therefore, a different thing from the good will which the owner parts with perforce or under compulsion. This is a necessary implication from the principle upon which *Labouchere v. Dawson* and *Trego v. Hunt* were decided.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 61 Hun, 625.

The necessity for the distinction which the law thus makes may readily be illustrated. If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale, not to solicit trade from customers of the old firm, merchants who had been in trade as partners of undesirable associates would constantly find themselves, by the mere fact of the dissolution of the firm they desired to leave, disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free, affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself as against the vendee of any special knowledge or advantage derived by him from the business whose good will he has voluntarily sold.

Courts of high repute in this country have adopted the same view as that of the House of Lords in *Trego v. Hunt* in reference to the right of a voluntary assignor of the good will of a business to solicit trade from old customers. It obtains in Massachusetts, New Jersey, Michigan, Rhode Island, Illinois, and Pennsylvania. *Hutchinson v. Nay*, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199; *Ranft v. Reimers*, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; *Wentzel v. Barbin*, 189 Pa. 502, 42 Atl. 44. Connecticut seems to be the only state in which a court of last resort has entertained a contrary view. *Cottrell v. Babcock P. P. M. Co.*, 54 Conn. 122, 6 Atl. 791. The rule thus sanctioned in England and in so many states of the Union commands our approval, and we feel bound to give it our assent in answering the questions certified to us in the present case.

It is suggested in the opinion of the Appellate Division that the sale of the good will in this case was not really voluntary, but should be regarded as compulsory inasmuch as it merely anticipated by a few weeks the actual termination of the copartnership and was made as an alternative of a liquidation. It seems to us, however, under the findings, that it must be deemed to have been a voluntary transaction no matter how powerful were the motives which led the parties to enter into it. It was a thing which they were at liberty to do or to refrain from doing; and hence the sale was of a character which falls within the doctrine that has been discussed.

The interlocutory judgment must therefore be modified by extending the injunction so as to forbid the defendants from soliciting

business from any customers of the former firm of Von Bremen, MacMonnies & Co., and as thus modified affirmed, with costs to the appellants.

The answers to the certified questions are as follows: The first and fifth questions are answered in the affirmative; the second question is not answered inasmuch as it does not appear whether or not the names on the list of trade therein mentioned were all those of former customers of the firm of Von Bremen, MacMonnies & Co.; the third, fourth, and sixth questions are answered in the negative.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(200 N. Y. 53)

BOOKMAN v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 22, 1910.)

1. NOTARIES (§ 3*)—OATH—STATUTORY PROVISION.

Under Code Civ. Proc. § 845, providing that when the oath is administered the witness shall lay his hand on the Gospels, etc., and section 846, providing that a witness shall repeat, "You do swear, in the presence of the ever-living God," etc., and section 847, providing that a solemn declaration or affirmation may be administered to a person who declares he has conscientious scruples against taking an oath, for a notary in administering an oath to affiants to have them sign the affidavit and then merely ask them if it is true, is insufficient to entitle him to the usual fees.

[Ed. Note.—For other cases, see Notaries, Dec. Dig. § 3.*]

2. MUNICIPAL CORPORATIONS (§ 258*)—FISCAL MANAGEMENT—PAYMENT OF DEBTS—NOTARIES—FEES.

Code Civ. Proc. § 3281, specifically allows a notary to demand his fee for administering an oath in advance, and section 3291 provides for the reimbursement of an officer who is required to take an oath, etc. *Held* that, in view of these provisions, a notary who administers an oath to a municipal officer must demand his remuneration from such officer, who in turn may be reimbursed by the city, but the city cannot be held liable directly to the notary.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 258.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Joseph Bookman against the City of New York. From a judgment (133 App. Div. 242, 117 N. Y. Supp. 197) for defendant, plaintiff appeals. Affirmed.

Bruce R. Duncan, for appellant. Archibald R. Watson, Corp. Counsel (James D. Bell, of counsel), for respondent.

HAIGHT, J. The plaintiff in his complaint alleges that he was a commissioner of deeds for the city of New York, and as such, between the 1st day of January, 1902,

and the 30th day of June, 1907, both inclusive, he, at the request of the defendant, took 11,700 affidavits as such commissioner of deeds, for which he demands payment at the rate of 12 cents for each affidavit taken. The answer was a general denial. Upon the trial the plaintiff was sworn as a witness in his own behalf, and gave evidence tending to show that he was a clerk in the office of the commissioner of jurors in the county of Kings, receiving a salary of \$1,500 per year; that the duties which he performed were the opening and closing of the office, writing notices and sending them out for services, the picking out of jurors and sending them to the commissioner to be sworn and examined, and the performance of such other duties as he was asked to perform pertaining to the office. He also gave evidence tending to show that he took the affidavit of the commissioner to the jury list that was filed in the office of the clerk, and also the affidavit of the jury servers as to the mode and manner upon which they made services upon the jurors drawn. In answer to the question of the corporation counsel, "Did each and every one of the affiants, whose names are set forth in the bill of particulars, appear before you in person on the respective days set forth or set opposite their names and swear to the truth of the contents of the affidavits subscribed by them?" he answered, "I don't have them coming in to me and raising their hands; no, sir; they go and sign them, and I say, 'Is that true,' and they go right out." Is this a performance of his duties as commissioner of deeds according to the requirements of the statute which entitles him to the fee prescribed therefor? It will be observed that the affiant says nothing, and the only thing that the plaintiff says is, "Is that true?"

Section 845 of the Code of Civil Procedure provides: "Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand on the Gospels and express assent to the oath, and it shall be according to the present practice except that the witness need not kiss the Gospels." "The present practice," which has existed from a time whereof the memory of man runneth not to the contrary, is to the effect that you do solemnly swear that the contents of this affidavit subscribed by you is correct and true.

Section 846 provides that, "the oath must be administered in the following form, to a person who so desires, the laying of the hand upon the Gospels being omitted: 'You do swear, in the presence of the ever-living God.' While so swearing, he may or may not hold up his hand, at his option."

Section 847 provides that, "a solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any

form: 'You do solemnly, sincerely, and truly, declare and affirm.'"

Other forms are permitted to be adopted by other provisions of the Code, where the court or officer is satisfied that the same would be more solemn or obligatory, or in accord with the religious views of the affiant. It is therefore apparent that some form of an oath or affirmation is essential, by or in the presence of the officer, by which the affiant's conscience becomes bound with an oath. To those entertaining religious convictions, who believe in Christianity, the statute contemplates that they should take their oath with their hand resting upon the Gospels, or that they should swear in the presence of the ever-living God. To those entertaining other religious views, the court or officer may adopt such a ceremony as they recognize as binding upon their consciences; and if a person entertains no religious belief, he may be permitted to solemnly declare and affirm. Whatever the form adopted, it must be in the presence of an officer authorized to administer it, and it must be an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath. *People ex rel. Kenyon v. Sutherland*, 81 N. Y. 101, 37 Am. Rep. 481; *O'Reilly v. People*, 86 N. Y. 154, 158, 161, 40 Am. Rep. 525.

Whether or not the persons alleged to have been sworn by the plaintiff could be charged with perjury is not now before us for determination. The question now is, Has the plaintiff performed his duties as commissioner of deeds by administering oaths in accordance with the spirit and intent of the statute, so as to entitle him to the fee allowed therefor? We are aware that in the transaction of official business in our great governmental and municipal offices there has prevailed a tendency to disregard form and ceremony. But this should not be allowed to the extent of doing away with the statute, especially in so far as it pertains to the administering of an oath upon which the crime of perjury may be based. We consequently entertain the view that the plaintiff has failed to show that he has earned the fees for which he sues. We do not intend, however, to rest the determination of his case upon that ground alone.

The affidavits for which the plaintiff seeks to recover pay were taken by him in the office of the commissioner of jurors in the county of Kings, in which he was a clerk. He says the commissioner instructed him to take them. After the expiration of six years he presented a claim to the comptroller of the city for payment, and after the expiration of 30 days he brings this action against the city. The fee allowed a commissioner of deeds or notary public for the administering of an oath is primarily charged against the person asking to have the oath taken, and may be demanded by the officer before he

renders his service. Code Civ. Proc. § 3281. Where an officer is required, in the course of a duty imposed upon him by law, to take an oath, to be filed or recorded or to be transmitted to another officer, he is entitled to the fees necessarily paid by him to the officer who administered the oath. Code Civ. Proc. § 3291. We thus have an express provision of the statute giving the right of reimbursement to the officer who has paid the fee for the oath taken. If, therefore, the plaintiff administered the oath to the commissioner of jurors, or to those who served notices upon persons drawn as jurors, by direction of the commissioner, he should call upon the commissioner for the payment of his fees, and then the commissioner upon such payment would have the right to be reimbursed for the amount so paid.

It may be urged that inasmuch as the city is liable for the fees, an action should be permitted to be maintained against the city therefor by the person who earned the fees. We think not. Every municipal government has regulations for auditing of the accounts of its departmental officers at stated periods, at which all payments for fees and expenses can be carefully scrutinized. The fees of commissioners of deeds for the administering of oaths being a legitimate expenditure of the office, it is one of the items that the officer may properly have audited and allowed to him. The city by virtue of the statute is bound as by a contract to pay him therefor; but no such statutory or contractual relation exists between the city and the commissioner of deeds upon which an action can be founded. To hold otherwise would open the door for the bringing of actions against the city by the thousands of notaries public and commissioners of deeds residing in the city of New York for the recovery of fees for the administering of an oath to a city officer or employé, who did not at the time pay therefor, for a period of six years after the services were rendered. Such a ruling would seriously embarrass the management of the city government, involve it in needless litigation and expense, and deprive it of a reasonable opportunity to audit and allow the fees at or about the time they were earned. The better rule, we think, is to adhere to the remedy referred to in the provisions of the Code to which we have alluded. The commissioner of deeds' remedy is against the person who procured the service rendered, and if it is by a public officer it should be demanded at the time the service is rendered, or within such time thereafter as would enable the officer, in the presentation of his claim for audit, to include the same and be reimbursed. These provisions of the Code were not called to our attention or considered by us when we had under review the case of *Merzbach v. Mayor*, etc., of N. Y., 163 N. Y. 14 57 N. E. 96, or

the case of *Morgan v. City of New York*, 190 N. Y. 237, 82 N. E. 1089. And in so far as they are in conflict with the views herein expressed, they should be deemed modified. The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur. VANN, J., concurs on ground first stated in opinion.

Judgment affirmed.

(300 N. Y. 72)

ACKERMAN v. ACKERMAN.

(Court of Appeals of New York. Nov. 22, 1910.)

1. APPEAL AND ERROR (§ 1004*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.

Where the decision of the Appellate Division affirming a judgment of the trial court is not unanimous, the Court of Appeals may review the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

2. DIVORCE (§ 328*)—JUDGMENT—VALIDITY.

A decree of divorce obtained in a court of a sister state, on service by publication alone, by a husband who left the state where he had resided with his wife since their marriage in the state, is void as against the wife, where she had no notice of the action until after the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831-834; Dec. Dig. § 328.*]

3. DIVORCE (§ 26*)—GROUNDS—ADULTERY.

A husband who obtained a void decree of divorce, and who married another woman and cohabited with her, is guilty of adultery, justifying his wife in suing for a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 52-60; Dec. Dig. § 26.*]

4. DIVORCE (§ 1*)—RIGHT OF ACTION—STATUTES.

An action for divorce is purely statutory, and the courts have no common-law jurisdiction over the subject; the ecclesiastical law of England concerning divorce not having become a part of the law of the state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. DIVORCE (§ 62*)—RIGHT TO MAINTAIN ACTION—STATUTES.

Under Code Civ. Proc. §§ 1756, 1768, authorizing an action for divorce on the ground of adultery where the parties were married within the state, or plaintiff was a resident of the state when the offense was committed and is a resident when the action is commenced, and providing that a wife dwelling within the state when she commences the action is deemed a resident thereof though her husband resides elsewhere, a wife who resided in the state with her husband from the time of their marriage in the state until his departure therefrom to avoid a criminal charge, and who continued to reside in the state, could sue her nonresident husband for divorce on the ground of adultery committed in a sister state.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 208-216; Dec. Dig. § 62.*]

6. DIVORCE (§ 63*)—ACTIONS—LIMITATIONS.

Code Civ. Proc. § 1753, providing that a party "is not entitled" to a divorce on the ground of adultery where the action was not

commenced within five years after the discovery by plaintiff of the offense, is absolute and mandatory, and the quoted words are equivalent to "shall not have," and the period of five years begins when a wife discovers that her husband, having obtained a void divorce in the courts of a sister state, has married another woman and is cohabiting with her as his wife, though the cohabitation continues down to the commencement of the action.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 68.*]

7. DIVORCE (§ 68*)—ACTIONS—LIMITATIONS.

Code Civ. Proc. § 1758, providing that a party is not entitled to a divorce on the ground of adultery where the action was not commenced within five years after the discovery by plaintiff of the offense, is a statute of limitations merely destroying the remedy without affecting the cause of action, and hence the limitation is subject to the exception in section 401, declaring that if, when a cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state; and an action for divorce by a wife against her nonresident husband is not barred, though she did not begin the action within five years after the discovery of her husband's adultery, and though she might have commenced the action by substituted service of process under section 435 et seq.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 68.*]

Haight, Vann, and Willard Bartlett, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Nellie M. Ackerman against Charles M. Ackerman. From a judgment of the Appellate Division (123 App. Div. 750, 108 N. Y. Supp. 534) affirming a judgment for plaintiff, defendant appeals. Affirmed.

George P. Breckenridge, for appellant.
John Hill Morgan, for respondent.

COLLIN, J. The parties intermarried December 18, 1889, in the city of Brooklyn, N. Y., where they resided until January 21, 1891, when the defendant, by reason of a criminal charge against him, left the state of New York. In October, 1891, defendant was for a few days at Roselle, N. J., where the plaintiff visited him. He then went to Florida, where, on November 9, 1891, he was arrested, taken to Chicago, and afterwards confined in the Illinois state penitentiary. Upon his release he went to and became a resident of Florida. On the 30th day of November, 1895, he filed in the circuit court of St. Johns county, Fla., a bill asking for absolute divorce from the plaintiff on the ground of desertion. This action proceeded to a decree of February 27, 1896, dissolving the marriage between the parties. The plaintiff in this action (the defendant in the Florida action) was never served with process within the state of Florida, nor did she appear in said action in the state of Florida or voluntarily submit to the jurisdiction of the Florida court. The defendant told the plaintiff in a letter of October 6, 1896, received by her,

that he had obtained the divorce. October 14, 1896, the defendant remarried at Ocala, Fla., and thence, until the commencement of this action, the parties to such marriage continuously lived as husband and wife. From October 14, 1896, to February, 1897, they lived in Gainesville, Fla., and since February, 1897, they have lived at Baltimore, Md. The review of the evidence, permitted by the fact that the decision of the Appellate Division was not unanimous, apprises us that the remarriage of defendant and cohabitation between the parties thereto is the only proof of the adultery of the defendant upon which the decree is based. About the 19th day of October, 1896, the plaintiff received a letter from the defendant's mother telling plaintiff of the defendant's remarriage. Thereupon plaintiff wrote to the defendant's sister informing her of defendant's remarriage, and thereafter often wrote and talked to defendant's sisters regarding said remarriage and the defendant's living with his second wife, and asked if the defendant and his second wife had any children. In October, 1896, plaintiff's brother-in-law, acting upon plaintiff's request, investigated defendant's remarriage by corresponding with various parties in Florida, from whom he received letters about that time informing him that the defendant had remarried and was living in Florida with his second wife, and he then sought to bring the matter before a grand jury in Florida to have the defendant committed for bigamy. In 1902 or 1903 plaintiff's brother-in-law located the defendant at Baltimore, Md. The plaintiff has been at all times since December 18, 1889, a resident of the city or borough of Brooklyn, N. Y. This action was commenced January 27, 1906. The complaint alleged that between the 1st day of January, 1904, and the 1st day of December, 1905, the defendant committed adultery at Baltimore with the woman whom he married in Florida. The Trial Term held that the decree of the circuit court of Florida assuming to dissolve the marriage between the parties to this action had no binding force or effect upon this plaintiff, and that a divorce should be granted her in this action on the ground of adultery.

The conclusion of the trial court that the Florida divorce was void as to this plaintiff is uncontested by defendant and is indubitable. *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569, 123 Am. St. Rep. 585. Nor does the defendant oppose the rule of law that the marriage and cohabitation of defendant with his second wife constituted adultery. *McGown v. McGown*, 19 App. Div. 368, 46 N. Y. Supp. 285, affirmed upon opinion below, 164 N. Y. 558, 58 N. E. 1069; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129. The defendant contends, however, that plaintiff could not lawfully have the judgment dissolving the marriage between herself and the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendant, because she discovered the adultery of defendant more than five years before the commencement of this action, and therefore the judgment was forbidden by section 1758 of the Code of Civil Procedure.

This is a statutory action. The courts of this state have no common-law jurisdiction over the subject of divorce, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663. The law of England concerning divorces was, until the act of 1858, the ecclesiastical and not the common law, and did not become a part of the law of this state. *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563. In this state, prior to the first statute, that of March 30, 1787 (Laws 1787, c. 69), the colonial governor and his council of the Legislature had sole jurisdiction concerning divorces. A survey at the outset of those parts of the statute relevant to the questions presented here will be advantageous. A married person may maintain an action to procure a judgment "divorcing the parties and dissolving the marriage, by reason of the defendant's adultery," where (among other cases) the parties were married within the state, or the plaintiff was a resident of the state, when the offense was committed, and is a resident thereof when the action is commenced. Code Civ. Proc. § 1756. Section 1758 of the Code of Civil Procedure is, in part, "In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established: * * * (3) Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery, by the plaintiff, of the offense charged." When the action is brought by the wife, certain designated "regulations apply to the proceedings," one of which is: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties." Code Civ. Proc. § 1759. A wife dwelling within the state, when she commences the action, is deemed a resident thereof, although her husband resides elsewhere. *Id.* § 1768. Other sections contain provisions relating to temporary alimony, costs, and other matters not involved, as we think, in our review. The right of plaintiff to maintain this action is unquestioned and unquestionable, because the parties were married within the state, and because also she was a resident of the state, when the offense was committed and when the action was commenced.

Was the judgment forbidden by section 1758 of the Code of Civil Procedure? The language of the introductory clause of that section is in its effect absolute and peremp-

tory. The origin of the section is section 42 of title 1, chapter 8 of part 2 of the Revised Statutes of 1829, wherein the introductory clause read: "Although the fact of adultery be established, the court may deny a divorce in the following cases." This language remained unchanged, under the several revisions of the statutes, until 1880, and it gave the court the power to grant or deny, in his discretion, the divorce. In 1880 that part of the Revised Statutes which related to matrimonial actions was made a part of chapter 15 of the Code of Civil Procedure, and said section 42 became section 1758 of the Code, with, however, the introductory clause amended for the purpose of making it peremptory "In accordance with the settled construction thereof," to its present language. See note of Mr. Throop to the section. The words "is not entitled to" therein are, therefore, the equivalent of the words "shall not have."

The findings of the trial court make the conclusion unavoidable that plaintiff discovered the divorce and remarriage and consequently the adultery of defendant in October, 1896. She then became aware of the existence of the divorce and second marriage. She then ceased to be ignorant of them. Her husband then told her that he had obtained the divorce and within a short time thereafter her husband's mother told her that he had married another woman. Her brother-in-law, in an investigation of these matters, made at about the same time at her request, obtained the information that defendant was divorced from plaintiff, had remarried, and was living with his second wife in Florida. Such information gave just and cogent reason to plaintiff to believe that defendant had obtained a divorce from her and had married and was living with his second wife. When the plaintiff in October, 1896, ceased to be ignorant of those facts, when she was apprised of them by such sources and in such wise that she had just ground to believe them, then there was a discovery by her of them and of the adultery committed by defendant through them.

The complaint alleges, and the finding is, that the defendant committed the adultery between the 1st day of January, 1904, and the 1st day of December, 1905; the view underlying such averment and finding being, undoubtedly, that the cohabitation through each day constituted a new and independent offense discovered by plaintiff at the time of its commission. If this is the true view, this action was obviously commenced within five years after the discovery, by the plaintiff, of the offense charged. The authorities have firmly established, as it seems to us, the rule that the period of five years began when the plaintiff discovered in October, 1896, that the defendant had contracted a second marriage and was living and cohabiting with the woman, as his wife, whom he then married, although such cohabitation was continued down to the commencement of the action. The

principle of such rule was declared and applied by Chancellor Kent in *Williamson v. Williamson*, 1 Johns. Ch. 488, 492, in 1815, in the absence of a rule or statute upon the subject, upon the ground of public morality and security. The chancellor said: "The lapse of time will, also, and on the soundest principles of justice and policy, form another exception (than condonation) to the right of prosecution for a divorce. An acquiescence of five years, without any existing disability, was, by the civil law, and is, by the law of the continental nations who have adopted the civil law, a bar to a prosecution for adultery. The injured party is presumed to have pardoned or remitted the offense. * * * We may, perhaps, venture to say that to sustain a bill of divorce for adultery, after the husband (as in this case) has acquiesced under a knowledge of it, for 20 years, would be repugnant to the institutions of all mankind." The Legislature intended to and did incorporate in the Revised Statutes of 1829, in these words of limitation under consideration, the principle declared in the *Williamson Case* that a husband or wife who acquiesces through the period of five years in the adultery of his or her spouse, consisting in a second marriage and continuous cohabitation thereunder, shall be denied a divorce. Revisers' notes, 5 Edmunds' Stat. at Large, 40. In *Valleau v. Valleau*, 6 Paige, 207, 210, the wife, the defendant, remarried after her husband had absented himself from her for the space of more than six years. She after her remarriage continued to reside and cohabit with her second husband, which was the adultery complained of in the bill. The suit was commenced in 1836, the Revised Statutes of 1829 being then, of course, in force. Chancellor Walworth held that the complainant, the husband, had not proved that he was ignorant of the marriage and continued cohabitation of his wife with her second husband until within five years of the commencement of the suit, and said: "I presume the complainant in this case has proceeded upon the supposition that the adultery continued down to the death of Morin (the second husband), and that it was sufficient if the bill was filed within five years from that time. * * * The decision of this court, however, in the case of *Williamson v. Williamson*, did not proceed upon any such ground, as the defendant in that case had continued to cohabit with the husband of the second marriage down to the very time of the filing of the complainant's bill. But that case went upon the ground that the defendant had contracted a second marriage during the complainant's absence in the West Indies, and had from the time of such marriage continued to reside and cohabit with Parisien as her husband, and that the complainant after his return had acquiesced therein by neglecting to commence his suit for more than five years, which, according to the principles of the civil law, was a sufficient acquiescence

in the continued adultery of the defendant to bar a suit for a divorce by the lapse of time. The revisers in their report to the Legislature refer to this decision, as containing the principles which they had introduced into the Revised Statutes, on this subject. In conformity with that decision, therefore, I must declare the true construction, of the third subdivision of the forty-second section of the article of the Revised Statutes relative to divorces dissolving the marriage contract, to be that if the complainant knows that his wife has contracted a second marriage and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person even without the usual form of a marriage, the right to file a bill for a divorce for such adultery will be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit." The Supreme Court of Wisconsin, basing its decision upon *Williamson v. Williamson* and *Valleau v. Valleau*, has given to the statute of that state, copied from our statute, the same force and effect. *Dutcher v. Dutcher*, 39 Wis. 651. We deem these authorities conclusive and the rule established by them salutary. The state has a deep interest in the institution of marriage and proceedings for the dissolution of marriage relations. Public morality and those virtues which underlie society, as well as personal and property rights, have close relations with them and will not be protected or promoted by divorces sought after many years of acquiescence in their grounds, through evil and oppressive motives springing from the fact that the defendants have acquired tempting fortunes or reared innocent offspring whose futures may be thereby threatened.

We must now determine the effect of the finding of the trial court that after November, 1895, the defendant was continuously a nonresident. Section 401 of the Code of Civil Procedure provides: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state." If the provision of section 1758 that the court must deny the divorce where the action was not commenced within five years after the discovery by the plaintiff of the offense charged is a mere limitation barring to the plaintiff the remedy, and if section 401 applies to the action for divorce, the decree herein is obviously lawful. Such provision of section 1758 made statutory the principles declared and applied in *Williamson v. Williamson*, and its scope and nature are indicated by the reasoning and decision from which it sprang. The language of the opinion makes it clear that the court applied a limitation of time upon the right of plaintiff to enforce his cause of action, and that the cause of action did not depend upon or have as an

integral part of itself the condition that it be begun within the five years. The decision did not deny or destroy the liability of the defendant or plaintiff's right of action, but denied to plaintiff his remedy and created a judicial limitation of time in cases of that class. Undoubtedly a limitation of time may be the essence of and qualify a right of action so that it does not exist independent of the limitation (*Hill v. Supervisors of Renss. Co.*, 119 N. Y. 344, 23 N. E. 921; *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792); but the limitation in section 1758 is not of such character and quality. It, leaving the cause of action unaffected, destroys the remedy, and is in the class of limitations created by the general statute of limitations.

At the time plaintiff's cause of action accrued, defendant was without the state within the meaning of the provision of section 401 already quoted, and which is applicable to nonresidents. *Mayer v. Friedman*, 7 Hun, 218, affirmed, 69 N. Y. 608. Chapter 4 of the Code of Civil Procedure contains the general statute of limitations constituted of sections 362 to 415, inclusive. Section 414 contains this provision: "The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases: (1) A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties." Recent decisions of this court lead to the conclusion that defendant's continued nonresidence excepts, by virtue of section 401, from the time of the limitation in section 1758, the right of the plaintiff to prosecute the action. In *Conolly v. Hyams*, 176 N. Y. 403, 407, 83 N. E. 662, 663, it was held that section 405, providing that if an action be commenced within the time limited therefor, and be terminated in any other manner than a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited, and within one year after such a renewal or termination, was applicable to

an action to foreclose a mechanic's lien filed and enforceable under the provisions of the mechanic's lien law. Chief Judge Cullen, writing for a unanimous court, said: "The tendency of the latest decisions of this court has been to extend to all claims the benefit of the exceptions given by the Code of Civil Procedure to the bar of the statute of limitation, except where there is an express statute or contract to the contrary." And this statement is sustained by the decisions referred to by him, in one of which (*Hayden v. Pierce*, 144 N. Y. 512, 39 N. E. 638) it was held that the limitation upon the prosecution of rejected claims against the estates of decedents, prescribed by section 1822, was subject to the provisions of section 401. In *McKnight v. City of New York*, 136 N. Y. 35, 78 N. E. 576, we held that the limitation, in chapter 572 of the Laws of 1886, that actions of negligence against a municipality having 50,000 inhabitants or over "shall be commenced within one year after the cause of action therefor shall have accrued," was a special limitation and subject to suspension during the existence on the part of claimants of any of the disabilities specified in section 396. The principle, therefore, making the limitation in section 1758 subject to the exceptions in section 401, is firmly declared. *Wetyn v. Fick*, 178 N. Y. 223, 70 N. E. 497, is not to any extent in conflict with this principle, because therein the special limitation in section 1596 of the Code of Civil Procedure was in itself intended to be complete as to limitations, exceptions, and disabilities and, therefore, was within the exception of section 414, subd. 1. Nor is the fact that the plaintiff might have commenced the action by the substituted service of process provided by section 435 and the following sections of the Code of Civil Procedure material here. *Simonsen v. Nafis*, 36 App. Div. 473, 55 N. Y. Supp. 449.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY and HISCOCK, JJ., concur. HAIGHT, VANN, and WILLARD BARTLETT, JJ., concur in result upon the ground that each act of adultery constitutes a new cause of action.

Judgment affirmed.

(33 Oh. St. 36)

PETER v. PARKINSON, County Treasurer.
(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

TAXATION (§ 552½*) — SUIT BY COUNTY TREASURER—AUTHORITY OF COUNTY COMMISSIONER.

Where suit is brought by the county treasurer under favor of section 2859, Revised Statutes—section 5697, General Code—to enforce the collection of personal taxes which stand charged upon the duplicate in the name of the person against whom such suit is instituted, the board of county commissioners is without authority to compromise or settle such suit, or to remit or release, in whole or in part, the taxes sued for.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1067; Dec. Dig. § 552½.*]

(Additional Syllabus by Editorial Staff.)

2. JUDGMENT (§ 1*)—DEFINITION.

A judgment is the judicial determination or sentence of a court rendered in a cause within its jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1, 3, 4; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

3. TAXATION (§ 1*)—"DEBT"—"TAX."

A tax is not a debt, nor in the nature of a debt. It is an impost levied by authority of government, upon its citizens or subjects, for the support of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628; vol. 8, pp. 6867-6886, 7813.]

Error to Circuit Court, Holmes county.

Action by Charles D. Parkinson against Emil A. Peter. Judgment for defendant in the common pleas was reversed in the circuit court, and he brings error. Affirmed.

The defendant in error, Charles D. Parkinson, as treasurer of Holmes county, Ohio, filed his petition in the court of common pleas of that county against Emil A. Peter, plaintiff in error herein, alleging that personal taxes to the amount of \$4,883.95 stood charged on the tax duplicate of said county against said Emil A. Peter, that said taxes were due and unpaid, and that the defendant, Emil A. Peter, was indebted to plaintiff as treasurer of said county in that amount, and praying for judgment against said Emil A. Peter for said sum of \$4,883.95, with interest thereon from September 16, 1905. To this petition Emil A. Peter filed the following answer: "The defendant, for answer herein, admits that the said Charles D. Parkinson is the treasurer of said Holmes county, Ohio, and is acting as such, but defendant denies that personal taxes to the amount of \$4,883.95 stand charged on the tax duplicate of said county against him, and he denies that there are any taxes due and unpaid said treasurer or county. Defendant denies that he is indebted to the plaintiff in said sum of \$4,883.95, the said alleged amount charged against him, or in any sum whatever, and,

if any entry or charge exists on the records as alleged, the same is without authority or knowledge of the auditor of said county, and were not duly levied, and defendant denies that said sum or any sum whatever is charged against him on said duplicate as taxes and penalty. And defendant denies each and every allegation in the petition contained except such as are herein specifically admitted to be true. Wherefore, defendant prays that this action be dismissed at plaintiff's costs." To this answer Charles D. Parkinson, plaintiff below, filed the following reply: "The plaintiff, for reply to the answer of the defendant, denies each and every allegation thereof, except such as constitute admission of facts set forth in the petition. On February 19, 1908, the cause being then pending in the court of common pleas, S. D. Anderson and P. M. Deetz, two of the commissioners of Holmes county, together with the defendant in said action, Emil A. Peter, appeared in open court, and S. D. Anderson on behalf of the county commissioners stated to the court that the board of county commissioners had settled said cause with the defendant, Emil A. Peter, for \$1,000 and the costs of the action; neither the plaintiff, Charles D. Parkinson, nor his attorney being then present. On February 24, 1908, the plaintiff, Charles D. Parkinson, treasurer, with S. D. Anderson, P. M. Deetz, and William Hoerger, the three commissioners of Holmes county, and the defendant, Emil A. Peter, all appeared in open court, and said Charles D. Parkinson, treasurer, objected and protested against the settlement of said action as theretofore made by said commissioners and the defendant, Emil A. Peter." We learn from the bill of exceptions that the foregoing was all the evidence offered by either party on the trial of the case. Thereafter, to wit, on March 9, 1908, the court of common pleas approved and confirmed the settlement made and entered into between said commissioners and the defendant in said case, Emil A. Peter, and thereupon rendered judgment against said Emil A. Peter for said sum of \$1,000, and for costs, and further ordered, adjudged, and decreed that upon final payment of said \$1,000 and costs of suit, the said plaintiff, Charles D. Parkinson, as treasurer, be perpetually enjoined from collecting or attempting to collect from said Emil A. Peter, by suit or otherwise, any further sum for taxes alleged to be due from him. The plaintiff below, Charles D. Parkinson, treasurer, filed his motion asking that said judgment be set aside and for a new trial. This motion was overruled by the court of common pleas and exceptions were duly noted. Thereafter Charles D. Parkinson, as treasurer, filed his petition in error in the circuit court of Holmes county where the judgment of the court of common pleas was reversed, for the reason, as stated by the circuit court,

"that the judgment of the court of common pleas was wholly without authority and contrary to the law, and because the commissioners of Holmes county, Ohio, had no authority to settle this said cause then pending in the court of common pleas of said county," and the circuit court remanded the cause to the court of common pleas for a new trial. Thereupon error was prosecuted to the Supreme Court, and we are now asked to reverse this judgment of the circuit court and to affirm the judgment of the court of common pleas.

W. S. Hanna, for plaintiff in error. David T. Simpson, C. J. Fisher, and W. Stilwell, for defendant in error.

CREW, J. (after stating the facts as above). The defendant in error, Charles D. Parkinson, as treasurer of Holmes county, Ohio, commenced a civil action in the court of common pleas of said Holmes county against the plaintiff in error, Emil A. Peter, to enforce the collection of certain unpaid personal taxes which then stood charged upon the tax duplicate of said county against the said Emil A. Peter. The suit was brought under favor of section 2859, Bates' Rev. St. (section 5697, General Code), which section provides as follows: "When any personal taxes, heretofore or hereafter levied, shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes; and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate of said county against such person, that the same are due and unpaid, and that such person is indebted in the amount appearing to be due on said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as prima facie evidence on the trial of said suit of the amount and validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any other or further special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases; and the judgment debtor shall not be entitled to the benefit of the laws for stay of execution or exemption of homestead, or any other property,

from levy or sale on execution in the enforcement of any such judgment." This statute in express terms confers upon the county treasurer, in addition to any other remedy provided by law, authority to enforce the collection of unpaid personal taxes by civil action against the person in whose name such taxes stand charged upon the duplicate, and the Legislature has not by statute, or in any wise, delegated to or conferred upon any other officer, board, or person the right to so enforce or collect the same, the right of the treasurer in this behalf is therefore exclusive. The treasurer then having the sole and exclusive right to bring such action, and it being his duty to bring it, by what authority did the board of county commissioners intervene and compromise and settle said cause without the treasurer's consent and against his protest? It is claimed by counsel for plaintiff in error that authority to make such settlement was and is conferred upon the board of commissioners by section 855, Bates' Rev. St. (section 2416, General Code), which section provides as follows: "The board shall have power to compound for or release, in whole or in part, any debt, judgment, fine or amercement due to the county, and for the use thereof, except in case where it, or either of its members, is personally interested; and when the commissioners compound for or release, in whole or in part, any debt, judgment, fine, or amercement, they shall enter upon their journal a statement of the facts in the case, and the reasons that governed them in making such release or composition." That taxes are not embraced in either of the descriptive terms "fine" or "amercement" employed in the above statute is at once obvious, and is admitted, and we think it equally clear that although the assessment of the tax and its entry or charge upon the duplicate, may, for the purposes of statutory collection, as definitely and conclusively establish the right of the treasurer to demand such tax as would a judgment, yet such assessment and charge do not in a technical, or in any proper sense, constitute a judgment. A judgment is the judicial determination or sentence of a court rendered in a cause within its jurisdiction; and such is the common acceptance and meaning of the term, and it is in this sense, we think, and in this sense only, that the word judgment is used in the foregoing section. In the further consideration of this statute it remains then only to inquire whether or not within its meaning and intent a tax may be considered as a debt, and this also we think must be answered in the negative. In *City of Camden v. Allen*, 26 N. J. Law, 398, Chief Justice Green says: "A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement.

It operates in invitum. *Peirce v. City of Boston*, 3 Metc. [Mass.] 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon, contract express or implied." In *Perry v. Washburn*, 20 Cal. 318, Field, C. J., in discussing the provision of the act of Congress making United States notes "a legal tender in payment of all debts public and private," says: "Taxes are not debts within the meaning of this provision. A debt is a sum of money due by contract, express or implied. A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and state; it does not draw interest; it is not the subject of attachment; and it is not liable to set-off. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. It operates in invitum. If authority for the distinction is required, it will be found in the cases of *City of Camden v. Allen*, 26 N. J. Law, 398; *Peirce v. City of Boston*, 3 Metc. [Mass.] 520; and *Shaw v. Peckett*, 26 Vt. 482." In *Anderson's Dictionary of Law* a tax is defined to be: "A charge, a pecuniary burden, for the support of government. A charge or burden for which the state may make requisition in a prescribed mode. A tax is not a 'debt'; that is, an obligation for the payment of money founded upon contract. It is an impost levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to its enforcement; it operates in invitum. The form of procedure to collect, as, an action of debt, does not change its character." Other authorities which hold that a tax is not a debt are: *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *Meriwether v. Garrett*, 102 U. S. 472, 28 L. Ed. 197; *City of Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55, and 1 Cooley on Taxation (3d Ed.) p. 17. In the light of these authorities it seems clear that under no proper interpretation of section 855 can its provisions be so extended as to include taxes within the term "debt," and hence, a tax being neither a debt, judgment, fine nor amercement, no authority is conferred upon the board of county commissioners by the provisions of said section to compound, release, or settle the same. Nor is any such authority vested in the board by section 845, Rev. St., which prescribes and defines the general powers and duties of county commissioners.

Some reliance seems to be placed by counsel for plaintiff in error upon section 1038, Rev. St., which authorizes the correction of errors on tax list and duplicate by the county auditor, and empowers the board of county commissioners, under certain circumstances,

to order refunded taxes that have been erroneously charged and collected. But neither by this statute nor by any other is the board of county commissioners empowered to settle, remit, or release, either in whole, or in part, taxes that stand charged upon the duplicate and are unpaid. While in a sense the board of commissioners is the representative and financial agent of the county, its authority is limited to the exercise of such powers only as are conferred upon it by law. As said by this court in the first paragraph of the syllabus in *Jones, Auditor, v. Commissioners of Lucas County*, 57 Ohio St. 189, 48 N. E. 882, 63 Am. St. Rep. 710: "The board of county commissioners represents the county in respect to its financial affairs, only so far as authority is given to it by statute."

Another, and perhaps sufficient, reason why the county commissioners could not rightfully settle or remit the taxes sued for in this case is that such taxes were not wholly due to, nor were they wholly levied for, the use of Holmes county, but there was included therein as well, state, township, municipal, and other taxes.

Without stopping to consider or discuss the irregularity of the mode of procedure adopted by the trial court in this case, we think it sufficient to say that, for the reasons already stated, the judgment of the court of common pleas was unauthorized and erroneous, and the same was properly reversed by the circuit court.

Judgment affirmed.

SUMMERS, C. J., and SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(83 Oh. St. 1)

BURCHARD et al. v. STATE.

(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 260*)—TRIAL BEFORE MAYOR—APPEAL—BILL OF EXCEPTIONS—NOTING IN DOCKET.

Where a case is tried before a justice of the peace, mayor, or police judge, and the defendant, during the progress of such trial, "excepts to the decisions of the justice of the peace, mayor or police judge upon matters of law arising in the case," and a bill of exceptions is prepared, signed, and filed in accordance with section 6505, Revised Statutes (Bates'), it is not essential to the jurisdiction of the court of common pleas, where such bill is filed for a review of said decisions, that the justice of the peace, mayor, or police judge "note such signing and filing in his docket" as required by said section. The failure of the officer to make the notation in his docket does not warrant the court of common pleas in refusing to consider and pass upon the questions contained in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.*]

Error to Circuit Court, Champaign County.

Burchard and McCarthy were convicted of an illegal sale of liquor, and bring error. Reversed.

On the 29th day of September, 1909, the plaintiffs in error were tried before E. L. Bodey, mayor of the city of Urbana, on an affidavit which charged them with keeping a place in said city where intoxicating liquors were kept for sale. They were found guilty, and, after making that finding, the mayor continued the case until October 1, 1909, and on that day the said parties were sentenced to pay a fine of \$200 each and the costs of prosecution, and were to stand committed to the county jail until the fines and costs were paid. A motion for new trial was overruled, and, on the application of the defendants, the mayor suspended the execution of the sentences until October 5, 1909.

It is claimed by the state that on October 4, 1909, within three days after sentence, the mayor allowed and signed a bill of exceptions, and it shows that he ordered the same made part of the record. The certificate of the mayor at the close of the bill of exceptions recites: "Thereupon, upon motion of the defendants, the court suspended the execution of the sentence until the 5th day of October, 1909. Thereupon the defendants, within three days, to wit, on the 1st day of October, 1909, made a motion to set aside the judgment herein and for a new trial, which was overruled by the court, to which ruling by the court the defendants then and there excepted, and defendants tender this their bill of exceptions, which is allowed, signed, sealed, and ordered made part of the record. E. L. Bodey, Mayor." The transcript made by the mayor is silent as to the signing or allowing of the bill of exceptions. The bill of exceptions and the transcript of the mayor's docket were filed with the clerk of court of common pleas in due time, and on application for that purpose the court of common pleas granted the defendants leave to file their petition in error to review the judgments of said mayor, and it was filed in due time. At the October term of the court, on the 30th day of November, 1909, the court made the following disposition of the case: "This day this cause came on for hearing upon the petition in error, bill of exceptions and exhibits, and a transcript of the docket entries of E. L. Bodey, mayor of the city of Urbana, Ohio; whereupon the court after hearing arguments of counsel, and being fully advised in the premises, finds that the bill of exceptions was not duly signed by E. L. Bodey, mayor of the city of Urbana, Ohio, within the time prescribed by the statutes, and for this reason the court finds no error in the record of the court below. The judgment of the court below is therefore affirmed at the costs of the plaintiffs in error, and this cause is remanded to the said mayor for

execution of sentence. To all of which ruling and orders of the court plaintiffs in error except." The circuit court granted leave to file a petition in error in that court to review the said judgment of the court of common pleas, and a suspending bond was given. At the April term, 1910, the circuit court found "that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas," and affirmed its judgment without giving other reasons on the journal. The case is here on error to reverse the judgments of the lower courts.

Benjamin E. Seibert and George W. Poland, for plaintiffs in error. George Waite, Pros. Atty., Harold Houston, City Sol., and H. M. Crow, for the State.

PRICE, J. (after stating the facts as above). The court of common pleas, as shown by the journal entry, after hearing arguments of counsel for the parties, found that the bill of exceptions was not duly signed by E. L. Bodey, mayor of the city of Urbana, Ohio, "within the time prescribed by the statutes, and for this reason the court finds no error in the record of the court below. The judgment of the court below is therefore affirmed."

What was said by counsel in the arguments referred to does not appear, but it seems that there was no motion filed by the state to strike off the bill of exceptions, and, so far as we can determine by use of the record, the questions raised in the bill of exceptions had been argued by counsel, for outside of the bill there was but little to require argument. It is not unfair to infer that, after the case on error had been argued and submitted, the court discovered what it thought fatal to the bill and did not read or consider it. On the contrary, the court ignored the bill, and, there being no error apparent on the record outside the bill, the judgment of the mayor was affirmed.

If we look to the bill itself, we think it clearly appears that the court of common pleas was mistaken—perhaps misled by a few words that appear below and to the left of the signature of the mayor. In our statement of the case we have quoted from the certificate of the mayor to the bill, and it shows that it was presented and allowed and signed on the 1st day of October, 1909. When we turn to the transcript of the mayor's docket, transmitted by him to the court of common pleas with the bill of exceptions, we discover that after hearing the case on September 29, 1909, and finding the accused parties guilty, the case was adjourned until 9 o'clock a. m., October 1, 1909, and at this adjourned day the mayor overruled a motion for new trial and passed sentence. The transcript also shows that after passing sentence, on application of defendants, execution of

sentence was suspended until October 5, 1909. The reason for this suspension does not appear of record, except that it was on application of the defendants.

The transcript does not show when the bill was allowed and signed, but the certificate of the mayor recites that it was done on the 1st of October, 1909—the day judgment was rendered. The transcript is typewritten, except the signature of the mayor, and he signed his name to the right and at the end of the certificate, which is the proper place for the signature. There is written with pen and ink, three or four inches to the left and lower down on the page, these words: "Dated October 4, 1909." There is nothing to show who wrote the words, or when they were written. They do not appear above or in any way related to the mayor's signature, and cannot be allowed to control or contradict the statement properly preceding the mayor's name. Therefore we must conclude that, so far as can be properly shown by the bill itself, it was presented, allowed, and signed on the 1st day of October, which is the day the mayor rendered judgment, and of course within the 10 days prescribed by section 6565, Rev. St. (Bates).

But it is argued in the brief for the state that there is nothing in the transcript sent up by the mayor to show that he allowed and signed the bill of exceptions, and therefore it was not error for the court of common pleas to disregard it. This is the more serious question in the case, although not expressed in the judgment entry made by the court of common pleas, and it becomes necessary to consider section 6565, above mentioned. It provides: "In all cases before a justice of the peace, mayor or police judge, whether tried by jury or the justice, mayor or police judge, either party shall have the right to except to the decisions of the justice, mayor or police judge, upon any matters of law arising in the case. The party objecting to the decision must except at the time the decision is made, and on application made then or immediately after the overruling of a motion for a new trial, decision rendered or sentence pronounced, time shall be given to reduce the exceptions to writing, but not more than ten days nor less than five days beyond the date of overruling the motion for a new trial, if such motion be made, or from the date on which the decision or sentence of the justice, mayor or police judge, is rendered; * * * the party excepting must reduce this exception to writing, and present the same to the trial justice, mayor or police judge, or his successor, within the time herein limited, and if such bill of exceptions be not correct he shall make the necessary corrections therein within three days after it is so presented, and when correct shall sign the bill of exceptions and file the same with the papers in the case, and note such signing and filing in his dock-

et, and transmit the same with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas and by him filed and entered upon his trial docket as in other cases." The language of the latter part of the section now pertinent is: "And if such bill of exceptions be not correct, he shall make the necessary corrections within three days after it is so presented, and, when correct, shall sign the bill of exceptions and file the same with the papers in the case, and note such signing and filing in his docket, and transmit the same with the transcript of his docket and original papers within ten days of the date of such signing, to the clerk," etc. Because the mayor did not "note such signing and filing in his docket," it is urged that the bill is not valid and may be disregarded.

It is true that the transcript is silent as to the signing and filing of the bill; but should the neglect of the mayor defeat the efforts of plaintiffs in error to have their case reviewed? The statute does not prescribe in what form or language the mayor shall note the signing and filing, and this ministerial act is not required to be done until the correct bill is signed and filed. After he has signed and filed the bill with the papers in the case, the magistrate should note such signing and filing on his docket. It was no part of the duty of plaintiffs in error to make or cause such notation to be made. They had no control over the docket, and when they presented a true bill within the statutory time, and the same was duly signed by the mayor, the labor of plaintiffs in error was ended, because the statute requires the magistrate to file the bill with the other papers in the case, and, having noted the signing and filing, he must transmit the bill, transcript, and original papers to the clerk of the court of common pleas. The mayor has performed all things made incumbent upon him by the statute, except making the notation on his docket. The signing and filing precede the noting on the docket; but in this case, without making the note on the docket, the mayor performed the remaining duty of transmitting the bill, transcript, and original papers to the clerk of courts. So the court of common pleas had before it a correct bill of exceptions, signed by the mayor within the statutory time and by him filed with the other papers in the case, and in due time transmitted to the court of common pleas. If the noting the "signing and filing" on the docket required by the section is jurisdictional as to the fate of the bill after it reached the court of common pleas, the judgments of the lower courts may be justified. But we are of opinion that such act of noting on the docket is not jurisdictional, if all other steps prescribed by the statute have been taken in time. Such notation may aid in the identification of the

bill of exceptions; but there was no question raised by the state, or any one, concerning its identity, and the same was evidenced by the same signs that identified the transcript and other original papers in the case, and it would appear harsh, indeed, that a bill of exceptions shall be cast aside because the magistrate neglected to perform the one ministerial act involved in the discussion.

We are not disposed to construe a statute regulating the practice before a mayor or justice of the peace with more strictness than is applied to the practice in the court of common pleas and circuit court, under provisions of sections 5301 to 5302, Rev. St., inclusive, which were then in force. The noting on the docket the fact that a bill of exceptions had been signed and filed by the mayor, not being essential to the jurisdiction of the court of common pleas, the neglect of that ministerial duty is not the fault or neglect of the parties taking the bill.

It follows that we reverse the judgment of the circuit court, and also that of the court of common pleas, and remand the case to the court of common pleas with instructions to read, consider, and pass upon the bill of exceptions and the questions therein contained.

Judgment reversed.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and SHAUCK, JJ., concur.

(207 Mass. 32)

COMMONWEALTH v. ALTHAUSE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 22, 1910.)

1. FALSE PRETENSES (§ 9*)—BY PLEDGEE—WHAT CONSTITUTES PLEDGE—INCIDENTAL AGREEMENT—INDUCEMENT TO PARTING WITH PROPERTY.

A pledgor and pledgee may agree that the securities pledged, in which the pledgor has the general property and the pledgee a special property for the payment of the debt secured, may be sold by the pledgee and the proceeds used by him as owner of the securities, leaving to the pledgor the unsecured personal obligation of the pledgee to account for the value of the securities at the date of payment of the debt; and such agreement is not an incident to the pledge, but is an agreement authorizing the pledgee to end the pledge and the rights of the pledgor in the securities, and hence that such agreement was induced by a false pretense on the part of the pledgee did not render him guilty of obtaining the pledged goods through larceny by false pretense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 9.*]

2. FALSE PRETENSES (§ 9*)—BY PLEDGEE—INCIDENTAL AGREEMENTS—INDUCEMENT TO PARTING WITH PROPERTY.

Such agreement, where included in and a part of the pledge agreement, must, if possible, be construed as declaring the terms of the pledge, rather than as authorizing the pledgee to end the pledge and the interest of the pledgor,

and, to justify the pledgee in selling the securities and accounting for the value thereof at the date of the payment of the debt secured, must give him that right in terms admitting of no doubt.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 9.*]

3. EMBEZZLEMENT (§ 11*)—PLEDGED PROPERTY—REHYPOTHECATION BY PLEDGEE.

A pledgee may not, in the absence of an agreement authorizing it, rehypothecate the securities; such unauthorized use of them being a criminal offense, under Rev. Laws, c. 208, § 71.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

4. EMBEZZLEMENT (§ 11*)—PLEDGED PROPERTY—REHYPOTHECATION BY PLEDGEE.

Where A. borrows of B., and pledges to B. securities for the repayment of the loan, and as part of the agreement authorizes B. to pledge the securities en bloc with other securities owned by B. for money borrowed by him, a use of the securities is authorized, and is incidental to the pledge of them, and not directly destructive of it, and is not larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

5. EMBEZZLEMENT (§ 11*)—PLEDGED PROPERTY—SALE BY PLEDGEE.

A provision, in an agreement pledging securities for a loan, that the pledgee has the right to make use of the securities as he may desire, subject only to his obligation to deliver to the pledgor or order collateral of the same amount and kind as that pledged, does not authorize the pledgee to sell the securities until the pledgor is in default under some one of the conditions imposed on him, and a sale by the pledgee before that time is unauthorized, and constitutes larceny.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

6. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

One may not complain of an invited error, committed by the trial court adopting a view requested by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

7. INDICTMENT AND INFORMATION (§ 191*)—ISSUES AND PROOF—BILL OF PARTICULARS—"LARCENY."

A bill of particulars, filed with an indictment for larceny of a receipt, which alleged that accused told prosecutor that he would loan prosecutor money and take from him as collateral a negotiable receipt of a third person for certain bonds, that accused falsely represented to prosecutor that he intended either to keep the certificate in his possession or to place the same as collateral with a bank for a loan, that accused loaned to prosecutor money and received as collateral the receipt, that accused sold the receipt, that after the maturity of the debt prosecutor made demands on accused for the return of the receipt and tendered the amount of the debt, that accused declined to deliver the receipt or any receipt of the same amount, and that accused never intended to retain possession of the receipt, but at the time of making the representation and receiving the receipt he intended to dispose of the same, etc., permitted the commonwealth to prove common larceny, embezzlement, obtaining property by false pretenses, or larceny, defined by Rev. Laws, c. 208, § 26, making one who, with intent to defraud,

obtains property by false pretense guilty of "larceny."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 604-621; Dec. Dig. § 191.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

8. CRIMINAL LAW (§ 1028*)—APPEAL—ERRORS REVIEWABLE—OBJECTIONS IN LOWER COURT.

Accused may not complain of an error of which he did not complain at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2619; Dec. Dig. § 1028.*]

9. FALSE PRETENSES (§ 11*)—ELEMENTS OF OFFENSE—OBTAINING PROPERTY—NATURE OF PROPERTY—LARCENY BY FALSE PRETENSE.

The crime of larceny by obtaining property by false pretense consists in obtaining title to property by a false pretense, or by procuring a contract by false pretense under which one party passes title to the other party.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 15; Dec. Dig. § 11.*]

10. FALSE PRETENSES (§ 9*)—OBTAINING PROPERTY—ACT COMPLAINED OF AS INDUCEMENT TO PARTING WITH PROPERTY—"LARCENY BY FALSE PRETENSE."

Where special property in a negotiable receipt for corporate bonds passed to accused as pledgee of it to secure a note executed by the pledgor, who did not lose his general property in the receipt, and accused, procuring his special property by a false pretense, sold the receipt wrongfully, without regard to his rights as pledgee, he was not guilty of "larceny by false pretense," under Rev. Laws, c. 208, § 26, since the only effect which the false pretense had was on the possession of the receipt, which passed to accused by the making of the note for which the receipt was delivered as security.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. § 9.*]

11. FALSE PRETENSES (§ 7*)—OBTAINING PROPERTY—NATURE OF PRETENSE.

The fraud of obtaining property by buying it, intending not to pay for it, is not the crime of obtaining property by false pretense, under Rev. Laws, c. 208, § 26; the offense being the obtaining of property by a false statement of a fact.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 12; Dec. Dig. § 7.*]

12. FALSE PRETENSES (§ 52*)—OBTAINING PROPERTY—INSTRUCTIONS.

Where, on a trial for the larceny of a negotiable receipt for corporate bonds, delivered to accused as security for a note executed by the pledgor, the pledgor testified that accused stated at the time of the making of the pledge that he would merely use the security as collateral for a loan, and accused sold the security and claimed that he had a right to do so under the agreement, a charge that a representation as to a future transaction in the nature of a promise was not a false pretense, within the statute punishing larceny by false pretense, and that it was not a false pretense for one to fail to do in the future a thing he had promised to do, unless the promise was made to induce another to do a particular thing, etc., did not fully charge on the issue of a representation of one's present intention as to a future act, as distinguished from a promise that a future act should be done; and the court should have charged that the statement by accused, that he would or would not use the receipt in a certain manner, was not a false pretense, and that a representation, as an inducement to the making of a loan, that some-

thing thereafter was or was not to be done, was not a false pretense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2662-2664; vol. 8, p. 7661.]

13. FALSE PRETENSES (§ 7*)—MODE OF OBTAINING PROPERTY.

A pledgee of a negotiable receipt for bonds of a corporation to secure a loan made by the pledgor is not guilty of larceny by false pretense, if, after receiving it from the pledgor, he sold it honestly under a claim of right; but if he lent money to the pledgor to secure possession of the receipt, with a view of feloniously converting it to his own use, and then feloniously converted it, he was guilty of larceny.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 12; Dec. Dig. § 7.*]

14. FALSE PRETENSES (§ 42*)—CONVERSION OF PROPERTY—EVIDENCE.

Where, on a trial for larceny by false pretenses of a security pledged to accused to secure a loan, the issue was whether, in the sale of the security, he acted honestly under a claim of right, so that he was not guilty of larceny, or whether he lent the money to the pledgor to secure possession of the security with a view of feloniously converting it, evidence of his representations to the pledgor at the time of the making of the pledge as to his intention to keep the security in a bank as collateral for money borrowed by him was admissible.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 56; Dec. Dig. § 42.*]

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Walter Althause was convicted of larceny, and he brings exceptions. Sustained.

The indictment alleged that accused did steal one negotiable receipt of the value of \$2,000, one piece of paper of the value of \$2,000, of the property of Charles A. Powers. The commonwealth filed a bill of particulars as follows:

"Now comes the commonwealth in the above-entitled action and in compliance with the defendant's motion therefor files the following bill of particulars:

"On or about the 3d day of February, 1909, the defendant told one Charles A. Powers that he would loan the said Powers the sum of five hundred dollars (\$500) for three (3) months at six (6) per cent. interest, and take from the said Powers, as collateral security for the payment of such loan, a negotiable receipt of one C. H. Venner for two (2) six (6) per cent. bonds of the Urbana Waterworks Company, and the defendant falsely and fraudulently represented to the said Powers that the defendant intended either to keep the said certificate in his possession, or to place the same as collateral security with some bank or banking company for a loan to be made by such bank or banking company to the defendant, or to the firm or person by whom the defendant was employed. Thereupon, upon the same date, the said Althause loaned to the said Powers the sum of five hundred dollars (\$500), and received a note for the said amount, dated Feb-

ruary 8, 1909, for three (3) months, at the rate of six (6) per cent. per annum, signed by Charles A. Powers, and the defendant also received as collateral security for the payment of the liability evidenced by said note the said receipt of said C. H. Venner. On or about the 3d or 4th day of February, 1909, the said Althause sold and delivered the said receipt through the office of Wesley A. Gove & Co., and has never since held any control over the said receipt, or retained any title or interest in the said receipt, but parted with title thereto absolutely. Thereafter, and after the maturity of the said note, the said Powers made repeated demands upon the said Althause for the return of the said receipt, or of a receipt similar in kind and amount to the said receipt, and has made tender of the amount of the note due from the said Powers to the said Althause, with interest at six (6) per cent. from the date of the making of the said note, but the said Althause has declined and refused to deliver to the said Powers the said receipt or any receipt of the same amount and kind as the said receipt.

"The said defendant never intended to retain possession of the said receipt, or to place the said receipt in any loan to be made to him by a bank or banking company, but at the time of making the aforesaid representation to the said Powers, and at the time of receiving the said receipt from the said Powers, and at the time of the defendant's selling the same, he intended to dispose of the same, and to divest himself of all title to the said receipt, and any lien thereon that the said defendant might have."

Arthur H. Weed, for the Commonwealth.
Clarence W. Rowley and Lewis Marks, for defendant.

LORING, J. The defendant contended that under the note held by him signed by Powers he had the right to sell the property held under it as collateral security at any time if he thought it wise to do so. But the presiding judge instructed the jury that the note did not authorize the holder to sell the collateral until the maker of the note was in default under some one of the promises or conditions stated therein. The difference between the two views lies at the foundation of this case and we take it up in the first instance.

The provision to be construed is in these words: "The right to make such use of the collateral security named herein * * * as they may desire, subject only to their obligation to deliver to the said borrower or order collateral of the same amount and kind as that mentioned above."

Were it not for the decision in *Ogden v. Lathrop*, 65 N. Y. 158, we should have had no hesitation as to the true construction of this provision. It is doubtless competent for

a pledgor and pledgee to agree that securities pledged for payment of a note (in which the pledgor has the general property and the pledgee a special property or lien for payment of the debt due to him from the pledgor) may be sold by the pledgee and the proceeds used by him (the pledgee) as if he alone had been the owner of the securities, leaving to the pledgor (in whom was the general property in those securities) nothing but the unsecured personal obligation of the pledgee to account to him for the value of the securities at the date of the payment of the note. Such an agreement, if made, is not an incident to a pledge of securities. It is an agreement authorizing the pledgee to end the pledge and all the rights of the pledgor in the securities pledged.

It follows that if it is found in a writing by which securities are pledged it must, to have that effect, be couched in terms which do not admit of doubt, as was the case in the note in question in *Wilson v. Hawley*, 158 Mass. 250, 33 N. E. 522. For if the provision is found in a writing pledging the securities it should be construed, if that be possible, to be an agreement declaring the terms of the pledge and not an agreement authorizing the pledgee to end the pledge and all interest of the pledgor in the securities pledged.

It is plain therefore that the "use" authorized in this note should be construed to be a "use" as collateral security unless the provision so construed would be meaningless. But that is far from the fact. It is a matter of common knowledge that, in lending money, banks and bankers require the pledge en bloc of the securities put up as collateral. That means that, if a lender of money on security wishes to be able to put himself in funds (in connection with the advances made by him) through a rehypothecation of the securities pledged to him, he must have authority to separate the securities received by him from the debts due to him for which they were respectively pledged. That is a right which he does not have in the absence of an agreement authorizing that to be done. Not only that, but such a use of securities pledged to him as collateral is, in the absence of an agreement authorizing it, a criminal offense. Rev. Laws, c. 208, § 71.

Where A. borrows of B., and pledges to B. securities for the repayment of the loan so made, and as part of the agreement authorizes B. to pledge those securities en bloc with other securities owned by him (B.) for money borrowed by him, a use of those securities is authorized which is incidental to the pledge of them and not directly destructive of it. We say not directly destructive of the pledge because it is evident that all the securities pledged en bloc might be sold to pay the new debt, and in that way the right of redemption which the original pledgor had might be extinguished.

The provision that the "right to make such

use of the collateral security * * * as they may desire" is to be "subject only to their obligation to deliver to the said borrower or order collateral of the same amount and kind" does not lead to a different conclusion. The obligation to keep sufficient securities of the same amount and kind on hand in place of the identical securities delivered is one of not uncommon occurrence in the methods of carrying on business which now obtain. Its most common occurrence is in case stocks are carried on margin in jurisdictions where the stock bought and carried on margin belongs to the customer. See *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, where the cases are collected.

Ample reason therefore for the provision here in question is found in authorizing the pledgee of the pledged securities to repledge them en bloc (as was done in *Wilson v. Hawley*, 158 Mass. 250, 33 N. E. 522), and such a "use" is a "use" incidental to a pledge and not destructive of it. For these reasons we should not have hesitated to limit the word "use" in this agreement to "use" as collateral security were it not for the case of *Ogden v. Lathrop*, 65 N. Y. 158. It was assumed in the opinion in that case, and assumed without argument, so far as that opinion goes, that no force could be given to the clause there in question unless a sale was authorized. The clause there in question gave the pledgee "authority to use, transfer or hypothecate" the securities pledged to him. However it may be with those words, we cannot believe that when a pledgor gives to the pledgee authority to "use" securities pledged to him he intends to authorize the pledgee to end his (the pledgor's) property in the securities pledged at his (the pledgee's) will, substituting therefor his (the pledgee's) unsecured obligation to account for whatever may be the value of the securities upon payment of the note by the pledgor. For these reasons we are of opinion that the decision in *Ogden v. Lathrop*, 65 N. Y. 158, should not be extended to the clause in the note here in question.

The case of *First Nat. Bank of Chicago v. Caperton*, 74 Miss. 857, 22 South. 60, is not an authority for the construction of the note put forward by the prisoner in the case at bar. Where a right to use is given to a mortgagor, and the mortgage is a mortgage of the product of a factory or the contents of a store, it would be hard not to construe a right given to the mortgagor to use the mortgaged property to be a right to sell it. But where the right to use is given not to a mortgagor but to a pledgee, and the property to be used by the pledgee consists of securities pledged as collateral for a debt due from the pledgor, it is not possible (in our opinion) to construe a right to use to be a right to sell. The other case relied on, *Estes v. First National Bank*, 15 Colo. App. 526, 63

Pac. 788, is a similar decision by an inferior court of Colorado.

We are of opinion therefore that the judge was right in the construction which he put upon the note here in question.

There is another matter lying at the foundation of the case. In that matter we are of opinion that the judge was wrong. The error, however, is an error of which the prisoner cannot complain, for he asked the judge to adopt the view which he adopted. We discuss it, however, to arrive at a correct understanding of the case and because, as we decide later on, the case must go back for a new trial. The matter we now refer to is the view taken by the judge of the bill of particulars. The judge ruled that the government had set forth in its bill of particulars the crime of larceny by obtaining property by false pretenses, and that having done so it must prove that kind of larceny. But in our opinion the bill of particulars is a colorless narration of facts. By that we mean that the facts set forth in the bill of particulars as the facts relied upon by the government are set forth without any color being added to them by way of a conclusion of law. Under this bill of particulars the government was at liberty to make out larceny in any way in which the facts stated show that a larceny was committed, whether it be a common larceny, embezzlement, obtaining property by false pretenses, or larceny as defined by Rev. Laws, c. 208, § 26. As to the last see *Commonwealth v. King*, 202 Mass. 379, 33 N. E. 454.

There is a further point on which in our opinion there was a mistrial, but of which again the prisoner cannot complain. In this instance he cannot complain of the error because he did not complain of it at the trial. The crime of larceny by obtaining property by a false pretense consists in obtaining title to property by a false pretense. *Commonwealth v. Barry*, 124 Mass. 325. In the case at bar the title to the receipt for the two bonds which Powers parted with when he signed the note here in question never passed to the prisoner. Not only that, but the note did not give the prisoner any power of selling the receipt for the bonds and so of passing the title to another. That is just what the judge told the jury that the note did not do. In the case at bar a special property in the receipt for the two bonds passed to the prisoner as pledgee of them to secure payment of the note signed by Powers. And it could have been found that this special property was procured by a false pretense. But that was immaterial. Powers did not lose his general property in and title to the receipt for the bonds by the prisoner's exercising his rights as pledgee. The bonds were not sold by the prisoner under his right of property in them as pledgee, nor were they sold under the special rights given by the note to the holder of it (construing the note

as it was in our opinion rightly construed by the presiding judge). To make out a case of obtaining property by a false pretense the title must be obtained by a false pretense or a contract must be procured by a false pretense, under which the other party passes the title to another. In the case at bar the receipt for the bond was sold by the prisoner wrongfully without regard to his rights as pledgee.

If the bill of particulars had confined the government to proving a larceny through obtaining property by a false pretense, the prisoner would have been entitled to a verdict of not guilty as matter of law under the construction of the note adopted by the judge. The only effect which the false pretense had (if there was a false pretense in the case at bar) was upon the possession of the receipt which passed to the prisoner by the making of the note. At common law that would have been material because obtaining possession by fraud is a taking within the meaning of that word in the definition of larceny at common law. *Commonwealth v. Barry*, 124 Mass. 325; *Commonwealth v. Rubin*, 165 Mass. 453, 43 N. E. 200; *Commonwealth v. Flynn*, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; *Commonwealth v. King*, 202 Mass. 379, 88 N. E. 454. But that is no longer material under Rev. Laws, c. 208, § 26. Under that act larceny is made out whenever a person "unlawfully, and with intent to steal or embezzle, converts * * * the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion."

But there is one error made by the judge which is open to the prisoner. By his sixth request the prisoner asked the judge to rule that "a statement by the defendant that he would or would not use the receipt in a certain manner is not a false pretense within the meaning of the word," and by his seventh request that "a representation as an inducement to the making of a loan that something thereafter was to be or was not to be done is not a false pretense." The testimony which gave rise to these two requests for rulings was given by Powers and was in these words: "As soon as I had read the form of the note through and Mr. Althause had finished writing in what he wrote, I asked him why he inserted the clause giving them the right to the use of the collateral. I cannot repeat that clause. On being shown clause, 'shall have the right to make use of such collateral named herein,' witness said, 'That was the clause.' Mr. Althause said that they had applications for loans greater by far than they had the money personally to supply, and that under that note they collected several minor loans which they had made to their customers into one group. He said that they had collected a number of minor loans which they made to their cus-

tomers into a group, and they themselves, on this group of loans, obtained a loan from the bank. I asked him what bank they used, or which bank they used, and he said there were several banks. He said, 'We are just now getting a collection of loans to go up to a bank in Haverhill, and your security will be put in that set and go there.' I said, 'Is there any doubt in regard to the security of the collateral?' He said, 'None whatever. We have a special arrangement with the banks with which we do business whereby we can substitute collateral, so that when a man pays his obligation to us, if he will just give us one or two days' time, we will get the collateral for him.'" The explanation and the only explanation given by the judge of the difference between a defendant's promise to do a thing in the future and a present intention of a defendant as to the doing of a thing in the future was in these words: "A representation or assurance in regard to a future transaction in the nature of a promise is not a false pretense; that is to say, if I say to you, 'Here, you do a certain thing and then I promise you that some time in the future I will do something else,' it is not a false pretense if I fail to do that thing in the future unless that promise was made to induce you to do the particular thing, and I deliberately intended at that moment not to do it and made it for the purpose of inducing you to do something which you had not determined to do and which you would not have done but for that promise." The prisoner "duly excepted to those portions of the charge to the jury which were given relating to the matters contained in the * * * sixth [and] seventh * * * requests."

As a general proposition of law, apart from statutes making it a crime to obtain property by a false pretense, it would seem that a man's present intention as to a future act is a fact. *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. In the first of these two cases (*Edgington v. Fitzmaurice*) Bowen, L. J., said, at page 483: "The state of a man's mind is as much a fact as the state of his digestion." And Chapman, C. J., in *Commonwealth v. Walker*, 108 Mass. 300, 312, said: "A man's intention is a matter of fact and may be proved as such." There are cases where this proposition has been applied in case of indictments for obtaining property by a false pretense. For example, it was so applied in *State v. Nichols*, *Houst. Cr. Cas. (Del.)* 114. In that case the prisoner, to induce the prosecuting witness to lend him money, represented to him that he wanted it to lend with some of his own money to a third person. The jury were told that if this was false it was a false pretense. The doctrine of this and similar decisions is that if in addition to making a

promise to repay money borrowed, for example, the prisoner procured the loan by a false statement of his present intention as to the purpose for which he wished to secure the loan, it is a false representation of a fact and so a false pretense. There is, however, a conflict in the authorities on this point. There are cases in which it has been held that in such a case as that before the court in *State v. Nichols*, ubi supra, the representation by the prisoner of his present intention as to the purpose for which he wished to secure the loan is essentially a promise by the prisoner that he will use the money lent in the way then stated and is not a false pretense. See, for example, *People v. Blanchard*, 90 N. Y. 314. The cases on one side and on the other are collected in 19 Cyc. 397, notes 57, 58.

But in the case at bar the presiding judge went beyond any decided case in the explanation which he gave of the difference between the representation of a person's present intention as to a future act and an assurance or promise that the future act shall be done. For the purpose of illustrating the essential difference between the two he put as an example of obtaining property by a false pretense a case which is not obtaining property by a false pretense. In effect he told the jury that if A. buys property intending not to pay for it he obtains that property by a false pretense. In that case A. makes no representation at all. All that he does is to make a promise, and a promise is not a representation of a fact. It has been sought to make out that in legal contemplation a promise with an intention not to perform is a false pretense because a promise to do a thing of necessity implies a present intention to do it, and therefore whenever you have a promise coupled with an intent not to perform you have an implied false representation of an intention to do the act which the prisoner promises to do and so a false pretense. And this finds some apparent support in *Swift v. Rounds*, 19 R. I. 527, 35 Atl. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791. In that case it was held that where a defendant buys property intending not to pay for it he is liable in an action of deceit because he impliedly represents that he intends to pay for it by the act of buying. It may be doubted whether the making of a promise implies of necessity in all cases a present intention to perform that promise. Upon that question we do not find it necessary to express an opinion. For, however that may be, the fraud of obtaining property by buying it intending not to pay for it is not, as matter of construction of the statute creating it, the crime of obtaining property by a false pretense. At common law obtaining property by a false representation of fact, that is, by a lie, was not a crime. *Commonwealth v. Hearsey*, 1 Mass. 137; *Commonwealth v. Warren*, 6 Mass. 72;

Commonwealth v. Call, 21 Pick. 515, 520. Obtaining property by false weights or false measures was a gross cheat at common law and punishable criminally as such. By St. 33 Hen. VIII, c. 1, cheating by false tokens was also made a crime. This was the state of the law when St. 30 Geo. II, c. 24, was enacted. That act provided that "all persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares or merchandises, with intent to cheat or defraud any persons of the same" shall be punished, etc. This was enacted in this commonwealth (in practically the same words) by St. 1815, c. 136. It is evident that the fraud (which by enacting that statute the Legislature intended to make a crime) was obtaining the property of another by a false statement of a fact; and it is equally evident that in enacting it the Legislature did not have in mind the fraud of buying goods not intending to pay for them. Both are frauds, but they are not the same fraud. In our opinion it was the former alone which the Legislature had in mind in making it a crime to obtain property by a false pretense.

The decisions in this commonwealth so far as they go are not in conflict with this view. *Commonwealth v. Drew*, 19 Pick. 179, was a case where a depositor had deposited money in a bank under a fictitious name and finally presented to the bank a check to be cashed after he had drawn out all the money deposited by him and received payment of it. It was held that he could not be convicted under the statute because drawing and presenting the check was not an implied pretense that he had funds in the bank. This conclusion was reached on the ground that "a check like an order on an individual is a mere request to pay." But the court added that if a check drawn under those circumstances is passed to a stranger "it would probably be holden to be a false pretense." In *Commonwealth v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596, three partners were indicted for conspiracy in defrauding persons of their goods of whom they made purchases while they (the defendants) were in failing circumstances. In the opinion in that case it was said, at page 222 of 1 Cush. (48 Am. Dec. 596), that if the defendants had bought "knowing that they had no funds to pay with," thus appropriating the goods to their own use, in fraud of the sellers, a different case would have been presented from that which was presented to the jury by the charge of the presiding judge. And this court went on to say: "Such a case would show a deceptive contrivance or false pretense. The known inability to pay for the goods would render the act of the party a fraudulent and unlawful one." In determining what effect should be given to this statement it is to be borne in mind that the

indictment then before the court was an indictment for conspiracy. And an indictment for conspiracy was an indictment which there was no reason for resorting to if buying property with an intent not to pay for it is obtaining property by a false pretense. See in this connection *People v. Wheeler*, 169 N. Y. 487, 494, 62 N. E. 572. The cases of *Commonwealth v. Walker*, 108 Mass. 309, and *Commonwealth v. Drew*, 153 Mass. 588, 27 N. E. 593, were indictments under the special statute originally enacted in 1863 (St. 1863, c. 248, § 2) making it a crime to obtain goods with intent to defraud "under false color and pretense of carrying on business, and dealing in the ordinary course of trade."

The fraud of obtaining property of another by buying it with an intent not to pay for it might well be made a crime by the Legislature. But it is not the fraud of obtaining property by a false pretense.

We are therefore of opinion that this exception must be sustained.

We have held that the fact in the case at bar (if it was a fact) that Powers was induced to borrow the money and pledge the receipt by the prisoner's misrepresentation of an intention on his part to keep it in a bank as collateral for property borrowed by him did not make out a case of obtaining

money by false pretense because Powers was not thereby induced to part with the property in the receipt. We have also held that although that misrepresentation might bear on the question of possession it is immaterial in that connection because possession is not now material in making out larceny under Rev. Laws, c. 208, § 26. But it does not follow that that fact (if it is a fact in the case at bar) is of no significance. It is in our opinion significant (if it is a fact), and its true significance lies in its bearing on the prisoner's criminal intent. If the prisoner in selling the negotiable receipt the day after he received it from Powers acted honestly under a claim of right he was not guilty of larceny. But, on the other hand, if he lent the money to Powers to secure possession of the negotiable receipt with a view of feloniously converting it to his own use, and then did feloniously convert it to his own use, he was guilty of larceny. Whether one or the other of these two was the fact was an issue on which the prisoner's representation as to his then present intention of keeping the receipt in bank so that he would be able to return it to Powers on his paying his loan was material.

The entry must be:

Exceptions sustained.

(175 Ind. 30)

MODERN WOODMEN OF AMERICA v. CRAIGER. (No. 21,708.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. COURTS (§ 488*)—RIGHT TO ORAL ARGUMENT.

The primary purpose of transferring a cause from the Appellate Court to the Supreme Court, under Burns' Ann. St. 1908, § 1394, subd. 2, is to correct erroneous declarations of law apparent on the face of the opinion, and not to give the parties another hearing on the merits, and oral arguments are not granted after transfer at the request of the litigants.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 488.*]

2. APPEAL AND ERROR (§ 763*)—RIGHT TO FILE ADDITIONAL BRIEF.

A party may not file, after the time allowed for filing an application and brief for a rehearing, an additional brief presenting propositions of law not contained in the original brief, supported by citation of authorities.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8098; Dec. Dig. § 763.*]

On petition for rehearing. Overruled.
For former opinion, see 92 N. E. 113.

MONTGOMERY, J. Appellee filed a petition for a rehearing of this cause, and a brief which in no respect questioned the opinion and decision heretofore announced by this court, but was devoted to an explanation of appellee's contentions before the Appellate Court, and failure to renew her request for oral argument after the transfer to this court. The primary purpose in transferring a cause is the correction of erroneous declarations of law, apparent on the face of the opinion, and not to give the parties another hearing upon the merits. Oral arguments, therefore, are not granted after transfer at the request of the litigants. *Ramsey v. Hicks*, 92 N. E. 164.

On October 24, 1910, and long after the time allowed for filing an application and brief for a rehearing, appellee, under the title of additional authorities, filed an additional brief, presenting propositions of law not contained in her original brief, supported by the citation of authorities. This practice cannot be sanctioned. We have, however, reexamined the questions treated in our former opinion, and are satisfied that the errors there pointed out are of such a fundamental character as to make a reversal of this cause inevitable.

The petition is overruled.

(175 Ind. 387)

RANKIN et al. v. McCOLLISTER et al.¹ (No. 21,580.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. DRAINS (§ 34*) — PROCEEDINGS TO CONSTRUCT—BURDEN OF PROOF.

Under Burns' Ann. St. 1908, § 6142, providing that a remonstrance, to defeat the construction of a drain, must be signed by two-thirds of the landowners named in the petition, or who may be affected by any assessment or damages, resident in the county or counties where the lands affected are situate, the persons filing a remonstrance have the burden of proving

that the remonstrance is signed by two-thirds in number of the landowners possessing the enumerated qualifications.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 34.*]

2. TRIAL (§ 404*)—SPECIAL FINDINGS—PRESUMPTIONS.

Nothing can be added to a special finding by presumption, inference, or intendment, and a special finding, silent on a material fact, is against the party having the burden of proving the fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

3. DRAINS (§ 34*)—PROCEEDINGS TO ESTABLISH—REMONSTRANCES—FINDINGS.

A special finding that the names of 78 signers of a two-thirds remonstrance against the construction of a drain, under Burns' Ann. St. 1908, § 6140 et seq., are not in the petition, and their lands are not described therein, and that from their lands surface water by natural and artificial courses finally flows into the proposed drain, and that they reside in one or the other counties in which it is proposed to construct the drain, does not justify the conclusion that the lands of the 78 signers will be benefited or damaged by the drain, and they cannot, therefore, be counted in determining whether or not the remonstrance is signed, as required by section 6142, by two-thirds in number of the landowners named in the petition, or who may be affected by any assessment or damages.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 34.*]

Appeal from Circuit Court, Jay County; J. F. La Follette, Judge.

Proceeding by William E. McCollister and others to construct a public drain, to which Rebecca A. Rankin and others filed a remonstrance. From a judgment for petitioners, remonstrators appeal. Affirmed.

Smith & Moran and R. D. Wheat, for appellants. Frank H. Snyder and Whitney B. Smith, for appellees.

MONKS, J. This proceeding was brought in the court below by appellees to construct a public drain under the act of 1907 (Acts 1907, p. 508), being section 6140 et seq., Burns' Ann. St. 1908. This appeal was taken under section 6143, Burns' Ann. St. 1908, from the judgment establishing said work and approving and confirming the assessments. At the proper time appellants filed what is known as a "two-thirds remonstrance" against the construction of said drain, under the first proviso of section 3 of said act, being section 6142, Burns' Ann. St. 1908. The court, on request of the remonstrators, appellants in this court, made a special finding of facts and stated conclusions of law thereon. The conclusions of law were to the effect that said remonstrance was not signed by two-thirds in number of the landowners possessing the qualifications required by said section 3 (6142), supra.

The burden of proof was upon appellants to prove that said remonstrance was signed by two-thirds in number of the landowners possessing the qualifications required by said section. As to 78 of the signers of said remonstrance it was found that their names

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
93 N.E.—14

¹ Rehearing denied.

"are not in the petition and their lands are not described" therein, and that from their said lands "surface water by natural and artificial courses finally flows into the proposed drain," and that they have shown residence in one or the other counties in which it is proposed to construct said drain. Said section 3 (6142), supra, requires that the remonstrance, to be sufficient to defeat the construction of the drain, must be signed by "two-thirds in number of the landowners named in such petition or who may be affected by any assessment or damages resident in the county or counties where the lands affected are situate." See *Thorn v. Silver*, 89 N. E. 943, 948-950. There is nothing in said finding showing that the lands of said 78 remonstrators will "be affected by any assessment or damages." We cannot say as a matter of law, merely from the fact found that "surface water from the lands of said remonstrators by natural and artificial courses finally flows into the proposed drain," that their said lands are benefited or damaged.

It is settled in this state that nothing can be added to a special finding by presumption, inference, or intendment, and that when any special finding is silent upon a material fact it is deemed to be found against the party who has the burden of proof as to such fact. *Donaldson v. State*, 187 Ind. 553, 557, 558, 78 N. E. 182, and cases cited. Under this rule it is evident that the 78 persons mentioned in said finding cannot be counted in determining whether or not said remonstrance was signed by the number necessary to defeat the construction of said drain, because said finding does not show that they possess the qualifications required by said section 3 (6142), supra. See *Thorn v. Silver*, 89 N. E. 943, 948-950. As said persons cannot be counted, the special finding does not show that the remonstrance was signed by the number of persons required to defeat the construction of said drain.

It follows that the court did not err in the conclusions of law stated.

Judgment affirmed.

VESEY et al. v. DAY et al.† (No. 21,758.)

(Supreme Court of Indiana. Dec. 16, 1910.)

WILLS (§ 361*)—PROBATE—APPEAL—PARTIES.

A party appealing from a judgment probating a will and codicil thereto, over his objections to the probate of the codicil filed by him after the setting aside of a previous judgment probating the will and refusing to probate the codicil, must name the beneficiaries under the codicil in the assignment of errors on appeal, and make them adverse parties.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 826; Dec. Dig. § 361.*]

Appeal from Circuit Court, La Grange County; James S. Dodge, Judge.

Proceeding by John B. Vesey and another to contest the probate of a codicil of Lydia C.

Howard, deceased, in which William H. Day and others appeared. From a judgment admitting the codicil to probate, plaintiffs appeal. Dismissed.

Frank J. Dunten and Vesey & Vesey, for appellants. Hanan, Ewbank & Hanan and Deahl & Deahl, for appellees.

MONKS, J. It appears from the record that the will, and a codicil thereto, of one Lydia C. Howard, deceased, were presented for probate to the court below, and that said will was admitted to probate by said court on April 28, 1909, the same being the third day of the April term, 1909, of said court, but the probate of said codicil was refused. Afterwards, on the 19th day of May, 1909, at the same term of said court, William H. Day and Amanda Day, his wife, two of the devisees in said codicil, filed a verified motion in the court below to set aside the order and judgment admitting said will to probate, and denying the admission of said codicil to probate, and asking that said codicil be admitted to probate. Afterwards, at the September term, 1909, of said court, appellants appeared specially to said proceeding, and filed a motion to set aside the order of the court, on the ground that no notice thereof was given. This motion was overruled by the court. Appellants then filed a demurrer to said motion, which was also overruled. At the same term the court sustained said motion, and set aside the order and judgment admitting said will to probate, and the order denying the probate of said codicil. Thereupon, at the same term of said court, appellants filed objections to the probate of said codicil, on the ground that the same "was unduly executed." Afterwards, and at the same term of said court, being the 30th day of September, 1909, said cause was tried by the court, and a finding and order made and entered that said will and said codicil be admitted to probate as the will and codicil thereto of said Lydia C. Howard. Afterwards, on November 19, 1909, the same being the fifth day of the November term of said court, appellants filed their motion for a new trial of said cause, which was on the same day overruled by the court. Appellants, who contested the probate of said codicil, appeal from said judgment to this court, and assign errors.

William H. Day and Amanda Day, his wife, the only persons made appellees in this court by appellants in the assignment of errors, have filed a motion to dismiss this appeal, and assign as the fourth ground for said motion "that this is an appeal from a judgment probating a will and the codicil thereto, over objections to the probate of said codicil filed by appellants after an order had been made setting aside a previous judgment probating the will and refusing to probate the codicil; and four of the six beneficiaries under said codicil, who were parties below,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
† Modified and withdrawn. See 21 N. E. 421.

have not been made parties to this appeal nor named in the assignment of errors herein," naming them. The beneficiaries under said codicil were necessary parties to the proceeding brought by appellants to contest the probate thereof, and must be named in the assignment of errors in this court as appellees. *Whisener v. Whisener*, 162 Ind. 136, 67 N. E. 984, 70 N. E. 152; *McGreath v. Starr*, 157 Ind. 320, 61 N. E. 664. They were parties adverse or opposite parties to appellants, and as they were not made appellees in the assignment of errors in this court we have no power to disturb the judgment of the court below in admitting said codicil to probate. *McClure v. Shelburn Coal Co.*, 147 Ind. 119, 46 N. E. 349; *Garside v. Wolf*, 135 Ind. 42, 34 N. E. 810; *Kreuter v. English, etc., Co.*, 159 Ind. 372, 65 N. E. 4. It is clear from the cases cited that, unless all parties adverse to appellants in the court below, who were affected by the judgment probating said codicil appealed from, are made parties appellee in this court, the case cannot be determined upon its merits. *Kreuter v. English, etc., Co.*, 159 Ind. 372, 65 N. E. 4, and cases cited. The motion to dismiss the appeal is therefore sustained.

Appeal dismissed.

(175 Ind. 16)

HENSLEY v. STATE. (No. 21,738.)

(Supreme Court of Indiana. Dec. 15, 1910.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—FINAL JUDGMENT.

Appeals in criminal cases can only be taken from final judgments.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1023*)—APPEAL—FINAL JUDGMENT.

The overruling of a motion to discharge accused, under *Burns' Ann. St. 1908*, §§ 2090, 2092, on the ground that he has been detained in prison without a trial to answer an indictment for murder continuously for more than two terms of court after his arrest, is not a final judgment, and is not appealable.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

Appeal from Circuit Court, Hamilton County; Meade Vestal, Judge.

James W. Hensley applied for his discharge. From an order overruling his application, he appeals. Dismissed.

Christian & Christian, for appellant. James Bingham, A. G. Cavins, E. M. White, and Wm. H. Thompson, for the State.

MONKS, J. This is an appeal from the decision of the court below in overruling an application to discharge appellant under the provisions of sections 2090, 2092, *Burns' Ann. St. 1908*. The ground alleged for the discharge was that "he had been detained in prison without a trial to answer an indictment"

for murder in the first degree "continuously for a continuous period of more than two terms of court after his arrest." It is settled law in this state that appeals in criminal cases can only be taken from final judgments. *Erganbright v. State*, 148 Ind. 180, 47 N. E. 464, and cases cited. The action of the court in overruling the motion to discharge was not a final judgment. As no final judgment has been rendered in said cause, this court has no jurisdiction of this appeal. The appeal is therefore dismissed.

(174 Ind. 752)

DRESSEL v. STATE. (No. 21,638.)

(Supreme Court of Indiana. Dec. 8, 1910.)

1. INTOXICATING LIQUORS (§ 176*)—RETAIL SALES—FEDERAL LICENSE.

The payment of the federal tax on the business of retailing intoxicating liquor affords no protection to one not authorized to sell under the state laws.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 176.*]

2. INTOXICATING LIQUORS (§ 143*)—UNLAWFUL SALES—STATUTORY PROVISIONS.

Under *Burns' Ann. St. 1908*, § 8351, punishing any person who keeps a place where intoxicating liquors are sold, etc., in violation of the state law, the gravamen of the offense is the keeping of a place where liquors are unlawfully disposed of, and the naked fact of being a wholesaler is no defense, and one who while in good faith conducting a wholesale business at the same time and place permits the sale of liquors to consumers violates the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 152; Dec. Dig. § 143.*]

3. INTOXICATING LIQUORS (§ 238*)—UNLAWFUL SALES—QUESTIONS FOR JURY.

In a trial for violating the liquor law, the jury had the right to find, if it thought that the evidence proved it, that accused was not a wholesaler, and was using his federal tax receipt as a wholesaler to cover his transactions as an illicit retailer.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 324-330; Dec. Dig. § 238.*]

4. INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALES—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a trial for keeping a place where intoxicating liquors were sold in violation of *Burns' Ann. St. 1908*, § 8351, evidence held to support a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 311; Dec. Dig. § 236.*]

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

John Dressel was convicted of violating the liquor law, and he appeals. Affirmed.

Henley & East and Robert G. Miller, for appellant. John H. Underwood, James Bingham, E. M. White, Alex. G. Cavins, and Wm. H. Thompson, for the State.

HADLEY, J. Appellant was found guilty of keeping a place where intoxicating liquors were sold, bartered, or given away, in violation of section 8351, *Burns' Ann. St. 1908*.

Numerous assignments are made, but the only one presented questions the sufficiency of the evidence to support the conviction. It appears from the bill of exceptions that, in December, 1908, at Bloomington, Ind., appellant established a wholesale liquor business, and continued to carry on said business to the time of the grievances alleged against him. Next, prior to December, 1908, he had for a number of years conducted a retail liquor business (a saloon) on the same premises, and with the same furniture and fixtures, but the screen, bar, and other appurtenances thereto had been moved from the north to the south side of the room after the expiration of the retail license. On the day laid in the indictment, to wit, March 27, 1909, the sheriff and posse with a search warrant raided, as it is termed, appellant's premises, and found in an upstairs room a regularly equipped bar—that is to say, a sideboard against the south wall, supporting a mirror and partially filled bottles; a counter in front of the sideboard, at the west end of which was a cigar case containing broken boxes of cigars; at the east end an ice box, within which, under the counter, were some bottled beer and pop in a bucket of water; also bottled whisky and wine, 29 empty beer bottles, some whisky and beer glasses, and a corkscrew. In a small cement storage room connected with the building by an inclosed passageway, two or three half barrels of whisky, four or five cases of beer, and a pump designed for taking whisky from the barrel. In another room adjacent to the barroom was a considerable number of cases of empty beer bottles. When the upstairs barroom was entered by the posse, one Tucker who had been in the employ of appellant four years as his assistant in the saloon and wholesaling business, was standing behind the cigar case, and two or three other men were loitering in the room. In the adjoining room four or five men were seated at a table playing cards. There were poker chips on the table, and two beer bottles, each containing but a small quantity of beer. In the cement storehouse there was found tacked up over the door two internal revenue receipts—one acknowledging the payment of "\$25 for special tax on business of retail liquor dealer," for one year ending June, 1909, and another acknowledging the receipt of "one hundred dollars for special tax on the business of wholesale liquor dealer," for one year ending June, 1909. One witness testified, in substance, that he had recently, before the date fixed in the indictment, called up appellant's place of business by phone and inquired of the party answering the call if he would deliver at witness' house a case of pint bottled beer, and was answered in the affirmative. In a few hours a case of beer of the kind ordered was delivered at his house. A few days later the witness called at appellant's place of business, and in the upstairs room described

found Tucker standing behind the cigar case. There were four or five other men idling in the room. The witness announced to Tucker that he had called to pay for the beer, and at the same time presented him a \$20 bill. Witness also, at the same time, extended a general invitation to the other men in the room to have a drink with him. Four or five of them stepped up to the counter. Tucker placed some glasses and a bottle of whisky on the bar, and they each had a drink, but witness was not certain whether each drinker poured his own drink, or whether Tucker poured it all, or part. After the drinking, Tucker gave witness his change, keeping out of the bill \$3.25 as full payment of the case of beer and the drinks. How much, if anything, was charged for the drinks witness was unable to state. Tucker afterward accounted to appellant for the \$3.25. It is not claimed that appellant had a retailer's license, or any right to sell, barter, or give away liquor, in a less quantity than five gallons at a time, other than that conveyed by the receipt executed by the agent of the federal government for the federal tax on the retailing business, and this was no right at all. Such a receipt conveyed no right to retail liquors, further than that when a citizen has been once licensed, or authorized, to sell at retail, by some state law, he cannot exercise the right until he has paid such tax to the government. The payment of such tax affords no protection whatever to one who has not been authorized to sell under the laws of the state.

Appellant insists that the foregoing evidence did not warrant the jury in finding him guilty of keeping a place where liquors are sold, bartered, or given away, in violation of law. We think otherwise. The gravamen of the offense denounced is the *keeping* of a place where liquors are unlawfully disposed of. The naked fact of being a wholesaler is no defense. The wholesaler has his limits, beyond which he cannot go without suffering the same penalty as he who is unable to show any legal authority to traffic in liquors. He may in good faith conduct a wholesale business, but in doing it, if at the same time and place he indulges, or knowingly suffers another in his behalf to sell, barter, or give away intoxicating liquors, to consumers in any quantity, he comes within the condemnation of the statute. *Skelton v. State* (1909) 173 Ind. 462, 89 N. E. 860. With respect to sales to consumers in any quantity, his being a wholesaler is no better shield than being a grocer if it is shown that he keeps the place for illicit disposition as well as wholesaling. Besides, the jury had the right to find, if it thought the evidence proved it, that appellant was not in fact a wholesaler, and was using his government tax receipt, as a wholesaler, as a cloak to cover his transactions as an illicit retailer.

It is urged that the wholesaler's tax receipt, supported by the positive testimony of

appellant that he was doing a wholesale and not a retail business, under the state of the evidence, should have been accepted by the jury as conclusive of the fact. If the jury had had before it nothing but circumstantial evidence as against the positive testimony of appellant and the tax receipt, we would be able to say the jury was not justified in finding appellant guilty as charged. Cotner v. State (last term) 89 N. E. 847, 848.

The significance, in a wholesale house, of a fully equipped bar, containing broken bottles of whisky and wine, bottled beer and pop in a bucket of water, whisky and beer glasses, a corkscrew, an ice box, cigars on sale, card tables and players, recently emptied beer bottles, with a total stock in trade of five cases of beer, and two or three half barrels of whisky was for the jury to determine, and when to these facts are added the testimony of the witness Gentry that at one time he bought a case of beer from the place by phone, and at another time bought four or five single drinks of whisky at appellant's bar, places the case in a light where we feel no hesitancy in affirming the judgment.

Judgment affirmed.

(175 Ind. 59)

STATE v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 21,409.)¹

(Supreme Court of Indiana. Dec. 9, 1910.)

1. STATES (§ 191*)—ACTIONS—RIGHT TO SUE STATE.

A state cannot without its consent be sued by a citizen, and, where the state through its Legislature grants the right of action, the actions must be confined to such claims as are contemplated by the statute.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. § 191.*]

2. STATES (§ 112*)—LIABILITY FOR DAMAGES.

In the absence of a statute creating a liability, the state is not liable for damages for an injury from the misconduct, negligence, or tortious acts of its officers or agents.

[Ed. Note.—For other cases, see States, Cent. Dig. § 111; Dec. Dig. § 112.*]

3. ACTION (§ 27*)—COMPLAINT.

A complaint, in an action by a foreign insurance company, to recover taxes paid by it to the state, which alleges the payment by it of taxes to the State Auditor, who failed to pay over the same to the State Treasurer; that a subsequent State Auditor demanded payment by the company of such taxes; that the company, coerced by the threats of the Auditor to revoke its authority to do business in the state, paid the taxes and notified the Auditor and Treasurer that it paid, not voluntarily, but under coercion, and which avers that the money paid by it to the state was wrongfully extorted from it—alleges a demand against the state not sounding in tort, but arising out of an implied contract, for the essential fact to be shown was that the payment of the money was involuntary and under protest.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

4. STATES (§ 191*)—RIGHT TO SUE STATE—STATUTES—"EXPRESS CONTRACT"—"IMPLIED CONTRACT."

Burns' Ann. St. 1908, § 1485, authorizing an action against the state on a money demand arising out of contract, express or implied, and section 1356, defining the expression a money demand on contract, when used in reference to an action, as any action arising out of contract when the relief demanded is the recovery of money, authorizes an action against the state on an "express contract which is the mutual understanding and coming together of the minds of the contracting parties to do or not to do a particular thing, and on an "implied contract" which is an obligation, where there is no express or formal agreement by the parties to contract, but their intention so to do is shown by the acts or from surrounding circumstances, or an obligation implied by law without regard to the acts or intention of the parties, and the statutes contemplate that money at some time may be paid into the treasury of the state under circumstances which will not lawfully permit the state to retain it against the person making the payment, so that the state will be impliedly obligated to refund the money, and hence, a foreign insurance company involuntarily paying money to the state, pursuant to an unjust demand by state officers, to pay taxes may recover money so paid under an implied contract to repay.

[Ed. Note.—For other cases, see States, Dec. Dig. § 191.*]

5. MONEY RECEIVED (§ 1*)—GROUNDS OF ACTION.

Where a person has obtained money to which he is not entitled, but which in right and justice belongs to another, an action may be maintained for its recovery by such person on an implied agreement on the part of the person obtaining the money.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.*]

6. TAXATION (§ 524*)—PAYMENT OF TAXES—STATUTES.

Under Burns' Ann. St. 1908, § 9247, pointing out the method of paying money into the treasury of the state, and section 10,216 requiring every foreign insurance company to report semiannually to the State Auditor the amount of its receipts from business in the state and to pay "into the treasury of the state" a specified sum on every \$100 of such receipts, etc., a foreign insurance company must pay the money exacted from it into the treasury of the state, and a payment to the Auditor having no authority to receive it is a payment at its peril, and the act of the Auditor in receiving the money from a foreign insurance company is not due to any misinterpretation of the statute which is unambiguous, and on the failure of the Auditor to pay the money into the state treasury, the company is liable to pay the taxes to the state.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 524.*]

7. STATUTES (§§ 176, 219*)—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION.

Where a statute is free from any ambiguity, there is no room for departmental or judicial construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 255, 296, 297; Dec. Dig. §§ 176, 219.*]

8. INSURANCE (§ 7*)—FOREIGN INSURANCE COMPANIES—STATUTES.

Burns' Ann. St. 1908, § 10,216, requiring every foreign insurance company to pay semiannually a specified percentage of receipts on account of insurance premiums paid in the

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Mandate modified.

state, does not impose a license fee for permission to do business within the state but it imposes taxes on such companies.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 7.*]

9. STATUTES (§ 219*)—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION.

Where a departmental officer of the state had no legal authority or jurisdiction to place a construction on a statute free from ambiguity, his act in construing the statute is without force.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

10. STATUTES (§ 219*)—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION.

The unwarranted act of the Auditor of State in so construing Burns' Ann. St. 1908, § 10,216, requiring foreign insurance companies doing business in the state to pay taxes "into the treasury of the state" as to authorize payments to him, is not binding on the state on the ground of acquiescence because the interpretation is manifestly at variance with the plain provisions of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

11. ESTOPPEL (§ 52*)—EQUITABLE ESTOPPEL—GROUNDS.

The doctrine of estoppel springs from equitable principles, and its purpose is to preserve rights previously acquired, and, generally speaking, the ground on which estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped, the fraud consisting in the denial of that which such person had previously asserted.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2494-2496; vol. 8, p. 7654.]

12. ESTOPPEL (§ 54*)—EQUITABLE ESTOPPEL—GROUNDS.

Where one seeks the benefit of an estoppel, and has knowledge or means of knowledge as to all the facts equal to that possessed by the one against whom the estoppel is urged, there can be no estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

13. TAXATION (§ 524*)—NATURE OF ESTOPPEL.

Foreign insurance companies doing business in Indiana paid taxes imposed by Burns' Ann. St. 1908, § 10,216 to the State Auditor instead of into the treasury of the state as expressly provided by the statute. The Auditor in his biennial reports disclosed such payments, and credited himself with the payment of the money to the Treasurer while he in fact retained a part of such payments. This practice continued for many years. The companies at the time of the making of the payments were bound to know that the Auditor was not authorized to receive the money for the taxes. There was no misrepresentation on the part of the state through any of its duly authorized officials. *Held*, that the state was not estopped from asserting that the payments to the Auditor which were retained by him were not payments to it, and that the taxes had not in fact been paid, and hence could subsequently insist on payment.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 524.*]

14. TAXATION (§§ 1, 528*)—TAXES—"DEBTS."

Taxes imposed by the state are not "debts" in the ordinary acceptance of that term, and, in the absence of express statutory provision, a

tax made payable at a certain time does not bear interest.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1, 981; Dec. Dig. §§ 1, 528.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

15. TAXATION (§ 528*)—TAXES—DEBTS.

The taxes imposed on foreign insurance companies doing business in the state by Burns' Ann. St. 1908, § 10,216, providing for semi-annual payment of taxes, and providing that any company failing for more than 30 days to pay the taxes shall forfeit a specified sum for each additional day to be recovered in an action in the name of the state, do not bear interest.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 528.*]

Appeal from Superior Court, Marion County; J. L. McMaster, Judge.

Action by the Mutual Life Insurance Company of New York against the State of Indiana. From a judgment for plaintiff, defendant appeals. Reversed in part, and remanded.

James Bingham, W. H. Thompson, E. M. White, and A. G. Cavins, for appellant. Chas. W. Smith, J. S. Duncan, H. H. Hornbrook, A. P. Smith, Wm. L. Taylor, and R. L. Willson, for appellee.

JORDAN, J. This action was instituted upon a complaint in two paragraphs by the Mutual Life Insurance Company of New York, as plaintiff, against the state of Indiana in the Marion superior court, the latter sitting as a court of claims under and by the authority of the provisions of section 1485, Burns' Ann. St. 1908, as amended in 1895 (Acts 1895, p. 231). By the first paragraph of the complaint the plaintiff insurance company (appellee herein) seeks to recover as a claim against the state \$1,296.76 as principal and \$1,726.84 interest, all paid by it in to the Treasurer of the state of Indiana involuntarily and under protest as alleged in the complaint. The principal sum demanded arises out of money paid by appellee to one James H. Rice, Auditor of the state of Indiana, as taxes for the first half of the year 1884, being \$3 on every \$100 of premiums collected by appellee within the state of Indiana, which sum it appears that said Auditor failed to pay in to the Treasurer of the State. The payment by appellee of the principal and interest was made on December 11, 1906, and interest was computed and charged by the state from the year 1884 to December 11, 1906. By the second paragraph of the complaint the plaintiff seeks to recover back from the state the interest only which it paid upon the principal. Appellant demurred to each paragraph of the complaint for want of facts. Its demurrer was overruled, to which ruling of the court it excepted. It then answered the complaint specially in four paragraphs. No general denial was filed. Appellee demurred to each paragraph of the answer.

Its demurrer was sustained to the second, third, and fourth paragraphs of answer and appellant refused to plead further. Appellee's demurrer to the first paragraph of the answer was overruled, and it refused to further plead. Thereupon the court rendered a judgment in favor of appellee against the state. From the judgment appellant has appealed directly to this court under the provisions of section 1480, Burns' Ann. St. 1908, same being section 5 of said act of 1889, and relies for reversal of the judgment below upon the alleged errors that the court erred in overruling its demurrer to each paragraph of the complaint, and in sustaining the demurrer of appellee to the second, third, and fourth paragraphs of the answer. The complaint to some extent may be said to state conclusions of the pleader instead of facts.

In the first paragraph thereof the plaintiff alleges: That on and prior to the 8th day of March, 1848, it was and ever since has been and yet is a corporation organized and acting under and pursuant to the laws of the state of New York. "That ever since the said 8th day of March, 1848, it has been engaged in conducting the business of life insurance, in the state of Indiana under authority granted to it by the properly constituted authorities of said state, and that upon the enactment of the first statute of said state so requiring, it made application to the Auditor of the state of Indiana, as a foreign corporation, for permission to do business in the state of Indiana. That upon such application this plaintiff took every step and did everything which said Auditor of State for the state of Indiana requested and required as a condition precedent to its right to do business in said state of Indiana, and thereupon said Auditor of State for the state of Indiana granted unto this plaintiff his certificate of authority for this plaintiff to do business in the state of Indiana as a foreign insurance company. That from time to time, ever since said date, and at the times provided by the statutes of the state of Indiana from time to time in force, it has applied to the Auditor of State for the state of Indiana for a renewal of such certificate of authority to do business in the state of Indiana, and at the time of each of said applications this plaintiff took every step and did everything which said Auditor of State for the time being requested or required from it, as a condition precedent to its doing business in the state of Indiana, as a foreign life insurance company, and in every such instance said Auditor of State has granted unto this plaintiff his certificate of its right to do business in the state of Indiana as a foreign insurance company. That ever since said 8th day of March, 1848, this plaintiff has been actively engaged in the business of life insurance in the state of Indiana under such certificates, and is yet so engaged in doing a life insurance business in the state of Indiana under the last

certificate of such authority to do business in the state of Indiana by said Auditor of State issued to it. That from the date of its beginning to do business in the state of Indiana under the authority of the certificates so issued to it by the Auditors of State for the state of Indiana, as above set forth, up to and including the year 1905, the Auditor of State for the state of Indiana construed the statutes of said state of Indiana as authorizing him to receive and collect from this plaintiff, and from other foreign insurance companies doing business in the state of Indiana, all taxes and charges levied and demanded from them under the laws of the state of Indiana for the privilege of so doing business in the state of Indiana, for the purpose of paying the same into the office of the Treasurer of State for the state of Indiana, and said Auditors of State for the state of Indiana from time to time demanded and received from this plaintiff and all other foreign insurance companies doing business in the state of Indiana (of which during the year 1884 there were 122, and which steadily increased to the year 1905 to the number of 162) except 5, under the construction so placed by him upon such statutes, the taxes and charges by him computed as being due; and from this plaintiff under such statutes for the privilege of doing such business in the state of Indiana, and in pursuance of such demand this plaintiff paid all such taxes and dues to said Auditors of State from the date of its admission to do business in the state of Indiana up to and including the year 1905; and said Auditor of State paid the same (except possibly as hereinafter stated) to the Treasurer of State, who received the sums from said Auditor of State, and placed said sums of money in the funds of the state. And this plaintiff further says that as required by the statutes of the state of Indiana, from time to time in that behalf enacted and in force, the respective Auditors of State made stated reports to the Governor of the state of Indiana of the business transacted in the office of the Auditor of State during the period covered by said reports respectively. That said reports in every instance showed the fact that said Auditors of State, under the construction by them placed upon such statutes, had collected from all such foreign insurance companies except five the taxes due from them to the state of Indiana, and had charged himself therewith on his account at the time of the receipt thereof, and had credited himself with the payment thereof to the Treasurer of the State at the time of making such payments to the Treasurer of State. That at the meetings of the General Assembly of the state of Indiana printed copies of such reports of the Auditor of State were by the Governor transmitted both to the Senate and House of Representatives and printed copies thereof were forwarded to each member of both houses.

That the Chief Executive of the state and the legislative department of the government were in this manner fully apprised of the construction placed upon the statutes of the state, enacted in that behalf by the Auditor of State, and of his acts and conduct in receiving such taxes and in paying the same to the Treasurer of the State.

"In addition to the delivery of copies of the said printed reports to the Governor and the members of the General Assembly of the state of Indiana, many hundreds of the copies of said reports were distributed to private citizens throughout the state. And this plaintiff further avers that in certain of said years the State Board of Tax Commissioners, who were charged with the duty of preparing blank forms of reports of said insurance companies, to be by them made to the Auditor of State as a basis for estimating the taxes to be paid by them, in preparing such form of reports, caused to be printed on the back thereof as a copy of the statute in that behalf enacted: 'Sec. 83. (Acts of 1881.) Every insurance company not organized under the laws of this state, and doing business therein, shall in the months of January and July of each year, report to the Auditor of State, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana, on account of insurance premiums for the six months last preceding, ending on the last days of December and June of each year next preceding, and shall, at the time of making such report, pay the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the state; and any insurance company failing or refusing for more than thirty days to render an accurate account of its premium receipts, as above provided, and pay the required tax thereon, shall forfeit one hundred dollars for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana, on relation of the Auditor of State, in any court of competent jurisdiction; and it shall be the duty of the Auditor of State to revoke all authority of any such defaulting company to do business within this state.' That such construction of said statute placed thereon by said several Auditors of State for the state of Indiana was with full knowledge thereof acquiesced in by the several Governors of the state of Indiana, by the Treasurer of State for the state of Indiana, by the legislative department thereof, and by the public at large for a period of more than 25 years as the proper construction thereof. And this plaintiff further avers that, in the years 1904 and 1906, one David Sherrick was Auditor of State for the state of Indiana, and in such years unlawfully converted to his own use certain of the moneys so paid into his hands by foreign insurance companies; that the Governor

of the state of Indiana, still putting the same construction upon the statutes of Indiana in that behalf enacted, directed the Attorney General of the state of Indiana and the prosecuting attorney of the state of Indiana to cause prosecutions for embezzlement to be instituted and prosecuted against said Sherrick for the embezzlement of moneys belonging to the state of Indiana, and such Attorney General and prosecuting attorney did so institute and prosecute such proceedings, and said David Sherrick was convicted upon said charge; that upon the trial of said cause the criminal court of Marion county adopted the same construction of said statute, but that upon the appeal of said cause to the Supreme Court of the state of Indiana, that court determined that said David Sherrick, as Auditor of State, had no lawful authority to receive such taxes, and this was the first time that any such construction had been put upon any such statute by any department of the state government. And this plaintiff further avers that on making said several payments of said taxes for said several years to the several Auditors for the state of Indiana, holding said office from time to time during said years, it acted in the utmost good faith, believing that said Auditors of State were lawfully authorized to receive said taxes for the purpose of paying them into the treasury of the state, and until the 6th day of August, 1906, supposed that said Auditor of State had in due course paid all said moneys into the treasury of the state of Indiana.

"That after the rendition of said decision by the Supreme Court of the state of Indiana in the case of Sherrick v. State of Indiana [167 Ind. 345, 79 N. E. 193], to wit, on the 6th day of August, 1906, one Warren Bigler, then holding the office of Auditor of State for the state of Indiana, notified this plaintiff by letter of that date that James H. Rice in the year 1884 had failed to pay over to the Treasurer of State for the state of Indiana the sum of eleven thousand four hundred eighteen and 50-100 (\$11,418.50) dollars which had been paid into his hands by various foreign insurance companies, and that of that account there was due from this plaintiff the sum of one thousand seven hundred ninety-nine and 45-100 (\$1,799.45) dollars, and demanded payment thereof. That thereafter, to wit, on the 22d day of August, 1906, said Warren Bigler, as such Auditor of State, wrote to this plaintiff another letter in which he stated that he was mistaken in his former letter, and that there was due from this plaintiff on account of said James H. Rice, former Auditor of State, having failed to pay over to the Treasurer of State, the amount by this plaintiff paid for the last half of the taxes for the year 1884, the sum of one thousand two hundred ninety-six and 76-100 (\$1,296.76) dollars, to which there must be added interest to the amount of

one thousand seven hundred eighteen and 21-100 (\$1,718.21) dollars, making an aggregate sum of three thousand fourteen and 97-100 (\$3,014.97) dollars, which amount was demanded from this plaintiff. That on the 20th day of November, 1906, said Warren Bigler wrote another letter to this plaintiff, demanding payment of said sum on or before December 11, 1906, and declared if said sum was not paid on or before that date this plaintiff would be declared in default to the state of Indiana and a penalty of one hundred (\$100) dollars per day added thereto, and a forfeit added for each day until it was paid, and its authority to do business in the state of Indiana declared revoked.

"That thereafter, on the 30th day of November, 1906, one John C. Billheimer, who had succeeded said Warren Bigler as Auditor of State for the state of Indiana, wrote another letter to this plaintiff wherein he stated that the second letter of said Warren Bigler as Auditor of State for the state of Indiana was in error in stating that the taxes which said James H. Rice as Auditor of State had failed to pay over to the Treasurer of State were for the last half of the year 1884, and that in point of fact they were the first half of the year 1884, and again demanding the amount of three thousand fourteen and 97-100 (\$3,014.97) dollars. That letters of like tenor and effect save as to amounts claimed to be due were written by said Warren Bigler as such Auditor of State and John C. Billheimer as such Auditor of State to a number of other foreign insurance companies, and such insurance companies were engaged in endeavoring to discover whether in point of fact said James H. Rice as such Auditor of State had in point of fact failed to account for said sum of eleven thousand four hundred eighteen and 50-100 (\$11,418.50) dollars and were of the opinion that it was by no means certain that he had failed to account for the sum; and they requested said Auditor of State to grant them time to further investigate that question, and that time be given them in which to institute some test case in the proper court both to determine that fact and also to determine whether as a matter of law they were liable to pay said several sums demanded from them respectively, even if it should be proved that said James H. Rice, as Auditor of State, had failed to pay or account for said sum of eleven thousand four hundred eighteen and 50-100 (\$11,418.50) dollars, and had offered by way of compromise to adjust the claim of the state by the payment of principal without right to make any demand for its return, and bring a friendly suit to test the question of liability for the interest, which offer was first accepted, but afterward on the 10th day of November, 1906, said Auditor of State withdrew his assent to such compromise, and declared that all such companies must pay the full amount

so claimed from them, principal and interest, on or before the 11th day of December, 1906, and if any company failed to make such payment on said date, the penalties stated in said letter of November 10th would be enforced, and the authority of such company to do business in the state of Indiana would be revoked.

"That during the years above named this plaintiff by expenditure of large sums of money and much labor had established a large and profitable business in the state of Indiana, and had secured more than 13,000 residents and citizens of the state of Indiana to become policy holders in its company, whose policies aggregated \$26,454,251. That the annual premiums thereon amounted to more than nine hundred and sixty thousand dollars (\$960,000). That in event said Auditor of State should proceed to enforce said threat of revoking its authority to do business, it would not only inflict great and irreparable injury upon the business of this plaintiff, causing a loss of many thousands of dollars to it, but it would create such confusion and uncertainty in the minds of policy holders and endanger their securities under said policies. That thereupon this plaintiff, imperiled and coerced by such threats so made by said Auditor of State, did pay unto the office of Treasurer of State the said principal sum of one thousand two hundred and ninety-six and 67-100 (\$1,296.76) dollars and the sum of one thousand seven hundred twenty-six and 84-100 (\$1,726.84) dollars interest thereon to date of said payment, and notified both the Treasurer of State for the state of Indiana and the Auditor of State for the state of Indiana in writing that it paid said sums not voluntarily but under the coercion and duress arising out of the threats contained in said communications from said Auditors of State and to arrest the imposition of the threatened penalties and the revocation of its charter and under protest both as to principal and interest, and reserved the right to recover either of said sums so paid. Wherefore," etc.

The second paragraph of the complaint is substantially the same as the first, except that the appellee thereunder seeks to recover \$1,726.84 so paid by it as interest upon the principal sum of \$1,296.76 into the office of the Treasurer of the state of Indiana.

At the very threshold we are confronted with the contention of the Attorney General that the superior court of Marion county, Ind., under the provisions of section 1485, supra, had no jurisdiction to hear and determine this action. This section, as amended in 1895 (Acts 1895, p. 231), reads as follows: "That any person or persons having or claiming to have a money demand against the state of Indiana, arising at law or in equity, out of contract express or implied, accruing within fifteen years from the time of the commencement of the action, may

bring suit against the state therefor in the superior court of Marion county, Indiana, by filing a complaint with the clerk of said court and procuring a summons to be issued by said clerk, * * * and jurisdiction is hereby conferred upon said superior court of Marion county, Indiana, to hear and determine such actions, and said court shall be governed by the laws, rules and regulations which govern said superior court in civil actions in the making up of issues, trial and determination of said cause. * * * The argument advanced by the Attorney General is that appellee under both paragraphs of its complaint proceeds upon the theory that the money which it seeks to recover was "wrongfully and unlawfully extorted from it by the state, acting through its Auditor, and that appellee was compelled to pay into the state treasury a sum of money which it did not owe, or to submit to a revocation of its right to do business within this state, and the imposition of the statutory penalty of \$100 per day." Or, in other words, he insists that each of the paragraphs charges the Auditor of State with illegal, unauthorized, and wrongful acts, in excess of the power granted to him by law. His claim is that the action as made or presented by appellee's complaint sounds in tort and not in contract. Therefore, it is asserted that under the terms of the statute in question the lower court had no jurisdiction.

It is settled beyond controversy that a state, which in the eye of the law is recognized as a sovereign, cannot without its consent be sued by a citizen. In case the state through its legislative department has granted the right or privilege to claimants to institute actions against it upon certain terms and conditions, all persons seeking to avail themselves of the privilege so granted must accept it subject to the terms and conditions attached thereto or forming a part of the right as granted by the state. Or, in other words, the suit instituted must be confined or limited to such a claim or claims as are contemplated by the act authorizing the state to be sued. *May v. State*, 133 Ind. 567, 33 N. E. 352; *Thweatt v. State*, 66 Ga. 673; *Chicago, etc., R. R. Co. v. State*, 53 Wis. 509, 10 N. W. 560; *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39; *Murdock, etc., Grate Co. v. Commonwealth*, 152 Mass. 28, 24 N. E. 854, 8 L. R. A. 399; *Hill v. U. S.*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862. In the absence of a statutory law creating a liability, the rule universally recognized and enforced is that neither a state nor the United States is legally liable to respond in damages to a person for an injury resulting from the misconduct, negligence, or tortious acts of its officers or agents. *Houston v. State*, *supra*, and authorities there cited; *German Bank of Memphis v. U. S.*, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564. It is evident, under the facts alleged in the paragraphs of the complaint, that appel-

lee's demand against the state cannot be said to arise out of or be founded upon an express contract between it and appellant. Consequently, unless appellee's money demand against the state—which it either actually has or claims to have—arises out of an implied contract, it, under the provisions or terms of the statute in question, has no standing or right to maintain this action, and the demurrer of appellant to the complaint upon this ground alone should have been sustained.

We are unable, however, to concur in the view of the Attorney General that the action at bar arises out of a tort committed by the state's officer or agent. It is true that the pleading contains averments that the money which was paid into the state's treasury by appellee was wrongfully and unlawfully extorted from it, etc.; that it was coerced and imperiled by a threat by the Auditor of State that he would revoke its authority to do business within the state. It is manifest that these averments were employed by the pleader to more fully show that the money in question was paid over by appellee involuntarily, and therefore, if it belonged to it and not to the state, it might be recovered back in this action. *Scottish, etc., Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 Am. St. Rep. 548, and cases there cited. Eliminate these averments from the complaint and it is shown, we think, by the remaining clear and positive allegations that the payment in question to the state was not voluntarily made, but was made by appellee under protest, and at the time it made the payment, as shown, it notified the Auditor and Treasurer of State that it reserved the right to recover the money so paid. The essential fact to be shown by the complaint upon this feature of the case was that the payment of the money was involuntary. Under the circumstances, the claim of the Attorney General that the action sounds in tort instead of contract is untenable.

We may next inquire, what did the Legislature mean or intend by the words "A money demand arising at law * * * out of contract, express or implied"? The phrase "money demands on contracts" was defined in the Revised Statutes of 1852 as follows: "The phrase, money demands on contracts, when used in reference to an action, means any action arising out of contract, when the relief demanded is the recovery of money." 2 *Gavin & Horde*, § 797, p. 336. This same definition is contained in the Revision of 1881, and is found in section 1356, *Burns' Ann. St.* 1908. It must be conceded that the relief demanded in this action is the recovery of money. It is evident, we think, that this demand does not arise out of an express contract.

It will be noted that the statute which authorizes the state to be sued does not confine the action alone to one arising at law or in equity out of an express contract, but

it may be one which springs from or arises out of what in law is recognized and denominated an implied contract.

We may presume that the Legislature in extending to claimants the right to recover against the state upon a money demand arising out of an implied contract fully understood the meaning and character of such contracts. The Legislature evidently contemplated that money at some time might be paid into the treasury of the state under such circumstances as would not lawfully permit the state to hold or retain it against the person making the payment and therefore the state, under the law, would be impliedly obligated to refund or pay over the money to the person entitled thereto. We are of the opinion that, in view of its terms, the statute in question must be construed and held to apply to such a case. The Attorney General, however, insists that the state has never recognized appellee's claim to the money in controversy, and in no manner has it agreed to repay it or restore it to appellee. It is true that the facts as alleged do not disclose any express agreement or promise on the part of the state to pay back or refund the money in question to appellee, and it is evident from the argument of its counsel that repayment thereof is the very opposite of its intention. It may be said, we think, that some looseness and ambiguity impress some of the decisions of the higher courts in respect to the application of the principle of implied contract to particular facts. An express contract is said to be a mutual understanding and coming together of the minds of the contracting parties to do or not to do a particular thing; while an implied contract, generally speaking, is defined: First. As an obligation where there is no express or formal agreement by the parties to contract, but their intention so to do is shown by their acts or from surrounding circumstances. Second. Obligations implied by law, without regard to the acts or intention of the parties. 7 Am. & Eng. of Law (2d Ed.) 92; 15 Am. & Eng. Enc. of Law, 1078; *People v. Speir*, 77 N. Y. 144.

In express contracts it is the consent or agreement of the parties thereto which creates the obligation or liability, while under a contract or obligation implied by law there is no actual consent or promise. Under the facts in the particular case it is the law alone which declares that the necessary consent or promise shall be implied. In *People v. Speir*, supra, the court characterizes implied or constructive contracts—as they are sometimes called—as follows: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of

express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention." This principle is recognized and sustained by the decisions of this court which hold that where a person has obtained money to which he is not entitled, but which in right and justice belongs to another, that under such circumstances an action may be maintained for its recovery by the person entitled thereto upon an implied promise or agreement on the part of the person obtaining the money. *McQueen v. State Bank of Ind.*, 2 Ind. 413. The court in the latter case held that: "If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party. It is not the money of the wrongdoer. He has no right to retain it; and the law therefore implies a promise from him to return it to the lawful owner." In support of the same rule, see, also, *Ash-ton v. Shepherd*, 120 Ind. 69, 22 N. E. 98; *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89. In the latter case this court said: "In an action for money had and received there need be no privity of contract proved, other than such as arises out of the facts that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it." In the 4th volume of *Wait on Actions and Defenses*, the author states the rule as follows: "An action for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received that money either from the plaintiff himself or third persons, under such circumstances that in equity and good conscience he ought not to retain the same, and which *et aequo et bono* belongs to the plaintiff. * * * It is not, however, essential that any privity of contract should be shown; if the plaintiff's right to the money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it."

By the facts alleged it is shown that the state, through its proper officials, demanded of appellee company, and received and obtained from it the money in controversy, and that the same passed into the state's treasury for the state's use in the administration of its affairs. In the light of the principle asserted by the authorities to which we have referred, if, as appellee under the facts insists and contends, the state is not entitled to the money in controversy, but on the contrary it rightfully belongs to appellee, con-

sequently the state cannot rightfully retain it as against appellee, and the law raises or creates an implied obligation or liability on the part of the state to pay it over to appellee. Therefore, appellee had the right to sue the state in the superior court of Marion county, Ind., under section 1485, *supra*, and that court, under the provisions of the statute had jurisdiction to hear and determine the merits of the action. What we have said, however, in dealing with the question of jurisdiction as raised by the Attorney General must be confined alone to that question; or, in other words, to appellee's right to sue the state under the statute upon an implied contract or liability, and we must not be understood as in any manner upholding or affirming appellee's ultimate right to recover against the state upon the facts alleged in the complaint.

We next turn to the consideration of the case as presented by the first paragraph of the complaint. The contention of the Attorney General is that the averments of the complaint disclose that the money which appellee seeks to recover in this action was lawfully collected from it both as to principal and interest, and that therefore there is no liability shown to exist against the state which appellee can enforce in this action. He insists that the decisions in *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193, and in *Dally v. State ex rel. Bigler, etc.*, 171 Ind. 646, 87 N. E. 4, deny appellee's right to recover the money in dispute, and that the decisions in these appeals must rule the question of the state's liability. On the other hand, counsel for appellee present their view of the case from the facts as follows: "Our contention is this, that although the construction placed upon the law by the Auditor of State was not sound, yet the state, through the officers and departments already so many times mentioned, by adopting that construction and acquiescing therein for so long a period, estopped or precluded itself from asserting the invalidity thereof against all persons who, acting in good faith and with honest intent and purpose, also accepted such interpretation of the statute, prior to the time when a different construction thereof was announced by this court." Counsel very frankly assert that if they are wrong in this contention that ends the matter. Further advancing their contention counsel say: "As to duration of time, the question is simply this, Did the state acquiesce in such payments, so generally and for so long a period of time as to lull appellee to sleep, and lead it to understand that it might safely pursue the course it did? Had any reasonable objection been made to the course pursued, the appellee and other insurance companies in the life of the bond given by the Auditor of State could have recovered the money thus wrongfully paid to Mr. Rice. The acquiescence of the state after the payments were made is quite as im-

portant a consideration as the acquiescence in the payments made prior to 1884, and particularly is this true when the state by such acquiescence has cut off the insurance companies from any redress. So that the appellee on the question of acquiescence is entitled to reckon the time which has elapsed since 1884, just as much as the time elapsing from 1873 to 1884."

The statute governing the payment of taxes by foreign insurance companies, to which class appellee belongs, is embraced in section 10,216, Burns' Ann. St. 1908, the same being section 67 of the general law concerning taxation approved March 6, 1891 (Acts 1891, p. 199). This section declares that: "Every insurance company not organized under the laws of this state and doing business therein shall in the months of January and July of each year, report to the Auditor of State, under oath of the president and secretary, the gross amount of all receipts received in the state of Indiana on account of insurance premiums for the six months last preceding, ending on the last day of December and June of each year next preceding, and shall at the time of making such report *pay into the treasury of the state* (our italics) the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the state, and any such insurance company failing or refusing for more than thirty days, to render an accurate account of its premium receipts as above provided and pay the required tax thereon shall forfeit one hundred dollars for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana on the relation of the Auditor of State in any court of competent jurisdiction, and it shall be the duty of the Auditor of State to revoke all authority of any such defaulting company to do business within the state."

It will be observed that this statute in positive and imperative terms requires insurance companies to pay the money exacted from them as taxes not to the Auditor of the State, but into the treasury of the state. This statute appears to have been first enacted in the Legislature in 1873, in an act supplementary to and amendatory of an act providing for the uniform assessment of property, etc., and is embraced in sections 8 and 9 of said act. See Acts 1873, p. 206. It was re-enacted in 1881 in an act concerning taxation, and is embraced in section 83 of this latter statute (see Acts 1881, p. 636); and re-enacted again in 1891 (Acts 1891, c. 99), and has been a law of the state for a period of over 37 years.

Section 9247, Burns' Ann. St. 1908, provides and points out the method of paying money into the treasury of the state. Appellee must be presumed to have known the requirements of sections 10,216 and 9247, *supra*, and in turning the money over to the Auditor it was chargeable, at its peril, with

notice or knowledge of the scope of his official authority under the law to receive the same for the state as payment of the taxes in question. Or, in other words, that under the laws of the state he had no authority whatever to receive the money in behalf of the state. *Sherrick v. State*, supra; *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *Silver, Burdett & Co. v. Ind. State Board*, 35 Ind. App. 438, 72 N. E. 829.

Appellee argues that Rice, as Auditor, received and accepted the money from it under the provisions of section 10,216, supra, and that he construed and interpreted said section as authorizing him in his official capacity to receive the money from appellee company to be paid by him in to the Treasurer of State, and it seeks to invoke the principle of practical or departmental construction in order to constitute a part of the basis upon which to predicate its right to recover the money in controversy. Its counsel concede that under the decision in the *Sherrick Case*, supra, the construction or interpretation accorded to the statute by Auditor Rice and the other auditors following him, was neither sound nor tenable, but they claim and insist that the state is shown to have acquiesced in this construction of the law for a series of years, and that the state is now precluded from claiming that the construction or interpretation placed upon the statute by the Auditors was not correct. We are not inclined to accept this view of the case. The statute in question is not impressed with any ambiguity whatever either patent or latent, and as to its meaning there can be no doubt. Therefore, under the circumstances, it affords no room for departmental or judicial construction, for the Legislature in plain and precise terms has declared therein that the money exacted of foreign insurance companies is, at the time they make their respective reports to the Auditor of State, to be paid by them in to the Treasurer of State. Neither departmental nor judicial construction is allowable to interpret a law which is plain upon its face and requires no interpretation. *State v. Sopher*, 157 Ind. 360, 61 N. E. 785; *Hord v. State*, supra, and authorities there cited. *United States v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126. The money required to be paid is not a license fee for permitting the insurance companies to conduct their business within the state, but it is for taxes imposed upon such companies by the Legislature. In respect to the payment of the money as required by this statute it is sufficient to say, "*Ita lex scripta est.*" Certainly, under the law, there is no reasonable grounds for asserting that the Auditor in any manner received the money from appellee in his official capacity, but he must be held to have received it in his individual capacity as the mere agent of appellee for the purpose, as we may assume, of paying it into the treasury of the state, possibly less any commission to which he

considered himself entitled. *Sherrick v. State*, supra.

The statute did not invoke any construction by the Auditor. The provision thereof requiring the money to be paid in to the Treasurer of State by the insurance companies is perfectly plain and certain upon its face, it affords no room for interpretation or construction. It was the duty of both appellee and the Auditor to regard its requirements. *Sherrick v. State*, supra. It must follow, therefore, under the circumstances, as a logical conclusion, that the act of the Auditor in receiving the money from appellee was not due to any misinterpretation of the law on his part, but must be attributed to his willful disregard of its plain provisions.

Again, upon another view of the question, the Auditor under the law, was not charged with the execution thereof in respect to whom the money should be paid by the foreign insurance companies in satisfaction of the taxes exacted of them by law. He was bound to know the requirement of the law and must be presumed to have known that the statute required the money to be paid by such companies, not to him as Auditor, but in to the Treasurer of State. Therefore, he had no legal authority or jurisdiction whatever to place an interpretation or construction upon that provision of the statute which prescribed the officer to whom the money should be paid. Having no legal power or authority, either express or implied, to construe or interpret the statute in this respect, his act in so doing would be of no avail or effect. Therefore, under the law in this case, the principle of departmental or administrative construction for which counsel for appellee contend, can have no application and is without force, for it is only in the discharge of their official duties that a construction or interpretation, placed upon a law by departmental or administrative officers charged with the duty of enforcing or applying it, becomes material or of any effect or force. *Endlich on Interpretation of Statutes*, § 360; *In re Manhattan Savings Institution*, 82 N. Y. 142; *United States v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, 37 L. Ed. 321; *Nye v. Foreman*, 215 Ill. 285, 74 N. E. 140; *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256. Under this view of the question, appellee's claim that the theory of the complaint is that the state has by its conduct so accepted the act of the Auditor of the State and so acquiesced in his conduct that it is precluded or estopped from demanding the money, which it received from the appellee on the 11th day of December, 1906, is untenable. Upon this viewpoint it is insisted that it is wholly immaterial what is the proper construction of the statute; that if the Auditor accorded the wrong construction to the law, and the state acquiesced therein, it is precluded. The infirmity of this argument is that it

would be unreasonable to assert that the state can be held in any manner to have acquiesced in the unauthorized acts of the Auditor of State. That officer having no jurisdiction to construe or interpret the provision of the statute in controversy, his act in so doing, under the circumstances, was unwarranted, and the charge that the state accepted his construction and acquiesced therein is but a conclusion of the pleader; for certainly the state cannot be regarded as having accepted and acquiesced in the Auditor's unauthorized interpretation of the law, which interpretation is manifestly at variance with the express and plain provisions of the act in question.

The contention of appellee that the state is estopped or precluded by its conduct from demanding or requiring appellee to pay the money involved into the state treasury, in our opinion, cannot be upheld. It may be said, in passing, that if the state on December 11, 1906, was legally entitled to the money which appellee paid over under protest, then, under the circumstances, a correct result having been reached by the payment of the money into the state's treasury, appellee must fail in this action.

In regard to the question of estoppel urged by appellee it may be said that: "The effect of an estoppel in pais is to prevent the assertion of an unequivocal right, or preclude a good defense, and justice demands that it should not be enforced unless substantiated in every particular." Generally speaking, the ground upon which an estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped. The fraud is said to consist in the denial of that which the person to be estopped had previously affirmed or asserted. *Ward v. Berkshire, etc., Co.*, 108 Ind. 301, 9 N. E. 361; *Wisehart v. Hedrick*, 118 Ind. 341, 21 N. E. 80; *Reid v. State ex rel.*, 74 Ind. 252; *Herman on Estoppel*, § 944. The doctrine of estoppel springs from equitable principles, and is designed to aid the law in the administration of justice where, without its aid, injustice might result. Its purpose is to preserve rights previously acquired, and not to create new ones. *Sherick v. State*, *supra*. There is in this case, however, no insistence by counsel for appellee that there was any misrepresentation, false or otherwise, on the part of the state, made through any of its duly authorized officials, but the argument is advanced by appellee that the state with knowledge or notice that the Auditor was receiving from it and the other foreign insurance companies the taxes in question, and was paying them in to the Treasurer of State must, under the circumstances, be deemed to have acquiesced in his acts, and is estopped by its conduct of acquiescing therein from recovering the money in controversy of appellee. Appellee, in order to maintain the estoppel which it urges against the state, seeks to bring home to the latter, through the biennial reports made by

the Auditor, as shown, notice of the unauthorized acts of the Auditor in collecting and receiving the money from the insurance companies.

It is charged that these reports disclosed that the several Auditors had, from time to time, collected from all the foreign insurance companies except five the taxes due from them to the state, and that these several officials had credited themselves, respectively, with the payment of the money to the Treasurer of State. While it may be conceded—arguendo without deciding—that by virtue of these reports of the Auditors, which were laid before the General Assembly by the Governors, the state may be held to be chargeable, through its legislative department, with notice of the unauthorized acts of the Auditor; nevertheless, an essential element to constitute an estoppel by conduct is lacking, namely, that it does not appear that appellee at the time it paid the taxes to the Auditor of State was apprised of the fact that he was not authorized under the law to collect and receive these taxes. It is an undisputed proposition that, in a case where a person seeking the benefit of the estoppel has knowledge or means of knowledge in respect to all of the facts equal to that possessed by the one against whom the estoppel is urged, there can be no valid estoppel. *Reid v. State ex rel.*, *supra*; *Leonard v. American Insurance Co.*, 97 Ind. 299; *Platter v. Board of Commissioners*, 103 Ind. 360, 2 N. E. 544; *Silver, Burdett & Co. v. Ind. State Board*, 35 Ind. App. 438, 72 N. E. 829; and authorities there cited. In short, it may be said that we have a case before us in which neither misrepresentation nor concealment is charged against the state; neither do the facts show knowledge as to one of the parties and ignorance on the part of the other; consequently, appellee is not in a position to invoke the principle of estoppel. It, and likewise the state, were each bound to know the law; or, in other words, they were bound to know that the Auditor was not authorized by the statute to receive the money for the taxes. Hence, in respect to the question of knowledge or notice, the state and appellee may be said to have been on a parity with each other.

If appellee continued, as it appears it did, to pay the money due from it to the state as taxes to an officer unauthorized under the law to receive it, such payments were unwise, and if it were conceded that the state was apprised of the acts of the Auditor in accepting the money, it certainly, under the law, was neither required nor could it be expected to take any steps to protect appellee against its own folly. Counsel for appellee argue that if appellee is again required to pay these taxes it will result in a hardship and injustice. In fact, it has never paid them, for its payment to the Auditor, as we have shown, was not a payment to the state, and the position in which it is now placed, under the circumstances, must be attributed to its own fault

in failing to comply with the plain requirements of the law. To sustain its contention that it ought not to account to the state for the taxes in controversy would be equivalent to offering an inducement to persons to rely upon their own voluntary ignorance in regard to their legal rights and duties, and would tend to break down the force and effect of the ancient maxim "*ignorantia legis neminem excusat*," which applies alike to both common and statutory law. By reason of the conclusions which we have reached, we dismiss, without consideration, the contention of the Attorney General that the state cannot be estopped by the laches or delays of its public officers. Upon this point, however, see *Terre Haute, etc., Ry. Co. v. State ex rel.*, 159 Ind. 438, 65 N. E. 401.

We conclude, and so hold, that the facts alleged in the complaint do not constitute an estoppel against the state and that appellee is not entitled to recover back, under the first paragraph of its complaint, the principal money which it paid over to the state on December 11, 1906.

Counsel for appellee next and lastly insist that whatever may be the law as to the right of the state to call upon appellee to pay the principal of the taxes in question, there can be no foundation upon which it can predicate any right to require it to pay interest on these taxes. We concur in this contention. It will be observed that section 10,216, supra, which imposes the taxes upon foreign insurance companies and which, as previously shown, has formed a part of the general taxation law of this state since 1873, provides that: "Any such insurance company failing or refusing for more than thirty days * * * to pay the required tax thereon shall forfeit one hundred dollars for each additional day, * * * to be recovered in an action in the name of the state of Indiana on the relation of the Auditor of State." It will be noted that neither this section, nor any other part of our statute concerning taxation, contains any provision for allowing interest upon taxes. This court has held that under the taxing law of 1891 interest is not authorized to be collected upon delinquent taxes. *Evansville, etc., Ry. Co. v. West*, 139 Ind. 254, 37 N. E. 1009; *Western Union, etc., Co. v. State*, 146 Ind. 54, 44 N. E. 793; *Gallup, Exr., v. Schmidt*, 154 Ind. 196, 56 N. E. 443. Upon the same point is the holding in *Morrow v. Geeting*, 23 Ind. App. 494, 55 N. E. 787. The same principle is affirmed and sustained in *Western Union Tel. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *Perry v. Washburn*, 20 Cal. 318; *Danforth v. Williams*, 9 Mass. 324; *Ky. Central Ry. Co. v. Pendleton Co. (Ky.)* 2 S. W. 176; *City of Camden v. Allen*, 26 N. J. Law, 398; *State v. Southwestern Rd. Co.*, 70 Ga. 11; *Perry County v. Selma, etc., R. Co.*, 65 Ala. 391. Taxes levied or imposed by the state are not debts in the ordinary

acceptation of that term so as to make them bear interest under the general interest laws of the state. In the absence of any express declaration by the Legislature that taxes shall bear interest, the latter, as authorities affirm, should not be allowed. A tax made payable by a statute at a certain time does not bear interest unless the statute so provides. In support of these propositions, see authorities above cited.

It is manifest, we think, that the state had no right to exact the payment of interest upon the principal sum of the unpaid taxes. It follows, therefore, that appellee is entitled, under the second paragraph of the complaint, to recover back from the state the amount of interest which it is shown to have paid upon the principal. The manifest theory of the first paragraph of the complaint is to recover the principal which appellee paid to the state on December 11, 1906; therefore, under our holding, this paragraph is insufficient and the lower court erred in overruling the demurrer thereto. Under our holding herein there was no error on the part of the court in overruling the demurrer to the second paragraph of the complaint.

On account of the error of the court in overruling the demurrer to the first paragraph of the complaint, the judgment is in part reversed, but so far as the judgment awards to appellee a recovery of the total amount of interest which it paid over to the state on December 11, 1906, on the principal sum of the taxes, it is in all things affirmed; and the cause is remanded to the lower court, with instructions to sustain the demurrer to the first paragraph of the complaint and to modify the judgment by striking out and eliminating therefrom all that part which embraces and awards to appellee a recovery of the principal amount of the taxes paid over by it to the state on December 11, 1906, and for further proceedings not inconsistent with this opinion.

(175 Ind. 25)

STATE v. RODGERS. (No. 21,632.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. INDIOTMENT AND INFORMATION (§ 63*) — STATUTORY REGULATIONS — OFFENSES — GUARDING MACHINERY—"PROPERLY GUARDED."

The phrase "properly guarded" in the statute, providing that enumerated machinery, including saws, shall be properly guarded, is a relative term, and involves the extent of guarding and the question of the efficiency of the machinery for the purpose used, and an allegation in an indictment for violation of the provision that a swinging cut saw was not properly guarded is merely a conclusion, and there must be an allegation that it is practicable to guard the saw so as not to render it inefficient for the use intended.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 185; Dec. Dig. § 63.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5692; vol. 8, p. 7768.]

2. INDICTMENT AND INFORMATION (§ 110*) — STATUTORY OFFENSES—INDICTMENT IN LANGUAGE OF STATUTE.

The rule that it is sufficient to charge an offense in the language of the statute applies, where the statute defines the offense and states what acts or omissions constitute it, but does not apply where the statute does not define the offense, and where other sections of the statute must be looked to, or where the act is necessary to be supplemented by some other elements, or where some other element is involved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 289; Dec. Dig. § 110.*]

3. INDICTMENT AND INFORMATION (§ 62*) — STATUTORY REGULATIONS — GUARDING MACHINERY—OFFENSES.

Under Burns' Ann. St. 1908, § 8045, providing that one who violates or omits to comply with the act requiring enumerated machinery to be properly guarded shall be guilty of a misdemeanor, an offense is committed only when it is practicable to guard machinery and it is neglected, and it cannot be left to presumption that it is practicable to guard, for the presumption is that an owner has done what is required of him as a practicable thing, which presumption must be overcome by the charge specifically made.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 184; Dec. Dig. § 62.*]

4. MASTER AND SERVANT (§ 121*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER—GUARDING MACHINERY—STATUTES.

The statute requiring enumerated machinery to be properly guarded does not enlarge the common-law duty of a master, but merely places emphasis on that duty, and removes the question of assumption of risk as to machines, appliances, and places to work designated by the statute and those designated by the inspector, and makes the neglect of the master negligence per se.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.*]

5. INDICTMENT AND INFORMATION (§ 70*) — REQUISITES.

Every element necessary to constitute an offense must be directly and positively charged, and no presumption will be indulged against accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.*]

6. INDICTMENT AND INFORMATION (§§ 63, 70*) — STATUTORY REGULATIONS — FAILURE TO GUARD MACHINERY—INDICTMENT.

An indictment charging a violation of Burns' Ann. St. 1908, § 8045, providing that any person who violates or omits to comply with the act requiring the guarding of machinery shall be guilty of a misdemeanor, must allege that it was practicable to guard the machinery without affecting its efficiency or utility, and a charge that machinery was not properly guarded is insufficient because a conclusion, and because not a direct and positive charge that the machinery could be guarded.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 185, 192; Dec. Dig. §§ 63, 70.*]

Appeal from Circuit Court, Jennings County; F. M. Thompson, Judge.

Homer Rodgers was charged with crime, and from a judgment quashing the indictment, the State appeals. Affirmed.

James Bingham, A. G. Cavins, E. M. White, and W. H. Thompson, for the State. Dixon & Méloy, for appellee.

MYERS, C. J. Appellee was sought to be charged with the violation of section 8029, Burns' Ann. St. 1908, by an indictment omitting the formal parts as follows: "That one Homer Rodgers, late of said county, on the 15th day of March A. D., 1909, at said county and state aforesaid, being then and there the owner of and the person in charge of a certain manufacturing establishment for the manufacture of lumber and wood products, in which establishment a certain saw, to wit, a certain swinging cut-off saw, was then and there used, did then and there unlawfully fail and neglect to properly guard the aforesaid saw, contrary to the form of the statute in such cases made and provided." The indictment was quashed on motion, and the state appeals. The indictment was quashed as we understand the record, for failure to allege that it was practicable to guard the saw without rendering it useless for the purpose for which it was intended. The statute provides that, "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description therein (referring to manufacturing and other plants described) shall be properly guarded." The statute recognizes the use of saws, and the machinery and appliances as lawful and necessary; its prohibition extends to the manner of their use. The Legislature has characterized saws as in themselves dangerous, and has provided that they shall be properly guarded.

What is meant by the phrase "properly guarded"? It is a relative term, and involves the extent of guarding, and the question of the efficiency for the purpose used. To say that a swinging cut-off saw was not properly guarded would be to state a conclusion and not a fact. The state contends that if it was important to show that the saw could not have been guarded it might have been shown as a defense, and that it was a matter for the jury, and not a question of law, and that it is sufficient to charge an offense in the language of the statute, and that is true where the statute defines the offense, and states what acts or omissions constitute it. But that is not true where the statute does not define the offense, and where other sections must be looked to as here, or where the act as here is held necessary to be supplemented by some other elements, or where some other element is involved, as practicability of guarding. *Vinnedge v. State* (1906) 167 Ind. 415, 79 N. E. 353. Here we have a general statute providing precautions in the operation of manufacturing plants in many particulars, and among other things provides that certain defined machinery shall be properly guarded. Another section—sec-

tion 8045, Burns' Ann. St. 1908—provides that "any person who violates or omits to comply with any of the provisions of this act * * * shall be deemed guilty of a misdemeanor." It has been held that it is not sufficient under this act even in a civil action to charge that a party failed to properly guard a prescribed specific appliance, machine or place defined by the statute. There must be coupled with it some allegation showing that it is practicable to guard the machine, appliance, or place to work so as not to render it inefficient for the use intended. *Bessler v. Laughlin* (1907) 168 Ind. 38, 79 N. E. 1033; *La Porte, etc., Co. v. Sullender* (1905) 165 Ind. 290, 75 N. E. 277; *Robertson v. Ford* (1906) 164 Ind. 538, 74 N. E. 1; *National Drill Co. v. Myers* (1907) 40 Ind. App. 322, 81 N. E. 1103; *Kintz v. Johnson* (1906) 39 Ind. App. 280, 79 N. E. 533; *National, etc., Co. v. Roper* (1906) 38 Ind. App. 600, 77 N. E. 370; *Cook v. Ormsby* (Ind. App. 1909) 89 N. E. 525; *Paul Mfg. Co. v. Racine* (1909) 48 Ind. App. 695, 88 N. E. 529; *Glenns Falls Co. v. Travelers' Ins. Co.* (1900) 162 N. Y. 399, 56 N. E. 897. It was the legislative intent to create an offense only when the thing neglected in and of itself resulted in an offense against the state, and it could only be an offense if it is practicable to guard and it is neglected, and it cannot be left to presumption that it is practicable to guard, for the presumption is that the owner has done what is required of him as a practicable thing, and it must be overcome by the charge specifically made. *Vinnedge v. State*, supra; *Stropes v. State* (1889) 120 Ind. 562, 22 N. E. 773.

To charge that one unlawfully failed and neglected to properly guard a swinging saw might argumentatively be said to charge that it was practicable to do so—that is, that the adverb "properly" means suitably, and practicably, having in view its use and efficiency—but that would present a question of fact wholly. What would be necessary to be proved by the state? Could it rest by simply showing that the saw was not guarded at all, if there was no pretense of guarding, or would it be required to show that it was practicable to guard it, or if there was an attempt at guarding, that it was inefficiently done, considering the use and efficiency of the machine? It is not like a case where there is no inherent right to do a thing, or carry on a business, as in case of the sale of intoxicating liquors, or other business, a condition precedent to which is having a license, for here is a business one has an inherent right to engage in, and he is only required under the judicial construction of the statute to guard machinery, appliances, and work which it is practicable to properly guard—that is having reference to the utility, and efficiency of the machine, appliance, and place. It does not enlarge his common-

law duty, except that it places emphasis upon that duty, and on the civil side of the question removes the question of assumption of risk as to the machines, appliances, and places to work designated by the statute and those designated by the inspector, and makes the neglect negligence per se. *United States Cement Co. v. Cooper* (1909) 172 Ind. 599, 88 N. E. 69.

The state's contention would put upon the defendant the duty of showing a negative, whilst it is the affirmative duty of the state to show that he could so guard as not to render the machine inefficient or useless. He is only guilty of a misdemeanor in failing to guard a machine, appliance, or place which he could guard without destroying its efficiency or use, and he has a right to be so charged that a court as a matter of law can determine whether or not an offense is charged, and certainly ought to be charged with as much particularity as in a civil action. *Johns v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789. Every element necessary to constitute an offense must be directly and positively charged, and no presumption will be indulged against the accused. *Hewitt v. State*, 171 Ind. 283, 86 N. E. 63; *State v. Metaker*, 169 Ind. 555, 83 N. E. 241.

It can scarcely be questioned that it must appear that the saw could be guarded without affecting its efficiency or utility in order to constitute the offense, and that to charge that it was not properly guarded is both a conclusion, and is not a direct and positive charge that it could be. An indictment under this statute ought certainly be as definite in order to constitute a misdemeanor as a complaint in order to charge negligence.

The judgment is affirmed.

(175 Ind. 1)

TURNER v. STATE (No. 21,741.)

(Supreme Court of Indiana. Dec. 13, 1910.)

1. INTOXICATING LIQUORS (§ 216*)—CHARGING AFFIDAVIT—SUFFICIENCY—"BEER."

An affidavit charging accused with the unlawful sale of a "pint of beer" sufficiently alleged a sale of malt liquor so as to render the affidavit sufficient; "beer" being a fermented liquor or a malt liquor made from malted grain or hops or other bitter flavors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 230-233; Dec. Dig. § 216.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 731-734; vol. 8, p. 7588.]

2. CRIMINAL LAW (§ 946*)—NEW TRIAL—WHEN GRANTED—PRIOR MOTION IN ARREST OF JUDGMENT.

A motion for a new trial will not be granted where a motion in arrest of judgment had already been made.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2353; Dec. Dig. § 946.*]

Appeal from Circuit Court, Hamilton County; Meade Vestal, Judge.

William A. Turner was convicted for the

unlawful sale of intoxicating liquor, and appeals. Affirmed.

Christian & Christian, for appellant. James Bingham, A. G. Cavins, E. M. White, and W. H. Thompson, for the State.

JORDAN, J. The state instituted this prosecution in the lower court against appellant upon an affidavit charging the unlawful sale of intoxicating liquors. The affidavit alleged that: "Ivan R. Godwin, being duly sworn, upon his oath says that, as he is informed and believes, Buff Turner, a person whose true name is unknown to affiant, on the 8th day of February, 1910, at the county of Hamilton and state of Indiana, did then and there unlawfully sell to Louis Wien one pint of beer at and for the price of ten cents; he, the said Buff Turner, not then and there being licensed under the laws of the state of Indiana to sell spirituous, vinous, and malt liquors." Appellant moved to quash the affidavit upon the ground that it did not state an offense. The motion was overruled, to which he excepted. Trial by the court; finding of guilty; and his punishment assessed at \$100. Over his motion in arrest of judgment and for a new trial, judgment was rendered upon the finding of the court. He appeals and assigns as errors the overruling of the motion to quash the affidavit and the overruling of the motion for a new trial.

The argument of appellant's counsel in regard to the insufficiency of the affidavit is somewhat confused, and we are not clearly advised thereby in respect to the deficiency urged against the pleading; but, as we view their argument, it is that the liquor charged to have been sold is not shown to have been of the kind or character which would have required appellant to have a license under the laws of this state in order to lawfully sell the same. It will be noted that the affidavit charges appellant with the unlawful sale of a pint of beer for the price of 10 cents to the person therein mentioned at the time and place stated. The absence of a license held by him is duly negated by the averments of the pleading. The affidavit, considered as a whole, certainly discloses that the liquor with which it is dealing and which it charges to have been sold by appellant is malt liquor. The primary meaning of the term "beer," as held by this court in *Myers v. State*, 93 Ind. 251, is "a fermented liquor"; or, in other words, "a malt liquor made from any malted grain with hops or other bitter flavoring." The sufficiency of the affidavit in respect to the liquor therein mentioned being malt liquor is fully sustained by the decision of this court in *Welsh v. State*, 128 Ind. 71, 25 N. E. 883, 9 L. R. A. 664. On the same point, see *Joyce on Intoxicating Liquors*, § 21; *Woolen & Thornton on Intoxicating Liquors*, § 76.

If the beer sold by appellant was not intoxicating liquor within the meaning of the statute prohibiting the sale of such liquors as a beverage by an unlicensed dealer, he had the right to controvert that fact upon the trial. The affidavit is sufficient, and there was no error in overruling the motion to quash.

It appears that, after the court found appellant guilty and assessed his punishment, he, on April 8, 1910, filed a motion in arrest of judgment. This motion the court denied, to which ruling he excepted. Thereafter, on the 11th day of the same month, he filed his motion for a new trial, wherein he assigns certain reasons in support thereof. As the motion in arrest of judgment and the ruling of the court thereon preceded the filing of the motion for a new trial, thereby appellant, under the circumstances, cut off or deprived himself of the right to file a motion for a new trial. Therefore the latter motion cannot be considered in this appeal. *Yazel v. State*, 170 Ind. 535, 84 N. E. 972, and cases there cited.

As the record presents no error, the judgment below is affirmed.

(175 Ind. 215)

BARNETT v. STATE. (No. 21,740.)¹

(Supreme Court of Indiana. Dec. 15, 1910.)

1. CRIMINAL LAW (§ 946*)—NEW TRIAL—MOTION IN ARREST OF JUDGMENT—EFFECT.

One could not obtain a new trial where he had already moved in arrest of judgment.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 946.*]

2. CRIMINAL LAW (§ 1063*)—APPEAL—PRESERVATION OF GROUNDS—CONSIDERATION OF BILL OF EXCEPTIONS.

A bill of exceptions could not be considered on appeal, where a motion for new trial could not be considered, because of a prior motion in arrest of judgment.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1063.*]

3. CRIMINAL LAW (§ 1110*)—APPEAL—CERTIORARI TO COMPLETE RECORD—APPLICATION.

An application for certiorari to bring up the amended affidavit in a criminal prosecution should set out the amended affidavit or wherein it differs from the one in the appeal record, and not simply allege its absence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2915; Dec. Dig. § 1110.*]

4. INTOXICATING LIQUORS (§ 198*)—CHARGING AFFIDAVIT—SUFFICIENCY—DUPLICITY.

The affidavit charging the sale of one-half a pint of whisky for 25 cents on a certain day at the county of Hamilton in the state of Indiana, where the liquor was then and there unlawfully sold to W., accused not being then and there licensed under the laws of the state of Indiana to sell spirituous, vinous, or malt liquors, was sufficient under *Burns' Ann. St. 1906*, § 8337, providing that it is a misdemeanor for any one without a license to sell or barter any spirituous, vinous, or malt liquors, unless in quantities of five gallons at one time, or to

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
²Rehearing denied.

sell or barter such liquors to be drunk or suffered to be drunk in his house.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 198.*]

5. INTOXICATING LIQUORS (§ 198*)—CHARGING AFFIDAVIT—SUFFICIENCY—DUPPLICITY.

The affidavit, charging that accused on a certain day in a certain county in the state of Indiana, being then and there a druggist or pharmacist, did then and there unlawfully sell to W. one-half a pint of whisky for the price of 25 cents, accused not being then and there licensed under the laws of the state of Indiana to sell spirituous, vinous, or malt liquors, the sale not being then and there made on the written prescription of a reputable physician engaged in the active practice of his profession, was not bad for duplicity, but was sufficient under Burns' Ann. St. 1908, § 8352, providing that it shall be lawful for any druggist or pharmacist to sell vinous or spirituous liquors in quantities not less than a quart at a time for medicinal or scientific purposes and for no other purposes, and then only upon the written prescription of a reputable physician in active practice.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 198.*]

6. CRIMINAL LAW (§ 1081½*)—CERTIORARI—REFUSAL.

Though appellant's application for a writ of certiorari was sufficient to justify its issuance, yet, where it is apparent that the merits of the case are against him, and that the granting of the motion, issuance, and return of the writ would be a useless ceremony, the writ will be denied.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1081½.*]

Appeal from Circuit Court, Hamilton County; Meade Vestal, Judge.

Roscoe Barnett was convicted of the unlawful selling of intoxicating liquors, and he appeals and applies for certiorari to correct the record. Writ denied, and judgment affirmed.

Christian & Christian, for appellant. James Bingham, A. G. Cavins, E. M. White, and W. H. Thompson, for the State.

MONTGOMERY, J. Appellant was fined in the sum of \$100 for having made an unlawful sale of intoxicating liquor. Errors have been assigned upon the overruling of his motions to quash the affidavit, and for a new trial. Appellant has filed a motion for a writ of certiorari, alleging merely "that the amended affidavit is omitted from the record and transcript," and "that the entry of the filing of the bill of exceptions is omitted from the transcript."

No attempt is made to show that there is any entry of the filing of the bill of exceptions, and, if so, when it was made, or what it contains, or to show any of the contents of the amended affidavit. The record does show that after a finding of guilty appellant made a motion in arrest of judgment, which was overruled, and subsequently he made a motion for a new trial. The right to move for a new trial was cut off by the previous motion in arrest of judgment. *Turner v. State* (No. 21,741, at this term)

93 N. E. 225; *Yazel v. State*, 170 Ind. 535, 539, 84 N. E. 972; *Gillespie v. State*, 9 Ind. 380; *Bepley v. State*, 4 Ind. 284, 58 Am. Dec. 628. It is manifest therefore that the bill of exceptions containing the evidence, if properly before us, would be of no value, since the motion for a new trial cannot be considered; and, the entry of the filing of such bill, if duly made and properly certified, would not serve any useful purpose in this appeal.

We are cited to page 2 of the record for the affidavit upon which the conviction was had, where we find the following entry: "Comes now state of Indiana, by C. M. Gentry, prosecuting attorney, and files amended affidavit herein, which amended affidavit reads as follows." An affidavit follows, which, omitting the formal parts, reads thus: "Ivan R. Goodwin, being duly sworn, upon his oath says that, as he is informed and believes, Roscoe Barnett on or about the 8th day of February, A. D. 1910, at the county of Hamilton, in the state of Indiana, did then and there unlawfully sell to Louis Wien, one-half pint of whisky at and for the price of twenty-five cents; he, the said Roscoe Barnett, not being then and there licensed under the laws of the state of Indiana, to sell spirituous, vinous, or malt liquors." This charge is clearly sufficient, and, if appellant's motion to quash were addressed to it, the court correctly overruled the same, *Gillett's Criminal Law*, § 576.

Appellant's affidavit for a writ of certiorari directly contradicts the record, above set out. The affidavit shown in appellant's brief contains after the word Indiana in laying the venue, "being then and there a druggist or pharmacist," and after the word liquors, "and the said sale not being then and there made on the written prescription of a reputable physician engaged in the active practice of his profession." If the amended affidavit contained the words included in quotation marks, and the same are omitted from the copy thereof given in the record, appellant's motion should have alleged that fact. Appellant insists that the amended affidavit is open to the charge of duplicity. If it is in fact in the terms first above set out, it is not amenable to this objection, but is sufficient, under section 8337, Burns' Ann. St. 1908. If it contains the words embraced in quotations, as above indicated, then it is clearly intended to rest upon section 8352, Burns' Ann. St. 1908, and is not open to criticism, but is equally good. The penalty in either case for the first offense is precisely the same, and appellant is in no position to complain on that account. It follows therefore that, if appellant's application for a writ of certiorari is conceded to be sufficient to justify its issuance, it is apparent that the granting of the motion, issuance, and return of the

writ would be a vain and useless ceremony, and the motion for the writ is denied.

It follows, also, that the judgment must be, and it is, affirmed.

(175 Ind. 345)

HANLY v. SIMS, Secretary of State, et al.¹
(No. 21,573.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. STATES (§ 117*)—DEBTS—CONSTITUTIONAL PROVISIONS—"CONTRACTING A DEBT."

The issuance by the state of bonds in settlement and payment of an obligation acknowledged to be justly owing for past considerations is not "contracting a debt," within Const. art. 10, § 5, prohibiting any law authorizing the contracting of any debt on behalf of the state, except in enumerated cases.

[Ed. Note.—For other cases, see States, Cent. Dig. § 116; Dec. Dig. § 117.*]

2. STATES (§ 117*)—DEBTS—CONSTITUTIONAL PROHIBITION.

Vincennes University, incorporated by the territorial Legislature, received a land grant from the United States, which lands the state subsequently appropriated and sold. Subsequently the state made settlement with the university at a compensation, found to be inadequate by a state commission. Held, that the claim of the university was a debt which the state might admit to be due, and liquidate by an issue of state bonds under Acts 1907, c. 244, though resting merely on an equitable or honorary obligation, and not capable of legal enforcement if against an individual, without violating Const. art. 10, § 5, forbidding any law authorizing the contracting of state debts except as specified.

[Ed. Note.—For other cases, see States, Cent. Dig. § 116; Dec. Dig. § 117.*]

3. STATUTES (§ 67*)—ACTIONS AGAINST STATE—LOCAL LAWS.

Const. art. 4, § 24, authorizing the adoption of a general law for the bringing of suits against the state as to all liabilities originating after the adoption of the Constitution, and prohibiting special acts authorizing such suits, refers only to liabilities after the adoption of the Constitution, and Acts 1907, c. 244, authorizing the issuance of bonds of the state to pay the claim of Vincennes University against the state, is not invalid, since the substantial basis, if not the entire amount of the claim of the university, antedates the Constitution.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 67.*]

4. EMINENT DOMAIN (§ 2*)—POWER OF STATE—CONSTITUTIONAL LIMITATIONS.

Bill of Rights, § 21, providing that no man's property shall be taken by law without just compensation, does not restrict the state's taxing power, but relates only to the exercise of the power of eminent domain, and hence Acts 1907, c. 244, authorizing the issuance of bonds of the state to pay the claim of Vincennes University against the state, is not invalid as taking a man's property without compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

5. CONSTITUTIONAL LAW (§ 70*)—CLAIMS AGAINST STATE—LEGISLATIVE DETERMINATION—CONCLUSIVENESS ON OTHER BRANCHES OF GOVERNMENT.

The conclusions of fact of the Legislature in passing, over the Governor's veto, Acts 1907, c. 244, authorizing the issuance of bonds of the

state to pay the claim of Vincennes University against the state, and determining that the state is equitably indebted to the university to the amount of the bonds authorized, are binding on the judiciary department of the government, and the court will not weigh the findings made by the Legislature against the contentions of the veto message of the Governor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.*]

6. STATES (§ 119*)—CLAIMS AGAINST STATE—PAYMENT.

No statute of limitation or other bar should restrain a state from yielding a complete account of a bounty rendered by the federal government in trust for a domestic university corporation, and where the Legislature, acting for the state, has made such an accounting, the act providing for the issuance of bonds to the university to the amount found due on the accounting is not invalid as a gift by the state to the university.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.*]

7. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE POWER.

The Legislature, under Const. art. 4, § 1, lodging legislative authority in the General Assembly, has supreme legislative power, except as restricted by the state and federal Constitutions, and laws and treaties passed pursuant to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

Monks, J., dissenting.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by J. Frank Hanly against Fred A. Sims, Secretary of State, and others. From a judgment sustaining a demurrer to each paragraph of the complaint, plaintiff appeals. Affirmed.

Charles V. McAdams and S. R. Artman, for appellant. James Bingham, Addison C. Harris, James W. Emison, B. M. Willoughby, J. M. House, and Harrison Burns, for appellees.

JORDAN, J. Appellant commenced this suit in the lower court as a taxpayer to enjoin the attestation, delivery, and acceptance of certain bonds of the state known as the "Vincennes University bonds," authorized by an act of the Legislature, passed over the Governor's veto on March 9, 1907, entitled "An act providing for the issuance of bonds and coupons of the state of Indiana for the liquidation and payment of the claim of 'the Board of Trustees of the Vincennes University,' against the state, in full and final settlement of said claim and of all other demands." See Acts 1907, p. 497. Judgment below was rendered upon a demurrer, on the ground of insufficient facts, to each of the two paragraphs of complaint. The sustaining of the demurrer as to each paragraph is assigned as error.

The first paragraph of the complaint sought an injunction against the formal attestation, delivery to and acceptance by the Board of Trustees for the Vincennes University of

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
²Rehearing denied, 94 N. E. 401.

bonds of the state payable to bearer in the aggregate amount of \$120,548, which bonds were to be issued under and by virtue of the aforesaid act. The contention of appellant is that said act is unconstitutional and void for the following reasons: First. It is in violation of section 5, art. 10, of the Constitution of the State of Indiana, which provides that: "No law shall authorize any debt to be contracted on behalf of the state, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense." Second. It is in violation of section 24, art. 4, of the Constitution of the State of Indiana, which provides that: "No special act making compensation to any person claiming damages against the state shall ever be passed." Third. It is in violation of section 21 of our Bill of Rights, which provides that: "No man's property shall be taken by law without just compensation." Fourth. That it requires that the public funds be used for private purposes and makes a gift of the public funds for private uses.

The second paragraph of complaint sets forth the same general facts as the first, and avers that at the time of the passage of said act the state was not indebted to the Board of Trustees for the Vincennes University in any sum on account of the matters embraced in the act and its preamble. Certain historical data giving rise to this controversy and in support of the denial of liability are set out in detail, the substance of which, in brief, is as follows: That in 1804 the Congress of the United States granted to the territory of Indiana, for the use of a seminary of learning, a township of land to be located in the Vincennes land district and to contain 23,040 acres; that on October 10, 1806, the Secretary of the Treasury located and set apart as constituting said grant, township 2 south, range 11 west, in the territory of Indiana; that by an act of the territorial Legislature approved November 29, 1806, and supplemented by an act approved September 17, 1807, the Board of Trustees for the Vincennes University was duly incorporated, and, under authority given in its charter, sold 4,000 acres of said land prior to January 22, 1820; that on January 22, 1822, 19,040 acres of said grant remained, which the state through its General Assembly erroneously assumed to own and directed to be sold and the proceeds paid into the State Treasury; that the state did sell and convey to numerous persons prior to May 4, 1846, 16,840 acres of said real estate; that in 1844 the Board of Trustees for said University commenced suits in ejectment against various purchasers, who on that account memorialized the General Assembly of 1846, and an act was thereupon passed, and approved January 17, 1846, entitled "An act to authorize the Trustees of the Vincennes University to bring suit against the state of

Indiana and for other purposes" (Loc. Laws 1846, c. 209); that in pursuance of this act on May 4, 1846, suit was commenced in the Marlon circuit court by the Board of Trustees against the state, in which a final judgment was rendered on May 21, 1849, in favor of the complainants for \$48,778.02, of which \$13,249.19 was paid by turning over to the board unpaid obligations for purchase money then in the hands of the state, and the remaining \$35,528.83 with interest was paid by the issuance of bonds, which had been fully redeemed and paid prior to March 9, 1907; that between May 4, 1846, and March 11, 1895, the state sold and conveyed at given dates 2,141.76 acres of said lands for a total consideration of \$1,547.80; that in the general appropriation bill of March 11, 1895, the General Assembly made an appropriation in favor of the Board of Trustees for the Vincennes University in full settlement of all claims against the state in the sum of \$15,000, which amount was subsequently paid and accepted pursuant to said act. It is finally averred that at the passage of the act of March 9, 1907, the state was not indebted to the Board of Trustees for the Vincennes University in any amount, and the issuance of "said bonds as in said act directed will be a gift and gratuity to said Trustees which the General Assembly has no authority to grant or bestow, and said act is therefore void and of no effect."

The preamble to the act in controversy recites certain historical matters and the fact that a commission consisting of the Secretary, Auditor, and Treasurer of State was created in 1903 to investigate and report as to the merits of the University claim, the finding of this commission, and concludes that: "Whereas the state of Indiana has not rendered to said Board of Trustees adequate compensation for said lands and the losses thereby sustained, and there is equitably and justly due to said Board of Trustees by reason thereof said sum so found due by said state officers, amounting to one hundred twenty thousand, five hundred and forty-eight (120,548) dollars, which sum, in bonds of the state, with interest coupons, the said Board of Trustees will accept in full settlement and payment of said claim and all demands against the state; therefore, be it enacted," etc.

Appellant first insists that the statute before us is invalid, because it purports to authorize a debt to be contracted on behalf of the state for an unauthorized purpose. Prior to 1851 the state had engaged in financing the construction of canals, railroads, and other internal improvements, which eventually resulted in much extravagance and many vexatious contentions. The section of the present Constitution restricting the contracting of debts on behalf of the state, and others of like nature, were designed to prevent the state from incurring debts on such account to be paid in the future, and to with-

draw and withhold the state's credit from the promotion and construction of public works remotely related to the primary functions of government. The manifest purpose of the General Assembly in the enactment of the statute assailed by appellant was not to contract a debt, but to pay and discharge a pre-existent outstanding obligation. The consideration for the act and contemplated payment was not to be received in the present or in the future, but had been received long before, even prior to the adoption of the constitutional provision upon which appellant relies. This clause of the Constitution does not purport to forbid the payment of an existing debt out of the current revenues. *City of Aurora v. West*, 9 Ind. 74, 77. If the General Assembly had elected so to do, it might have paid the acknowledged liability to the University, and thereby caused a casual deficit in the revenues, and then would have authority under this provision of the Constitution to go into the money market and contract a debt, by borrowing money to replenish the treasury. If such a thing might be legally accomplished by indirection, it may certainly be done directly. The bonds authorized by the statute in question were designed merely to transform the state's existing liability or indebtedness from an unliquidated claim into a definite amount payable at a particular time. The essence of the debt or liability, and hence the debt itself, was long before existent, and the statute in controversy merely authorized the execution of such evidences of the indebtedness as in the absence of money would be acceptable as payment. This court, in construing article 13 of the State Constitution, which prohibits municipal corporations from creating a debt in excess of 2 per cent. of their taxable property, said: "The issuing of new bonds to provide, at their par value, for the payment of an old debt, or the substitution of new evidences of a pre-existing debt, is not, in any legal or proper sense, the creation of a new indebtedness." *Powell v. City of Madison*, 107 Ind. 106, 114, 8 N. E. 31, 35. See, also, *City of Logansport v. Dykeman*, 116 Ind. 15, 21, 17 N. E. 587; *Ætna Life Ins. Co. v. Lyon County (C. C.)* 44 Fed. 329; *Id.*, 82 Fed. 929. It is certainly clear that the issuance of bonds in settlement and payment of an obligation acknowledged to be justly owing for past considerations was not the "contracting of a debt" within the meaning of that term as employed in the Constitution.

Appellant denies that the claim of the University was such a "debt" as might be recognized, and would limit the application of the principle just stated to the substitution of a debt or obligation which is contractual, legal, and enforceable. This interpretation of the term "debt" is too narrow, and is untenable. The Constitution of the United States authorizes Congress to lay and collect taxes to pay the "debts" of the United States. In the case of *United States v. Realty Co.*,

163 U. S. 427, 440, 16 Sup. Ct. 1120, 1125 (41 L. Ed. 215), in construing this provision the court said: "It cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon consideration of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body." See, also, *Mount v. State ex rel.*, 90 Ind. 29, 30, 46 Am. Rep. 192; *Julian v. State*, 122 Ind. 68, 77, 23 N. E. 690; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 536-537, 19 Sup. Ct. 513, 43 L. Ed. 796.

We conclude, therefore, that the General Assembly in the exercise of its powers may transform a debt such as appears to have existed in favor of the Vincennes University into a liquidated or admitted form, evidenced by negotiable paper, without transgressing the constitutional inhibition against contracting debts in the name of the state.

The next constitutional provision invoked against the statute is section 24 of article 4, which reads as follows: "Provision may be made by general law, for bringing suit against the state as to all liabilities originating after the adoption of this Constitution, but no special act authorizing such suit to be brought for making compensation to any person claiming damages against the state shall ever be passed." This provision, if applicable in any sense, has reference only to liabilities originating after the adoption of the Constitution. The Legislature of 1855, soon after the adoption of the Constitution, passed an act akin or similar to that now before us, authorizing the issuance of bonds to pay the judgment, with interest and costs, rendered against the state, May 21, 1849, on account of this controversy. The act of January 17, 1846, authorizing the state to be sued in that behalf, does not provide for the recovery of damages for the use of said bonds or any interest, accruing prior to the institution of such suit, which was begun May 4, 1846. It is suggested that interest to the amount of \$23,000 had accrued prior to that

date. This sum compounded, or at simple interest, would approximate the sum admitted to be equitably due and owing in 1907. This court is not concerned with the accuracy of the amount, but judicially knows that the substantial basis, if not the entire amount, of the University claim antedates the present Constitution, and this clause of the Constitution cannot affect the validity of the act authorizing its payment.

It is alleged that the statute under consideration violates section 21 of the Bill of Rights contained in the State Constitution, which provides that "no man's property shall be taken by law without just compensation." It is not proposed to appropriate any specific part of appellant's property, but only to subject it, in connection with other taxable property, to such burden of taxation as may be necessary to discharge the obligations of the state. This provision of the Constitution was not intended as a restriction upon the state's taxing power, but relates only to the exercise of the power of eminent domain. This court at an early day made the distinction clear and unmistakable by the use of the following words: "Property may be taken, through the taxing power, for public use, without any other compensation than the common benefit which the appropriation and expenditure of the tax produce. It is only the taking of specific pieces of the property of an individual, by virtue of the right of eminent domain, that is prohibited by the Constitution without special compensation." *City of Aurora v. West*, 9 Ind. 74, 83; *People v. Mayor, etc.*, 4 N. Y. 419, 55 Am. Dec. 266; *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491; *Stone v. Fritts*, 169 Ind. 861, 82 N. E. 792, 15 L. R. A. (N. S.) 1147.

It is finally argued that the issuance of the bonds described is a mere gift or gratuity, which the General Assembly is not authorized to make. We are not called upon to determine under what circumstances, if any, the Legislature may make charitable donations or voluntary gifts, since under the facts disclosed, this contention is not entitled to serious consideration. In the case in hand, the General Assembly manifestly did not assume to make a gift, but upon prior investigation, and preliminary to the passage of the act now challenged, declared that "there is equitably and justly due" to the Board of Trustees of the Vincennes University the sum of \$120,548. It was within the province and power of the Legislature to investigate and determine this question for itself, and, when so determined, that conclusion is and should be binding on other co-ordinate departments of the state government. In the case of *Hovey v. Foster*, 118 Ind. 502, 508, 21 N. E. 39, 41, this court, by Judge Mitchell, said: "The power of obtaining information for the purpose of framing laws, to meet existing or apprehended contingencies, is within the legitimate province

of a legislative body, and to that end it may summon witnesses and hear testimony in proper cases. *People v. Keeler*, 99 N. Y. 463 [2 N. E. 615, 52 Am. Rep. 49]; *Killbourn v. Thompson*, 103 U. S. 168 [28 L. Ed. 377]. Courts cannot make an issue of fact, or review the facts as such, upon which the Legislature must be presumed to have passed, in order to determine the validity of an act of the Legislature."

In the case of *Mount v. State ex rel.*, 90 Ind. 29, 30 (46 Am. Rep. 192) this court said: "It would be a violation of the principles underlying our governmental structure for courts to sit in judgment on the action of the Legislature allowing relief to individual claimants against the state or its funds, and review their decision solely upon the ground that there was no legal foundation for the claims. A conflict would result which would produce endless confusion and serious disaster."

In *Julian et al. v. State*, 122 Ind. 68, 77, 23 N. E. 690, 693, the court pertinently said: "By the Legislature passing an act adjusting the claim, it took the whole jurisdiction of the matter, and withdrew from the courts any jurisdiction to adjudicate upon the right to recover, or the amount to be recovered. The law authorizing the state to be sued only authorizes suits to be brought in cases where there is a liability on the part of the state to the claimant, which has not been adjusted by the Legislature, but does not justify suits where there only exists a moral obligation to pay, as may exist in case of appellants. In such cases payment is discretionary with the Legislature, and its action is final." See, also, *United States v. Price*, 116 U. S. 43, 6 Sup. Ct. 235, 29 L. Ed. 541.

The principle embodied in the above quotations has been long settled on elemental reasons, and from it we have no inclination to depart. The Governor in the rightful exercise of his authority elected to withhold his approval from this act and interposed a veto message embodying all of the objections urged by appellant in this appeal. The General Assembly passed the act over the Governor's veto, and thereupon its conclusions of fact became as binding upon the executive as upon the judiciary department of government. We are in effect now asked to weigh the findings of fact made by the Legislature against the opposing contentions of the disregarded veto message. This we decline to do and cannot do with propriety or a decent regard for the rights of a co-ordinate branch of the state government. It is not becoming a sovereign state to weigh its obligations to an injured and helpless subject in an "apothecary's scales." While the state is not required to be generous, nevertheless, it at least ought to be just in its dealings, and it may well set an example of complete justice in making voluntary reparation, long deferred, in a matter involving its honor and fair dealing. No statute of limitation, or

other barrier, should restrain the state from yielding a complete account of the bounty granted by the federal government in trust for a creature of its laws, for a noble work. The General Assembly—virtually the state's great directory—acting for it, has made such an accounting, and there is no longer any basis for the contention that the sum awarded is a mere gift or gratuity.

In conclusion, we may say that, after a careful and full consideration of the questions presented by appellant, we are unable to perceive that the act in question violates any constitutional or fundamental law. As this court said, in *State ex rel. v. Menaugh*, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408, 418: "Under article 4, section 1, of the State Constitution, all legislative authority is lodged in the General Assembly, and, as regards this authority, that body is considered supreme and sovereign, subject to no restrictions except those which the state Constitution expressly or impliedly imposes, and the restraints of the federal Constitution and the laws and treaties passed and made pursuant thereto. Aside from these inhibitions or restrictions, the Legislature may be said to be unfettered in the exercise of the power with which it has been invested."

The demurrer to each paragraph of complaint was correctly sustained.

Therefore the judgment is affirmed. All concur, except MONKS, J., who dissents.

(46 Ind. A. 586)

NUSBAUM v. GEISINGER. (No. 6,804.)

(Appellate Court of Indiana, Division No. 1.
Dec. 14, 1910.)

APPEAL AND ERROR (§ 781*)—DISMISSAL—MOOT QUESTION.

Where, pending an appeal from a decree enjoining defendant from practicing medicine in a county within five years from September 1, 1905, according to his contract upon selling his practice to plaintiff, the five-year period covered by the injunction and contract expired, the appeal will be dismissed, as presenting only a moot question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3122; Dec. Dig. § 781.*]

Appeal from Circuit Court, De Kalb County; Emmett A. Bratton, Judge.

Action by Lewis N. Gelsingier against William H. Nusbaum. From a decree for plaintiff, defendant appeals. Appeal dismissed.

Chas. M. Brown, Chas. E. Emanuel, Wm. F. McNagny, Thos. R. Marshall, and P. H. Clugston, for appellant. J. H. Rose and J. E. Rose, for appellee.

WATSON, J. The appellant, who was in the practice of medicine and surgery in De Kalb county, Ind., sold his said practice and good will thereof, together with certain real estate and personal property, to the appellee, and as a part of the contract and consideration thereof the appellant agreed with

the appellee that he (the appellant) would retire from the practice of medicine and surgery in the said county for and during the period of five years from the 1st day of September, 1905, and would not during said period engage in the practice of medicine and surgery in said county. Appellee instituted an injunction proceeding to enjoin appellant from so practicing, alleging that appellant had been and was practicing in said county in violation of said contract. A trial was had, and the court made special findings, finding in part as follows:

"Finding 13. That the defendant has since the 1st day of October, 1905, until the commencement of this action, performed surgical operations in De Kalb county, not being at the time in consultation with other physicians, but himself as operating surgeon.

"Finding 14. That the defendant has been since the 1st of October, 1905, until the commencement of this action, and thereafter, engaged in the practice of medicine and surgery in the city of Auburn, De Kalb county, Ind., and will continue so to do unless enjoined from so doing."

The court thereupon enjoined the appellant from the practice of medicine and surgery in said De Kalb county until the 1st day of September, 1910, the date on which the contract expired.

The appellee moves to dismiss this case, for the reason that, the contract having expired and the injunction which was issued herein having lapsed, the appeal presents only mooted and abstract questions, and in this he is sustained by the record.

The cause is therefore dismissed, upon the authority of *Hale et al. v. Berg*, 41 Ind. App. 48, 83 N. E. 357, and cases there cited.

(47 Ind. A. 315)

**UNITED STATES BOARD & PAPER CO.
v. LANDERS.** (No. 6,944.)¹

(Appellate Court of Indiana. Dec. 14, 1910.)

MASTER AND SERVANT (§ 321*)—SERVANT OF INDEPENDENT CONTRACTOR—INJURIES—NEGLECT.

A boiler maker in the employ of an independent contractor to repair boilers of defendant was injured by steam escaping while he was at work in one of the boilers. Defendant turned over the boiler in a safe condition with the valve shut, and notified the boiler maker to keep it shut. The valve was in plain view and under the control of the boiler maker, who opened the valve to let out water, and then closed it again, and he failed to show that the valve was thereafter opened, so as to permit the escape of steam injuring him, by defendant or any of its servants. *Held*, that defendant was as a matter of law not guilty of actionable negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 321.*]

Comstock and Hadley, JJ., dissenting.

Appeal from Superior Court, Marion County; Elmer J. Binford, Special Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied.

On petition for rehearing. Granted and former judgment reversed.

For former opinion, see 92 N. E. 208.

William J. Henley, Frederick E. Matson, John W. Kern, Watson, Titsworth & Green, and Edward E. Gates, for appellant. Douglas Morris, H. N. Spaan, J. B. Kealing, and M. M. Hugg, for appellee.

ROBY, C. J. Appellee recovered judgment in the trial court for \$1,200 for damages caused by personal injuries alleged to have been caused by the negligence of the appellant. The disposition of the appeal depends (1) upon whether the relation of master and servant existed between the parties or whether he was a common servant with appellant's employes; (2) whether the facts are sufficient to sustain the finding of negligence by appellant.

Appellee was in the employment of an Indianapolis firm which made and repaired boilers, and which contracted with appellant to repair certain boilers at its plant at Carthage, Ind. Appellee and another workman were sent to the plant to do the work, reported to the chief engineer, and were told to go to work on the boilers and do anything necessary to fix them. At the time of his injury appellee was doing this work.

The test by which appellant's first point must in the light of these facts be judged is stated in the text-books as follows: "Nearly all the definitions of fellow servants given in the book make it essential to the relation that they shall be servants of the same master. The general rule is that the servants of different masters are not deemed fellow servants within the meaning of the rule in question, although they are working together in the same common employment or in what has been called 'con-association.' Mere co-operation or community labor and ultimate purpose is not enough to make them fellow servants, but they must all be under the control and direction of a common master." 4 Thompson on Neg. 4916, 4917; Wood, Master and Servant, 317. The appellee was not under the control of appellant, and the appellant had no authority to discharge him. He was in the employment of the Indianapolis firm, and it alone could discharge him. Murray v. Dwight, 161 N. Y. 301, 306, 55 N. E. 901, 48 L. R. A. 673; Wabash, etc., R. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. St. Rep. 696; New Albany, etc., Co. v. Cooper, 131 Ind. 363, 30 N. E. 294; Zimmerman v. Baur, 11 Ind. App. 607, 619, 39 N. E. 299. These legal propositions applied to the facts exhibited require this point to be held against appellant.

The second point is not so easily disposed of. There were four boilers at appellant's

plant. There was a mud pipe in the rear and a pipe from the boiler to it in which there was a valve which when shut prevented steam passing from one boiler to the other. When this valve was open, there was nothing to prevent steam from passing into and between all the boilers. Appellee went into boiler No. 1 on a Sunday morning with a helper for the purpose of making the repairs. A fireman in charge of boilers No. 3 and 4 undertook to blow them out. This required a pressure, so that, if the valves on No. 1 and 2 were open, it would drive steam into them. The valve on No. 1 was open, and appellee was scalded.

The judgment was originally affirmed on the theory that it was appellant's duty, knowing that appellee was working in boiler No. 1, not to turn on steam without knowing that the valve between it and the mud pipe was shut. The general duty is as thus stated, but it affirmatively appears that the valve was closed when appellee went into the boiler, and that it was located in a manhole at the rear of the boiler through which he entered. The valve was in this manhole and within 2½ feet from the place where appellee was at work. Any person opening and closing it from above would have to enter the manhole and would be in easy view of those inside. When the appellee entered the boiler, the valve was shut, and the boiler was a perfectly safe working place. He was notified that he must keep the valve shut. He opened the valve to let water out of the boiler, and, after this had been done, closed it. The manner in which it came to be open is entirely unexplained, and there was a sharp conflict of evidence between appellee and the helper as to whether he did close it. The appellee failed to show in any way that the valve was opened by appellant or any of its servants. The only theory on which it was possible to affirm the judgment is the one heretofore adopted, by which the duty was placed upon appellant to know that the valve was shut before blowing the other boiler. It had, however, turned over the boiler in a safe condition with the valve shut, had notified appellee to keep it shut, the valve was in plain view and under his control, and we are persuaded that it ought not to be held responsible for the opening of the valve without evidence in some way tending to show that it was opened by some person in its service.

Judgment reversed. Cause remanded, with instruction to sustain appellant's motion for new trial.

MYERS, WATSON, and RABB, JJ., concur. COMSTOCK and HADLEY, JJ., dissent upon the ground that the judgment can only be reversed by weighing the evidence.

(47 Ind. A. 411)

HOME TELEPHONE CO. v. NORTH MANCHESTER TELEPHONE CO.¹

(No. 6,480.)

(Appellate Court of Indiana, Division No. 1.
Dec. 16, 1910.)**TELEGRAPHS AND TELEPHONES (§ 16*)—CONTRACTS—VALIDITY—OPPRESSIVE RATES.**

A contract between two telephone companies for exclusive toll business will not be adjudged invalid on the ground that by its terms one of the companies is given the right to fix tolls where the right has not been exercised, and where the company is not charging oppressive rates.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 10; Dec. Dig. § 16.*]

On petition for rehearing. Overruled.
For former opinion, see 92 N. E. 558.

HADLEY, P. J. Appellant in its brief for a rehearing earnestly argues that the contract in question should be declared invalid for the reason that by its terms appellee is given the right to fix tolls. It does not appear that it has exercised this right, or that the tolls on appellee's lines are in excess of those fixed on the Commercial or El River lines, or that such tolls are in any sense oppressive. On the contrary, the finding of the court is that the service of appellee to the public is in all respects equal to that of the Commercial and El River lines. We should not go further than the contention of the parties. When it is shown that appellee is charging exorbitant or oppressive rates, it will be time enough to consider that question.

Petition for rehearing overruled.

(46 Ind. A. 594)

ZWEIG v. ZWEIG. (No. 6,810.)(Appellate Court of Indiana, Division No. 1.
Dec. 15, 1910.)**1. DIVORCE (§ 27*)—GROUNDS—"CRUELTY"—ACTS CONSTITUTING—STATUTE.**

Any act or conduct on the part of a spouse which tends to impair either the mind or the body is "cruelty," under Burns' Ann. St. 1908, § 1067, which provides that cruel and inhuman treatment is a ground for divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1768-1777; vol. 8, p. 7624.]

2. DIVORCE (§ 27*)—GROUNDS—"CRUELTY"—ACTS AND CONDUCT CONSTITUTING.

What constitutes cruel and inhuman treatment sufficient for a divorce must be determined by the facts of the given case, situation of the parties, and their social standing and, under this standard, conduct of the husband in refusing for some years to speak to his wife, accompany her to the neighbors, or permit neighbors to visit her was cruel treatment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 62-83; Dec. Dig. § 27.*]

Appeal from Circuit Court, Lake County;
W. C. McMahan, Judge.

Action for divorce by Louise Zweig against Charles Zweig. From a judgment for plaintiff, defendant appeals. Affirmed.

F. N. Gavitt and J. E. Westfall, for appellant. Fancher & Pattee, for appellee.

WATSON, J. This was an action brought by the appellee against appellant for an absolute divorce upon the grounds of cruel and inhuman treatment. It is alleged in the complaint that they were married on November 12, 1904; that after the lapse of six months from said date and until February 16, 1907, the defendant refused to speak to, or hold any conversation with her, or to permit her to in any manner converse with him, and when she attempted to do so, he would say that he wanted to have nothing to do with her; that he refused to visit the neighbors with her, and would not permit the neighbors to visit her. The complaint was challenged by a demurrer which was overruled, and exceptions reserved. The errors assigned are that (1) the court erred in overruling the demurrer to the complaint; (2) the decision of the court is not supported by sufficient evidence; (3) the court erred in overruling the motion for a new trial. "Both a sound mind and a sound body are necessary to health." Therefore, whatever threatens it, and does, impair either or both, endangers life or health, and constitutes cause for divorce under the fourth clause of section 1067, Burns' Ann. St. 1908, which is as follows: "Cruel and inhuman treatment of either party by the other."

In the case of *Rice v. Rice*, 6 Ind. 100, cold neglect was held to be cruel and inhuman treatment, and the court said, with reference to an instruction: "We may remark of this instruction that it seems to contemplate an entirely physical, sensual view of the marriage relation; and if that relation has no aim to the social happiness and mental enjoyments of those united in it, the instruction should have been given. But if it is otherwise, if it be true that we are possessed of social, moral, and intellectual natures, with wants to be supplied, with susceptibilities of pain and pleasure; if they can be wounded and healed, as well as the physical part, with accompanying suffering and delight, then we think that conduct which produces perpetual social sorrow, although physical food be not withheld, may well be classed as cruel, and entitle the sufferer to relief."

In *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, the court well said: "The tendency of the modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual life of the parties to it—a relation designed to bring to them the comfort and felicities of home life,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Transfer denied.

and between whom, in order to fulfill such design, there should exist mutual sentiments of love and respect. 'It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the feelings of the other or so utterly destroys the peace of mind of the other as to seriously impair the health, * * * or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statute.'"

The courts of this and other states have construed the cause "cruel and inhuman treatment," and like causes, liberally, and in that broader sense which includes more than personal violence. It is also well settled that what constitutes cruel and inhuman treatment will be determined by the facts of a given case, the situation of the parties, their social standing, their morality and refinement. Anything that tends to humiliate or annoy may as effectually endanger life and health as personal violence, and affords grounds for divorce. The conduct of the husband in abusive language, treatment, and demeanor toward his wife might cause greater suffering to a refined and gentle woman than an act of violence. Such conduct might well be considered as cruel and inhuman treatment. The blows thus inflicted may cause deeper anguish than physical injuries to the person, more enduring and lacerating to the wounded spirit of the gentle woman than actual violence to the person, even though severe. It would make no difference to such a woman whether she received a blow upon the head or the heart. *Rice v. Rice*, 6 Ind. 100; *Spitzmesser v. Spitzmesser*, 26 Ind. App. 533, 60 N. E. 315; *Massey v. Massey*, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732; *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; *Kelley v. Kelley*, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; *Holyoke v. Holyoke*, 78 Me. 404, 6 Atl. 827. The demurrer to the complaint was properly overruled.

It is insisted that the residence of the appellee was not fully established. We are of the opinion, upon examination of the record, that the trial court is sustained in its holdings with reference thereto. *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Curtis v. Curtis*, 131 Ind. 489, 30 N. E. 18; *Jonas v. Hirshburg*, 18 Ind. App. 581, 48 N. E. 656; *Smith v. Smith*, 35 Ind. App. 610, 74 N. E. 1008.

The finding of the court is sustained by the evidence. No error having intervened, the judgment of the trial court is therefore affirmed.

(46 Ind. App. 551)

SCHAFFNER v. VOSS et al. (No. 6,883).
(Appellate Court of Indiana, Division No. 1.
Dec. 7, 1910.)

1. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE OF MORTGAGE—CONSTRUCTIVE NOTICE—RECORDS.

Where plaintiff's title was derived remotely from one who executed a purchase-money mortgage thereon, which mortgage was recorded in the county in which the land was situated when plaintiff purchased, he was charged with constructive notice of the mortgage, though a nonresident.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 513-539; Dec. Dig. § 231; * *Mortgages*, Cent. Dig. § 393.]

2. DEEDS (§ 120*)—ESTATE CONVEYED.

A grantee takes only such interest in the land as the grantor had when the conveyance was executed.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 120.*]

3. LIS PENDENS (§ 13*)—PENDENCY OF ACTION.

If title was in plaintiff's grantor when a suit to foreclose a mortgage was commenced, plaintiff by purchasing pending the proceedings, became a purchaser pendente lite and bound by the decree, though no lis pendens notice was filed therein, pursuant to *Burns' Ann. St. 1908*, § 329.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 23; Dec. Dig. § 13.*]

4. ACTION (§ 64*)—MORTGAGE—FORECLOSURE—COMMENCEMENT OF PROCEEDING—TIME OF COMMENCEMENT—PUBLICATION OF NOTICE.

A mortgage foreclosure proceeding was commenced as to a nonresident defendant at the time of the first publication of the nonresident notice; *Acts 1881, c. 38*, § 55 (*Burns' Ann. St. 1908*, § 317), providing that civil actions shall be deemed to have been commenced as to those against whom publication is made, from the time of the first publication.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 725-734; Dec. Dig. § 64.*]

5. DEEDS (§ 54*)—DELIVERY—NECESSITY—"EXECUTION."

The "execution" of a deed includes its delivery, which is necessary to divest the grantor of title.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 116; Dec. Dig. § 54.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2558-2561; vol. 8, p. 7656.]

6. DEEDS (§ 194*)—DELIVERY—BURDEN OF PROOF.

The burden of showing the delivery of a deed is upon the party claiming delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 574-583; Dec. Dig. § 194.*]

7. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

Whether a deed had been delivered is a question of fact to be determined from all the evidence, and the trial court's finding thereon will not be disturbed on appeal if there is evidence from which such fact might have been found.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

8. DEEDS (§ 208*)—EVIDENCE—TIME OF DELIVERY.

In a suit to quiet title to land or redeem it from foreclosure, evidence held to sustain findings either that plaintiff's deed was delivered to him when he made the first payment

thereon, or afterwards when it was left for record, either of which dates was after the first publication of notice of the foreclosure proceedings to nonresidents, so that plaintiff was a purchaser pendente lite.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.*]

Appeal from Circuit Court, Lake County; W. C. McMahon, Judge.

Suit by Charles Schaffner against Jochim Voss and others to quiet title or for permission to redeem. From a judgment for defendants, plaintiff appeals. Affirmed.

C. B. Tinkham and N. L. Agnew, for appellant. Johannes Kopelke, for appellees.

MYERS, J. On June 8, 1907, appellant filed his complaint in the court below, wherein it appears that on November 15, 1890, Jochim Voss was the fee-simple owner of certain real estate in Lake county, Ind., and on that day by warranty deed conveyed the same to one Arthur E. Clark, who thereupon executed a purchase-money mortgage to said Voss on said land, to secure the balance of unpaid purchase money. On November 24, 1890, said Clark conveyed said land to one Peter Stein. Thereafter said Stein caused said real estate to be subdivided and platted into lots, and said plat to be recorded in the recorder's office of Lake county, Ind. On December 19, 1890, said Stein conveyed said real estate to the Tolleston Park Company, the grantee assuming and agreeing to pay said mortgage. On November 27, 1892, the said Tolleston Park Company conveyed to one Jacob Schimelfenig two of said lots, and on November 29, 1892, four additional of said lots. On October 22, 1895, said Schimelfenig conveyed said lots then owned by him, to the appellant, Charles Schaffner. On October 25, 1895, said deed of appellant was recorded in the office of the recorder of said county. On October 21, 1895, said Voss filed in the office of the clerk of the Lake circuit court his complaint to foreclose said mortgage. At the time of filing said complaint appellant was a nonresident of the state of Indiana, and was not at that time, or thereafter, made a party to said suit, nor was he notified of the pendency of said suit by any service of process, nor with notice by publication; that at the time of accepting said conveyance appellant had no notice or knowledge of the filing of said complaint, or the beginning of said foreclosure. Appellant's grantor, Schimelfenig, was a nonresident of the state, and was made a party to said foreclosure proceeding, and was given notice by publication, which notice was published in a newspaper of general circulation in said county, the first notice appearing on October 24, 1895, and the last on November 7, 1895.

On February 4, 1896, in the Lake circuit court, such proceedings were had that all of the defendants named in the complaint were

defaulted, the cause submitted to the court for trial, finding and judgment in favor of Voss; that thereafter proceedings were had according to law, and said real estate sold by the sheriff to said Voss; that at the expiration of a year from the date of sale, the sheriff of Lake county executed to said Voss a sheriff's deed for all the real estate covered by said mortgage, including said six lots. On August 10, 1896, Voss and his wife executed a warranty deed to Alma Hess for two of said lots, and on the same day executed a warranty deed to Hilda Hess for the other four of said six lots, which deeds were recorded in the deed records of said county; that the lots conveyed to Schimelfenig were the first lots sold at said foreclosure sale; that said lots at the foreclosure sale were sold at an average of about \$10 each. Appellant also alleges that he is the owner in fee simple of said six lots, and that he is entitled to have his title quieted as against said foreclosure, and as against Voss, Hess, and Hess; that he is willing to pay \$10 each, with interest, from the date of the execution of said mortgage, to redeem said lots, if the court shall find they are still subject to a proportionate share of said mortgage. Appellant demands that his title be quieted, or that he be permitted to redeem said lots. The defendants answered by a general denial. Trial by the court; finding and judgment for defendant. Appellant's motion for a new trial, on the ground that the decision of the court was contrary to law, and not supported by sufficient evidence, was overruled. The only error assigned is based on the overruling of the motion for a new trial. The facts stated in the complaint concerning the title of the lots in question were admitted to be true, the controverted question being whether appellant, Schaffner, was a good-faith purchaser of said lots, and paid value for them before the commencement of the Voss foreclosure suit.

Appellant's evidence was in the form of a deposition, which showed that at the time he purchased the lots in suit, and at the time of the trial, he resided at Chicago, Ill.; that said Jacob Schimelfenig was his brother-in-law; that he purchased the lots in the fall of 1895 for \$1,000, and in good faith, and did not know of the Voss suit at that time. Upon cross-examination he testified that his brother-in-law came to him in Chicago and asked him to buy the lots, as he was needing the money; that he did not know who drew the deed; that after it was made out and signed it was shown to him, and he told his brother-in-law to have it recorded. The deed for the lots was recorded before it was turned over to him; he did not know much about the lots or their value. His brother-in-law wanted the money paid to his wife, which he did, making the first payment by check for \$39, December 28, 1895, and on December 31,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1895, \$50; in May, 1896, he paid \$200; in November, 1896, he paid \$75; in December, 1896, \$25; in March, 1897, \$100; in April, 1897, \$100; in September, 1897, \$50; October, 1897, \$150; November, 1897, \$150; December, 1897, \$150. He also testified that when he bought the lots his brother-in-law owed him some money, but he does not recollect whether that indebtedness was taken into consideration or not. He did not remember anything about when he received the deed, and did not know whether or not he received an abstract of title, for the reason that he did not pretend to keep track of his private papers. That was done by some one else. He was engaged in two lines of business. "I do not give my private matters any attention." He did not remember whether he knew of the Voss mortgage at the time he made the purchase. He did not remember what conversation was had at the time he purchased the lots, or whether he made any investigation regarding the title, as "it made very little difference to me whether the lots were \$5 or \$5,000, because he was my brother-in-law and he needed the money," and he was willing to let his brother-in-law have the \$1,000 whether he got any title to the lots or not. With reference to the title, he thinks he took his brother-in-law's word for it, and does not remember what he said on the subject. On re-examination he said that Schimelfenig came to him with the deed; that he examined it and had it in his possession and told his brother-in-law to have it recorded for him. By agreement of the parties the affidavit of Jochim Voss of date December 31, 1907, was admitted in evidence, whereby it appears that he knew nothing of the purchase by Charles Schaffner of any of said lots prior to the time he received the sheriff's deed; that the first knowledge he had of any claim of Schimelfenig to the lots was about three months before the making of the affidavit. This, in substance, was all the evidence given in the cause, and trial was had February 10, 1908.

At the time appellant purchased the real estate in question, the mortgage records of Lake county disclosed the fact that Voss held a mortgage thereon. Appellant's claim of title proceeded from Clark, who executed the mortgage to Voss. These facts are sufficient to charge appellant with constructive notice of the Voss mortgage at the time he purchased and took the title to the real estate from his grantor, Schimelfenig. *Schmidt v. Zahrdt*, 148 Ind. 447, 47 N. E. 335. It must be conceded that Schimelfenig transferred to appellant only such rights or interest in the land as he had at the time he parted with the title thereto. It must also be conceded that if the title to the real estate in question was in Schimelfenig, at the time Voss commenced his suit to foreclose his mortgage, appellant must be regarded as a purchaser pendente lite, and therefore bound by the decree subsequently rendered in that

suit. *Randall v. Lower*, 98 Ind. 255; *Davis v. Barton*, 130 Ind. 899, 90 N. E. 512; *Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27. As said in *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403: "The obvious reason for this is, that if, when the jurisdiction of the court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to the litigation, and justice would be defeated by the number of these transfers," and this is true without the filing of a lis pendens notice as provided by section 329 Burns' Ann. St. 1908. *Rothschild v. Leonhard*, 83 Ind. App. 452, 71 N. E. 673.

While appellant was chargeable with constructive notice of the Voss mortgage, Voss must be regarded as having had constructive notice of appellant's deed after it was recorded, and under the facts disclosed by the record in this case, in order to cut off appellant's right of redemption, Voss must have commenced his suit against appellant's grantor while the title to the real estate was still in him.

Schimelfenig was made a party to the foreclosure proceeding, and as to him, the suit was commenced at the time of the first publication of the nonresident notice, which was October 24, 1895. Act 1881 (Sess. Laws 1881, p. 249, § 55 [section 317, Burns' Ann. St. 1908]); *Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425. On October 25, 1895, appellant's deed bearing date October 22, 1895, was recorded. The theory of appellee is that while the deed is of date October 22, 1895, it was not delivered until after it was recorded, or in any event not before October 25, 1895, and after the commencement of the foreclosure suit against Schimelfenig.

The execution of a deed includes its delivery to the grantee, which is necessary to divest the grantor of title. *Fitzgerald v. Goff*, 99 Ind. 28; *Rogers v. Eich*, 146 Ind. 285, 45 N. E. 93. The delivery of a deed being one of the necessary elements in so passing title to real estate, the burden of showing its delivery is upon the party claiming under it. *Burkholder v. Casad*, 47 Ind. 418. Whether or not a deed has been delivered is a question of fact to be determined from the evidence adduced at the trial of the cause, and the trial court's finding in that particular will not be disturbed on appeal, where the record discloses evidence from which such fact might have been found. *McReynolds v. Smith*, 172 Ind. 336, 86 N. E. 1009; *State ex rel. v. Scott*, 171 Ind. 349, 86 N. E. 409; *Rocker v. Metzger*, 171 Ind. 364, 86 N. E. 403.

It has been held that the leaving of a deed by the grantor at the recorder's office for record, in the absence of a showing to the contrary, will be regarded as a delivery of such deed. *Colee v. Colee*, 122 Ind. 109, 23 N. E. 687, 17 Am. St. Rep. 345; *Fireman's Insurance Co. v. Dunn*, 22 Ind. App. 332, 53 N. E. 251; *Franklin Insurance Co. v. Feist*, 31 Ind. App. 890, 68 N. E. 188. By refer-

ence to the evidence it will be seen that appellant does not claim to have made a payment on account of the purchase of the lots in question until December 28, 1895, although his grantor was in need of money. Appellant says he was shown the deed, but has no recollection when it actually came into his possession. The grantor and grantee were brothers-in-law, and the former had an equity in the lots in question, "and he needed the money," which the latter was willing to furnish regardless of the value of the lots, but who did not find it convenient or necessary to furnish any part of it for more than two months after the alleged sale and purchase, and then only \$39, which was paid to the wife of the grantor. It does appear from the evidence that during the month of September, 1895, the appellant paid to Schimelfenig \$500, and that he owed appellant some money at the time the deed was made, but this loan does not appear to have entered into the purchase and sale of the lots. Schimelfenig's version of the transaction was not before the court. What weight the trial court may have given these various items of evidence tending to show when the deed was delivered, we have no way of determining, but in view of the ordinary and everyday business transactions, and the unsatisfactory evidence of the appellant, it might not be unreasonable to infer that the deed was signed and acknowledged on October 22d, and recorded on October 25th, as shown by the instrument, without the knowledge of appellant and for the purpose of securing the repayment of the money then owing by Schimelfenig to the appellant. If such was the case, and the deed thereafter ripened into an unconditional conveyance of the lots, when, under the evidence, did this most likely occur? It may be inferred from the evidence that the appellant was a man of considerable financial strength, and when appealed to by his brother-in-law, he took the lots solely because of the desire to render his brother-in-law financial assistance, for he admits that he gave no attention to the value of the lots. If the necessity for financial aid on the part of the grantor was then present, which might be inferred, and which seems to have been the principal inducement on the part of appellant to make the alleged purchase, the time of the first payment, December 28, 1895, is not without persuasive force as tending to show the time when the deed was actually delivered unconditionally. But this is not at all the only conclusion which the evidence will justify, for it more strongly supports the finding that the deed was not delivered until left with the recorder for record, which was, as we have seen, after the first publication of notice to nonresidents. Either of the suggested findings would make the appellant a purchaser pendente lite, and therefore bound by the decree subsequently rendered in Voss'

foreclosure suit. We are convinced that a right result was reached on the merits of this case.

Judgment affirmed.

(46 Ind. App. 532)

PERRY-MATTHEWS-BUSKIRK STONE CO. v. BENNETT. (No. 7,131.)

(Appellate Court of Indiana, Division No. 2
Dec. 14, 1910.)

1. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR.

Error, if any, in overruling a demurrer to a paragraph of a complaint, was harmless where the verdict rested on another paragraph.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.*]

2. MASTER AND SERVANT (§ 258*)—INJURY TO SERVANT — ACTION — COMPLAINT—SUFFICIENCY.

A complaint alleging that defendant so negligently piled stones around a derrick on which plaintiff was working that, when one of the stones was removed, another stone fell and injured plaintiff; that, plaintiff was 16 years old, and he did not know of the defective manner in which the stones were piled; that the point of contact between the stones was in a measure concealed, and was observable only on close inspection, etc.—was not demurrable for want of facts, but sufficiently showed a disregard of defendant's duty to provide a reasonably safe place for work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISK.

Risk is not assumed within the meaning of the rule that bars recovery when the injured party really knew there was some danger, unless the danger was appreciated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

4. MASTER AND SERVANT (§ 201*)—SAFE PLACE FOR WORK—CONCURRENT NEGLIGENCE OF FELLOW SERVANTS AND MASTER.

The negligence of fellow servants will not excuse the master from his duty to provide a reasonably safe place for his servants to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

Rabb, J., dissenting.

Appeal from Circuit Court, Lawrence County; James B. Willson, Judge.

Action by James R. Bennett, by next friend, against the Perry-Matthews-Buskirk Stone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. R. Kurrie and John H. Underwood, for appellant. M. B. Hottel and A. J. Fields, for appellee.

COMSTOCK, J. Appellee, suing by next friend, recovered a judgment for damages in the sum of \$—— against the appellant for personal injuries received by him while in its employ through its alleged negligence in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

falling to maintain a safe place to work and safe tools with which to do the work. The amended complaint is in three paragraphs. A separate demurrer for want of facts was sustained to the first and overruled as to the second and third.

The negligence sought to be charged in said second paragraph is that about eight months before the date of the injury the appellant caused a pile of mill blocks to be stacked near the derrick on which the plaintiff was working; that the appellant had negligently and carelessly piled them, so that they leaned one against the other, and so that the removal of one might cause the others to fall; that one of said stones so leaned against the stone to be removed that the removal of the stone ordered to be moved by the defendant would cause the stone to the west to tumble down and fall, thereby rendering the place unsafe. It is also charged that the plaintiff was only 16 years of age, and had little knowledge or experience in that kind of work; that he had no knowledge of the manner in which they were stacked, or of the fact that they were likely to fall upon the removal of said stone ordered moved; that the appellant knew, or might have known, that the hoisting and removal of said stone so ordered to be removed would cause said mill blocks on the west to fall, etc.; that all of plaintiff's injuries were caused by the carelessness and negligence of defendant in allowing its premises to become dangerous, etc.

The third paragraph is substantially the same as the second, except that it also charges that one of the dogs which plaintiff was using was defective, in this: That the point was too straight, and it was necessary to hold the dog in place until the chain tightened; that the plaintiff went upon this stone as ordered by the defendant and attached the dog to the stone; that he was required to hold it until the chains tightened because of said defective point; that just as the dogs were made fast the plaintiff turned to go to a place of safety, and before plaintiff could get to a place of safety the attempted hoisting and removal of said stone caused the stones on the west on account of their being so carelessly and negligently stacked and placed leaning to the east and being supported in part by said already removed stones, as above set out, as well as by the one they were then attempting to remove, to tumble down and fall, etc.

The errors assigned and relied upon for reversal are that the second and third paragraphs of the amended complaint do not state facts sufficient to constitute a cause of action against the defendant, that the court erred in overruling appellant's demurrer to the said second and third paragraphs, separately and severally, and in overruling its

motion for judgment on the answers to interrogatories and for a new trial. The insufficiency of the complaint is not discussed. Counsel for appellant in their brief under propositions of law say that it is insufficient. The answers to interrogatories show that the hooks or dogs were not defective as alleged in the third paragraph, so that the ruling upon the demurrer to said paragraph is immaterial, as the verdict manifestly rests on the second paragraph.

The second paragraph shows that the injured party was an employé of appellant in the line of work assigned him; that he did not know of the defective or negligent manner in which the stone had been piled; that he did not know that the stone which fell upon and injured him was supported by the stone which was about to be removed; that the point of contact between them was in a measure concealed, and was observable only upon close inspection; that his attention was called to the hook which he was about to attach to the stone. We think this paragraph sufficiently shows a disregard of the duty which the master owes to his employé to provide for him a reasonably safe place in which to work.

The answers to interrogatories do not show such irreconcilable conflict as to overthrow the general verdict. The evidence shows that the plaintiff was 16 years of age, and that, if he knew, he did not appreciate the danger of the situation. Risk is not assumed within the meaning of the rule that debars recovery when the injured party really knew there was some danger, unless the danger is appreciated. *Avery v. Nordyke & Marmon Co.*, 34 Ind. App. 541, 70 N. E. 888. The dangerous condition was created by the master. There was evidence that the defective piling of the stone was the proximate cause of plaintiff's injury; that this condition might have been discovered by the appellant by reasonable inspection. The conditions were not created by the employé. They were made by the appellant for its own purpose. The fact that the act of an employé in pulling out or removing the stone with a derrick released the pressure would not defeat appellee's claim based upon the failure of appellant to provide a reasonably safe place to work. The negligence of fellow servants will not excuse the employer from his duty to provide a reasonably safe place for his employes. *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864.

The questions of assumption of risk, negligence, contributory negligence, and proximate cause, discussed, were all passed upon by the jury.

Judgment affirmed.

ROBY, C. J., and MYERS, HADLEY, and WATSON, JJ., concur. RABB, J., dissents.

(46 Ind. A. 567)

WIDENER et al. v. BOARD OF TRUSTEES OF TOWN OF LAPEL (No. 7,738.)

(Appellate Court of Indiana, Division No. 1. Dec. 13, 1910.)

MUNICIPAL CORPORATIONS (§ 321*)—STREET IMPROVEMENTS—APPEAL.

Towns and Cities Act (Acts 1905, c. 129) § 31, subd. 9, and section 267 authorize the board of town trustees to improve the streets of the town; and section 270 provides the method of exercising the authority so granted. Acts 1909, c. 172, § 1, authorizes abutting property owners to object to a street improvement, provides for the submission of the final order for the improvement and the objections to the circuit court, and declares that the court's order shall be final. *Held*, that no appeal lies from the order of the circuit court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 837-840; Dec. Dig. § 821.*]

Appeal from Circuit Court, Madison County; Chas. K. Bagot, Judge.

Proceeding by the Board of Trustees of the Town of Lapel for a street improvement, wherein Oliver P. Widener and others filed objections. A judgment was rendered by the circuit court ordering the improvement, and objectors appeal. Appeal dismissed.

Kittinger & Diven, for appellants. Wade H. Free and Luther F. Pence, for appellee.

MYERS, J. This proceeding was begun on June 1, 1909, when the board of trustees of the town of Lapel passed and adopted a resolution for the improvement of a certain portion of Pendleton avenue, in said town. On June 5, 1909, the appellants, in writing, filed the first three statutory objections to said improvement. Acts 1909, pp. 412, 417, 418, § 1. Thereupon such proceedings were had that the clerk of said town filed in the office of the clerk of the Madison circuit court a copy of said order for said improvement, together with the written objections of the appellants thereto. The questions thereby presented were in due time submitted to the Madison circuit court, and a hearing had, resulting in a judgment whereby it was ordered and adjudged by the court that said improvement be made. From this judgment appellants have perfected an appeal to this court.

Appellee has filed a motion to dismiss this appeal, on the ground that this was a special proceeding for the improvement of a certain street, under the act of 1909; that the judgment of the Madison circuit court is final, and there is no right of appeal from the decision of that court authorized by law. In *Randolph v. City of Indianapolis*, 172 Ind. 510, 88 N. E. 949, it was held that "statutory provisions for the improvement of streets and other highways, and for the assessment of the cost thereof against the property benefited, are special in character, and, unless expressly granted, no appeal lies

from any action or decision of the board or tribunal conducting such proceedings." The statute known as the "Towns and Cities Act" (Acts 1905, p. 231), in section 31, subd. 9, and section 267, authorizes the board of town trustees to pave and otherwise improve the streets of the town, and, unless it is otherwise provided by law, the town has exclusive power over her streets, and may alter, improve, and repair the same; and section 270 of said act makes provision for the method of exercising the authority so granted. In the case before us, said board of trustees having ordered the improvement of one of the streets of said town, section 1, supra, authorized 40 per cent. in number of the owners of property abutting on said street and liable for the cost of such improvement to file written objections thereto, and provision is made for the submission of such final order and such objections to the circuit court of the county, as was done in this case. It is further provided in effect that after a hearing of the matters thus presented by the court "it may confirm the order of such council or board or sustain the objections thereto, and such order of the court shall be final and conclusive upon all of the parties thereto."

We find no statute, nor has any been pointed out, expressly authorizing an appeal to this court from the order as made by the Madison circuit court. It cannot be said that the general provisions of our Code authorizing an appeal are applicable to a case like the one before us, when the statute authorizing the proceeding specifically points out the procedure in such cases, and expressly forbids a further appeal by providing that the order of the circuit court shall be "final and conclusive upon all of the parties thereto." There is no right of appeal in the absence of legislative sanction, and as that right in proceedings of this character does not seem to have been given, but, on the contrary, to have been denied, it follows that appellee's motion to dismiss should be sustained. *Randolph v. City of Indianapolis*, supra; *Evansville, etc., R. Co. v. City of Terre Haute*, 161 Ind. 26, 67 N. E. 686; *City of Crawfordsville v. Brown*, 91 N. E. 252.

Appeal dismissed.

PITTSBURG, C., O. & ST. L. RY. CO. v. JOHNSON. (No. 7,660.)¹

(Appellate Court of Indiana. Dec. 13, 1910.)

Appeal from Circuit Court, Pulaski County; F. J. Vurpallit, Judge.

Action by Carl Johnson against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From the judgment, defendant appeals. On motion to modify an order made for certiorari. Motion overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes
¹Appeal dismissed, 93 N. E. 683. Rehearing denied, 95 N. E. 610. Transfer denied.

G. E. Ross, for appellant. M. Winfield and Geo. A. Gamble, for appellee.

PER CURIAM. We are asked to modify the order heretofore made for certiorari in this cause, but we are of the opinion that the response filed on the 26th day of May, 1910, by the clerk of the Pulaaki circuit court, to the certiorari issued herein sufficiently shows that the judgment in said cause was entered on the 8th day of October, 1908, but was not signed by the judge thereof until the 17th day of December, 1909.

The motion to modify the order heretofore made in this cause for certiorari is therefore overruled.

HOUK v. CITIZENS' NAT. BANK OF CRAWFORDSVILLE (No. 7,713.)

(Appellate Court of Indiana. Dec. 13, 1910.)

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action between Wilbur G. Houk and the Citizens' National Bank of Crawfordsville. From the judgment, Houk appeals. On motions of appellee bank to strike out appellant's brief and to dismiss the appeal. Motion to strike brief sustained, and motion to dismiss overruled.

Wilbur G. Houk, in pro. per.

PER CURIAM. The motion of appellee as to the striking out of appellant's brief is sustained, and overruled as to the dismissal of the appeal herein. Appellant is granted 30 days from this date in which to prepare and file his briefs herein upon the merits.

(46 Ind. App. 734)

VOGEL v. HANCOCK et al. (No. 7,352.)

(Appellate Court of Indiana. Dec. 15, 1910.)

Appeal from Circuit Court, Jackson County; Joseph H. Shea, Judge.

Action by Emma C. Vogel, executrix of Valentine Vogel, deceased, against George L. Hancock and another. From a judgment for defendants, plaintiff appeals. Dismissed.

Lewis & Seavalls and Thomas M. Honan, for appellant. Carl E. Wood and Frank S. Jones, for appellees.

PER CURIAM. The order overruling appellees' motion to dismiss is withdrawn, and the appeal is dismissed, upon the authority of *Holderman v. Wood*, 34 Ind. App. 519, 73 N. E. 190.

(247 Ill. 268)

GODSCHALOK v. WEBER.

(Supreme Court of Illinois. Oct. 28, 1910.)

Rehearing Denied Dec. 14, 1910.)

1. JUDGMENT (§ 585*)—BAR OF CAUSES OF ACTION—IDENTITY OF SUBJECT-MATTER.

The dismissal on the merits of a bill to establish complainant's equitable title to land, subject to a mortgage, is a bar to a subsequent bill to redeem from a foreclosure of the mortgage, whether the second bill presented any better case than the first or not; the issue in each case being the equity of the complainant in the land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1064, 1085, 1092–1096, 1097–1132; Dec. Dig. § 585.*]

2. JUDGMENT (§ 713*) — CONCLUSIVENESS — MATTERS CONCLUDED — MATTERS WHICH MIGHT HAVE BEEN LITIGATED.

The doctrine of *res judicata* extends, not only to the questions which were actually decided in a former case, but to the whole controversy, including matters properly involved which might have been raised and determined, and all grounds of recovery or defense which the parties might have presented, whether they did so or not.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1241; Dec. Dig. § 713.*]

3. JUDGMENT (§ 570*)—BAR OF CAUSES OF ACTION—SUFFICIENCY OF PLEADING.

That a bill to enforce a trust is subject to the defense of the statute of frauds does not determine its sufficiency as affecting the question whether its dismissal is a bar to another suit, since the statute must be pleaded as a defense.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1039; Dec. Dig. § 570.*]

4. JUDGMENT (§ 570*)—RES JUDICATA—DISMISSAL OF BILL—WANT OF JURISDICTION.

The dismissal of a bill for a defense going to the jurisdiction of the court does not constitute a bar to another bill, or an action at law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028–1045; Dec. Dig. § 570.*]

Error to Circuit Court, Douglas County; William C. Johns, Judge.

Bill in equity by Johanna Godschalck against Henry Weber. From a decree in favor of respondent, complainant brings error. Affirmed.

E. J. Miller, for plaintiff in error. Hugh Crea, Charles G. Eckhart, and Hugh W. Housum, for defendant in error.

DUNN, J. This writ of error brings up for review a decree of the circuit court of Douglas county dismissing upon demurrer a bill whereby the plaintiff in error sought to redeem certain real estate from a lien thereon, to have an accounting of the rents and profits thereof, and to have a conveyance of the title made to her. It appears from the allegations of the bill in its final form that Joseph Fulmer, the father of the plaintiff in error, died about 1863 in Vigo county, Ind., owning 145 acres of land there and certain personal property, and leaving a widow and 8 children, the plaintiff in error being then about 12 years old. The personal estate was never sold; and the widow and children continued to reside on the land without partition. Ruben H. Fulmer, a brother of plaintiff in error, by reason of his age became the manager of the land, controlled the estate, used the personal property and the proceeds as his own, and made large profits. Plaintiff in error remained at home and assisted in doing the work until she was 31 years old, when she married and removed to Douglas county, Ill. Prior to March 10, 1887, Ruben informed the plaintiff in error that, if she would select a farm, he would buy the place for her and pay for it for her share in her father's estate. Thereupon she contracted for the 80 acres

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of land in question in this case for \$3,080, and on March 10, 1887, the contract was consummated, and by virtue of the agreement between the plaintiff in error and her brother the deed to the land was taken in his name, with the agreement that he should hold the paper title until the plaintiff in error and her husband should pay off the mortgage which was on the land at the time of the purchase thereof, to the amount of \$1,500, which mortgage was given by the said Ruben H. Fulmer, with the consent and at the instance of the plaintiff in error, as a part of the purchase price of said land. The said Fulmer agreed to convey the said land to the plaintiff in error as soon as she would pay off said \$1,500 mortgage. The greater part of the purchase money except the \$1,500 mortgage was advanced by the brother, but the money so advanced was due the plaintiff in error from her father's estate, from the rents and profits of the home farm and for her interest in the farm. Of the purchase money \$155 was paid by the husband of the plaintiff in error. Her brother directed the plaintiff in error to take possession of said land, move on it with her family, live in the residence and occupy it as her own, and make such improvements as she was able, because, he stated to her, it was her land, and he was simply holding the paper title thereto, and was ready to convey it to her when she should pay off the incumbrance. It was further agreed that she should pay the taxes on the land. The plaintiff in error thereupon took possession of the land and occupied and resided upon it with her husband and family for many years, paying all taxes as well as the interest on the mortgage, and making permanent improvements to the amount of \$1,700 with her own money and with the consent of her brother. The plaintiff in error subsequently borrowed \$2,200, with which she paid off the \$1,500 mortgage and an indebtedness to her brother for money borrowed of him, and, the title still remaining in him, he executed the mortgage securing the \$2,200 loan on the land. She paid the interest on the new loan, and her brother did not deny her right to a deed, but in August, 1893, he made an assignment for the benefit of creditors, including therein this land. The plaintiff in error then filed a bill in the circuit court of Douglas county, to the October term, 1893, setting up the facts which have been narrated, offering to convey her interest in her father's farm and to release all claim for the rents and profits thereof, and praying for a conveyance of the Douglas county land to her and the removal of the cloud upon her title, caused by the deed of assignment.

This bill is set out in *hæc verba* in the bill in the present case and is followed by a statement of the proceedings under it, resulting in a decree at the April term, 1895, of the Douglas county circuit court dismiss-

ing the bill, after a hearing upon the pleadings and evidence, and an affirmance of that decree by this court at the October term, 1898. *Godschalk v. Fulmer*, 176 Ill. 64, 51 N. E. 852. The plaintiff in error had remained in possession during the pendency of these proceedings, but in the meantime default was made in the payment of interest on the \$2,200 mortgage and a bill was filed to foreclose it. The name of the plaintiff in error not appearing of record in connection with the title, though she and her husband were in possession of the land, they were not made parties to the foreclosure suit when the bill was filed. A decree was rendered foreclosing the mortgage, the premises were sold by the master, and a deed was made to the assignee of the purchaser, who procured a writ of assistance for the possession of the land. Before the execution of the writ, the original bill in the present case was filed on January 14, 1898, and a preliminary injunction was obtained restraining the sheriff from dispossessing the plaintiff in error. This preliminary injunction was afterwards dissolved, and in December, 1898, the writ of assistance was executed by ejecting the plaintiff in error from the land.

The amended bill, to which the demurrer was sustained, was filed February 3, 1910. Besides the facts which have been already stated, it set out the proceedings in the foreclosure suit, showing, as is insisted by plaintiff in error, that the court had no jurisdiction of her person, and the decree was therefore of no force against her. It also set out the conveyances whereby defendant in error acquired the title under the foreclosure decree, and various proceedings in the present case from the filing of the bill on January 14, 1898, to the filing of the amended bill on February 3, 1910. It will not be necessary to make any further reference to these statements, because we hold that the decree dismissing the former bill filed by the plaintiff in error was an adjudication that she had no interest in the land and is a bar to her maintenance of this suit.

The only substantial difference, if it may be called substantial, between the averments of the present bill and those of the former bill in respect to the equities of the plaintiff in the land as against her brother, is in the statement of the agreement or understanding under which the deed was made to the brother in 1887. The statement of the present bill in that regard has been given. The statement of the former bill was that the contract for the purchase of the land was consummated, and in consideration of an agreement between the plaintiff in error and the said Ruben H. Fulmer the deed was taken to and in the name of said Fulmer, to be by him held in trust for the plaintiff in error, for the reason that there were fears that, if the deed were taken in the name of the plaintiff in error, she might, through the

influence of her husband, squander and lose the farm for debts made by her husband, and so it was agreed that the deed might be, and it was, taken in the name of Ruben H. Fulmer, to be by him held in trust for the plaintiff in error until she and her husband should pay off the trust deed lien against the lands to the amount of \$1,500 and interest.

The present bill states in regard to the former bill that it is doubtless true that had a demurrer been interposed to the bill of complaint it would have been dismissed upon demurrer, as being insufficient upon which to base a decree for any kind of relief; that the bill of complaint was not, and could not properly be, construed as a bill to enforce the specific performance of a verbal contract for the conveyance of land, for the reason, among others, that there was no claim made in the bill of complaint that the plaintiff in error had complied with the contract made with her brother in reference to paying off the indebtedness against the land; and that there was no averment in the bill of complaint that the plaintiff in error was ready to do so, and, if viewed as a bill for the specific performance of a verbal contract for the conveyance of land, the bill was not sufficient, on its face, to sustain any decree for any kind of relief in favor of the plaintiff in error, and that the decree rendered in said cause was necessary because of defective pleadings.

The doctrine of *res judicata* extends, not only to the questions which were actually decided in the former case, but to the whole controversy—to all matters properly involved which might have been raised and determined, and to all grounds of recovery or defense which the parties might have presented, whether they did so or not. The rule is so stated in numerous decisions, and the doctrine applicable to this case is thus stated in *Henderson v. Henderson*, 3 Hare, 115: "In trying this question I believe I state the rule of the court correctly, that, where a given matter becomes the subject-matter of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their cause. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward in time." The principle "extends not only to questions of fact and law which were decided in the former suit, but also to the

grounds of recovery or defense which might have been but were not presented." *Town of Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205. The language of these decisions has been quoted as announcing the true doctrine in *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579, and *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 133, 13 N. E. 161, 164, 5 Am. St. Rep. 502. In the latter case it is said: "Nor is such former judgment or decree conclusive only as to questions actually and formally litigated. It is conclusive as to all questions within the issue, whether formally litigated or not." In *Rogers v. Higgins*, 57 Ill. 244, it is said: "When the complainant before presented his cause of action before the court, he should have brought forward and urged all the reasons which then existed for the support of it. The controversy cannot be reopened to hear an additional reason which before existed and was within the knowledge of the party, in support of the same cause of action." So it was held in *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; and among numerous other cases to the same effect may be cited *Hamilton v. Quimby*, 46 Ill. 90; *Kelly v. Donlin*, 70 Ill. 378; *Allen v. Haley*, 169 Ill. 532, 48 N. E. 478; *Terre Haute & Indianapolis Railroad Co. v. Peoria & Pekin Union Railway Co.*, 182 Ill. 501, 55 N. E. 377; *Harvey v. Aurora & Geneva Railway Co.*, 186 Ill. 283, 57 N. E. 857; in *re Northwestern University*, 206 Ill. 64, 69 N. E. 75.

The issue in the former case was, as in this, the equity of the plaintiff in error in the Douglas county land arising out of her agreement with Ruben H. Fulmer. She knew what that contract was as well in 1893 as in 1898. Nothing affecting her rights had occurred except the subsequent litigation. It was her duty to have presented to the court all the right and title she had to the property when she filed the first bill. Whether the present bill be regarded as presenting any better case than the first or not, the plaintiff in error cannot now have any advantage in a second suit of what was negligently omitted from the first, or of any claim for relief in respect to her equitable rights which then existed but was not presented.

The objection that the first bill was insufficient on demurrer and would not have sustained a decree, and for that reason is not a bar, is not tenable. It is true that, regarded as a bill to enforce an express trust, the suit was subject to the defense of the statute of frauds. It is also true that that defense may be taken by demurrer when it appears from the face of the bill that the case stated is within the statute. *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Dicken v. McKinley*, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267. But the defense that a contract is not in writing must be urged in the trial court. If not insisted upon by demurrer, it must be set up by way of plea or answer. It cannot be raised for the first time on ap-

peal. *Lear v. Chouteau*, 23 Ill. 39; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Finnucan v. Kendig*, 109 Ill. 198. If a default be suffered, the defense is regarded as waived, and a decree may be properly rendered in accordance with the prayer of the bill. *Boston v. Nichols*, 47 Ill. 353; *Clayton v. Lemen*, 233 Ill. 435, 84 N. E. 691. The dismissal of a bill for a defect going to the jurisdiction of a court of equity does not constitute a bar to another bill or action at law. *Gage v. Ewing*, 114 Ill. 15, 28 N. E. 379; *Lundy v. Mason*, 174 Ill. 505, 51 N. E. 614. But this rule does not apply here, for the case presented was within the jurisdiction of equity, and it was decided on its merits.

The decree is affirmed.

Decree affirmed.

(247 Ill. 276.)

PEOPLE ex rel. WIES, County Treasurer, v. BOWMAN.

(Supreme Court of Illinois. Dec. 8, 1910.)

1. MUNICIPAL CORPORATIONS (§ 18*)—ENFORCEMENT OF TAXES—VALIDITY OF MUNICIPALITY IMPOSING TAXES.

The regularity of the organization of a municipal corporation cannot be questioned in proceedings to collect taxes levied by the corporation, though the objection goes to the jurisdiction of the tribunal through whose agency the organization is effected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 41-44; Dec. Dig. § 18.*]

2. HEALTH (§ 4*)—ENFORCEMENT OF TAXES—VALIDITY OF MUNICIPALITY IMPOSING TAXES.

Where there is an attempt to organize a sanitary district under Act May 17, 1907 (Hurd's Rev. St. 1909, c. 42), authorizing the creation of sanitary districts, and a user of the franchises of such a district, there is an acting de facto corporation, and its existence and authority to exercise the powers conferred by statute may not be questioned in an action by it for delinquent taxes levied by it.

[Ed. Note.—For other cases, see *Health*, Dec. Dig. § 4.*]

3. STATUTES (§ 285*)—ENACTMENT—LEGISLATIVE JOURNALS.

The court in determining whether a statute has been enacted in accordance with the Constitution may go behind the printed statute and the enrolled act, and examine the journal of either house of the Legislature.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 17, 27, 384, 385; Dec. Dig. § 283.*]

4. STATUTES (§ 286*)—LEGISLATIVE JOURNALS—CONCLUSIVENESS.

The journals of the Senate and House, accepted as containing a true record of the proceedings of the houses, must show on their face a compliance with every requirement of the Constitution, from the introduction of a bill until its final passage, or the bill will not be a law, and the silence of a journal of either house as to anything required to be shown is evidence of its nonexistence.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 386; Dec. Dig. § 286.*]

5. STATUTES (§ 286*)—ENACTMENT—LEGISLATIVE JOURNALS.

A senate journal showing that a bill was read a third time, and that on the question,

"Shall this bill pass?" It was decided in the affirmative by yeas 84, followed by the names of 84 senators, shows the passage of the act in accordance with the Constitution, since the failure of the journal to show any negative votes is a showing that the bill was passed by vote of 84 yeas and no nays.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 386; Dec. Dig. § 286.*]

6. STATUTES (§ 107*)—TITLE—CONSTITUTIONAL PROVISIONS.

An act may contain many provisions and details for the accomplishment of the legislative purpose, and, where they legitimately tend to effectuate that object, the act is not violative of the Constitution, that no act shall embrace more than one subject which shall be expressed in the title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

7. STATUTES (§ 107*)—TITLE—CONSTITUTIONAL PROVISIONS.

Act May 17, 1907 (Hurd's Rev. St. 1909, c. 42), authorizing the creation of sanitary districts in certain localities, and to drain and protect the same from overflow for sanitary purposes, does not violate the Constitution that no act shall embrace more than one subject, because none of its provisions are foreign to the purpose of providing for the public health and safety by the inauguration of a general system of drainage for sanitary purposes.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 121-134; Dec. Dig. § 107.*]

8. HEALTH (§ 4*)—CREATION OF SANITARY DISTRICTS—STATUTES.

Act May 17, 1907 (Hurd's Rev. St. 1909, c. 42) providing for the preservation of the public health and safety, authorizes the formation of sanitary districts for the protection of the public health and safety, as distinguished from the organization of drainage districts for agricultural purposes, and the act is not within Const. art. 4, § 31, authorizing the passage of laws for the construction of drains by special assessments for property benefited.

[Ed. Note.—For other cases, see *Health*, Cent. Dig. § 3; Dec. Dig. § 4.*]

9. STATUTES (§ 77*)—SPECIAL STATUTES—VALIDITY.

Act May 17, 1907 (Hurd's Rev. St. 1909, c. 42), authorizing the creation of sanitary districts, does not on its face purport to be a local or special statute, and, though construed to be such, it is not in conflict with Const. art. 4, § 22, prohibiting the passage of local or special laws in enumerated cases not including sanitary or drainage districts.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. § 77.*]

10. CONSTITUTIONAL LAW (§ 53*)—LEGISLATIVE POWERS—INVASION OF JUDICIAL POWER.

A provision in a statute which declares what the statute is intended to express does not violate Const. art. 3, as interfering with the right of the courts to construe statutes.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 51; Dec. Dig. § 53.*]

11. HEALTH (§ 4*)—SANITARY DISTRICTS—PROCEEDINGS FOR ESTABLISHMENT—STATUTES.

The Legislature in authorizing the creation of a sanitary district for the preservation of the public health and safety may declare what officers shall manage its affairs, and how, when, and by whom they shall be elected or appointed, and may change the mode of appointment at its pleasure, and it need not provide that the trustees of a district shall be elected at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Indexes

same time or in the same manner as the officers of other municipalities are elected.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 4.*]

12. DRAINS (§ 13*)—HEALTH (§ 4*)—DRAINAGE AND SANITARY DISTRICTS—NATURE.

Drainage and sanitary districts, created as authorized by law, are municipal corporations, and merely parts of the machinery for carrying on the affairs of the state; they exist only for public purposes and possess no powers except such as are given them for public or political purposes, and the Legislature may regulate and control them, their franchises and their funds, and alter, modify, or abolish them at pleasure, provided their property is not diverted from the uses and objects for which it was given or acquired.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 13.* Health, Dec. Dig. § 4.*]

13. MUNICIPAL CORPORATIONS (§ 3*)—POWER TO CREATE.

The Legislature in exercising its power to create municipal corporations may authorize the organization of such corporations with powers of taxation for corporate purposes, and is not limited by the boundaries of pre-existing corporations or compelled to adopt their corporate authorities, nor prohibited from endowing them, when created, with all the attributes of other pre-existing corporate authorities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 3.*]

14. DRAINS (§ 13*)—HEALTH (§ 4*)—POWERS TO CREATE DISTRICTS.

The Legislature may authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and may authorize them to co-operate, so far as may be consistent with, or desirable for, the accomplishment of their respective purposes, or may authorize the organization of a sanitary district to include drainage districts already organized, and there is no limitation on the power of the Legislature to compel the sanitary district to take and pay for the levees and drains within its territory, or to compel the drainage districts to surrender such levees and drains to the sanitary district so long as the use of such levees and drains for the purposes for which they were constructed is not impaired.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 13.* Health, Dec. Dig. § 4.*]

15. HEALTH (§ 4*)—ESTABLISHMENT OF SANITARY DISTRICTS—STATUTES—VALIDITY.

Act May 17, 1907 (Hurd's Rev. St. 1909, c. 42) § 24 providing that in case any sanitary district, organized under the act, shall include any drainage district, organized under the laws of the state, having drains conducive to sanitary purposes, the drainage district shall be paid, on such terms as may be agreed on, the reasonable cost or value of such drains, etc., is not invalid as requiring a sanitary district to take and pay for the drains of any drainage district included in the sanitary district, because it merely confers on the sanitary district authority to acquire the drains of the drainage district when conducive to sanitary purposes, and recognizes that the purpose of the two classes of districts are different, and whether the works of the drainage district may be conducive to sanitary purposes is for the consideration of the sanitary district, and it may take the drains of the drainage district and pay the value thereof not less than the unpaid indebtedness incurred in constructing them.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 4.*]

Appeal from St. Clair County Court; Frank Perrin, Judge.

Action by the People, on the relation of John J. Wies, County Treasurer and Collector of Taxes, against Walter J. Bowman. From a judgment for delinquent taxes, defendant appeals. Affirmed.

Turner & Holder, J. M. Freels, and Whittnel, Browning & Gillespie, for appellant. F. J. Tecklenberg, State's Atty. (A. B. Davis, J. E. Hamlin, and Dan McGlynn, of counsel), for appellee.

DUNN, J. This appeal is from a judgment recovered against the appellant's property for delinquent taxes levied by the East Side Levee & Sanitary District, claiming to be a municipal corporation organized under the act of May 17, 1907, entitled "An act to create sanitary districts in certain localities and to drain and protect the same from overflow for sanitary purposes." Hurd's Rev. St. 1909, p. 923.

It will not be necessary to mention in detail the numerous objections filed in the county court. Those urged here resolve themselves into an attack upon the existence of the East Side Levee & Sanitary District because, first, the act under which it purports to be organized was not passed in a constitutional manner by the Legislature; second, the act is unconstitutional; third, the proceedings by which the organization of the district is claimed to have been accomplished were so irregular that the county judge and the board of commissioners provided for by the act never obtained jurisdiction in the matter, the elections held were void, and no organization was or could be effected by those proceedings.

In regard to the last class of objections it may be said that they cannot be considered in a case of the character of this. If it be conceded that the act is valid, then the regularity of the proceedings by which the organization of a municipal corporation is attempted cannot be drawn in question in a proceeding to collect taxes levied by such corporation, even though the objection goes to the jurisdiction of the tribunal through whose agency the organization is effected. It is not controverted that a petition was presented to the county judge of St. Clair county to submit to a vote the question whether certain territory should be organized under the act in question as a sanitary district; that he called to his assistance a circuit judge and the county judge of Madison county; that the board thus constituted fixed the boundaries of the proposed district; that at an election called for the purpose a majority of votes was cast for the sanitary district; that trustees were elected at a later election, and that the East Side Levee & Sanitary District has ever since assumed to be lawfully incorporated, and has exercised the privileges and franchises of a municipal corporation. An attempt

was thus made to follow each step required by the statute. Section 3 of the act provides that if a majority of the votes cast shall be in favor of the incorporation of the proposed sanitary district, the district shall thenceforth be deemed an organized sanitary district under the act. By these proceedings a corporation was professedly brought into existence with all the powers conferred by statute. There was a law authorizing the organization of a sanitary district. There was an attempted organization and a user of the franchises of such a district. There being thus an acting *de facto* corporation, it is clearly not admissible in this form of action to question the existence of the corporation or its authority to exercise the powers conferred by statute upon such corporations. *Blake v. People*, 109 Ill. 504; *Trumbo v. People*, 75 Ill. 561; *People v. Newberry*, 87 Ill. 41; *Osborn v. People*, 103 Ill. 224; *People v. Dyer*, 205 Ill. 575, 69 N. E. 70; *People v. Pederson*, 220 Ill. 554, 77 N. E. 251.

For the same reason that the regularity of the incorporation cannot be inquired into, the evidence in regard to the sanitary purposes of drainage district No. 1 and of the Outlet Sewer District of East St. Louis, and in regard to the sanitary conditions in and around the city of East St. Louis, was properly rejected. Such evidence merely went to the legality of the organization, and was incompetent for that reason.

The journal of the Senate of the Forty-Fifth General Assembly was produced in evidence for the purpose of showing that the act was not passed in the Senate in the manner required by the Constitution. The journal shows that the bill was read a third time, "and the question being, 'Shall this bill pass?' it was decided in the affirmative by the following vote: Yeas 34. The following voted in the affirmative," followed by the names of 34 senators. The Constitution requires the vote upon the final passage of all bills to be by yeas and nays and to be entered upon the journal. The objection made is that the nay votes are not entered upon the journal, and it is not expressly stated that there were none. It is competent to go behind the printed statute book and the enrolled act and to show by the journal of either branch of the Legislature that the act was not passed in the mode prescribed by the Constitution. The journals of the Senate and House of Representatives must be accepted as containing a true record of the proceedings of those bodies. They must show on their face a compliance with every requirement of the Constitution, from the introduction of a bill until its final passage, or it will not become a law. The silence of the journal as to anything required to be shown is evidence of its nonexistence. *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 121, 85 Am. Dec. 848; *Ryan v. Lynch*, 68 Ill. 160. If

the journal fails to show anything which, if it had occurred, should have appeared on the journal, the failure of the journal to show it is evidence that it did not occur. If there had been any negative votes upon the passage of the bill in question they should have been recorded in the journal. The fact that none are recorded is evidence that there were none. The effect of the record in the journal is that the bill was passed by a vote of 34 yeas and no nays.

It is insisted that the act violates the constitutional requirement that no act shall embrace more than one subject, which shall be expressed in the title. It is said that the act includes the subjects of levees, drainage, the taking control of other drainage districts and the maintenance of a police force. All these subjects are dealt with in the act, but only in a manner subsidiary to the general purpose of the act, which is indicated by its title. The legislation is not incongruous but is reasonably connected with the subject mentioned in the title. An act may contain many provisions and details for the accomplishment of the legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision. *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; *Meul v. People*, 198 Ill. 258, 64 N. E. 1106; *Town of Manchester v. People*, 178 Ill. 285, 52 N. E. 964. None of the objects mentioned can be said to be foreign to the purpose of providing for the public health and safety by the prevention of overflow, the inauguration of a general system of drainage for sanitary purposes, and making provision for the protection of the levees, ditches, and other improvements which might be constructed.

It is contended that the act has for its main purpose the drainage of lands; that the sanitary purposes are merely incidental; that the drainage designed by the act to be accomplished can only be done, under the Constitution, by special assessment, and that, since the act makes no provision for a special assessment, but provides only for the levy of a general tax, it is unconstitutional. The act purports, in its title, to authorize the creation of sanitary districts for sanitary purposes only. It provides for their organization only in contiguous territory within two counties, including two or more incorporated cities, and having a population of not less than 25,000, which is subject to overflow from a river or tributary thereof, and in which the maintenance of one or more levees for protection against overflow and a new or improved outlet for drainage will conduce to the preservation of the public health and safety. The necessity to the public health of protection against the after-effects of great floods under the circumstances indicated is manifest, as well as the difficulty of obtaining the concert of action necessary to secure such protection. We may take notice that at

the time this act was passed East St. Louis was a city whose population exceeded 50,000; that other cities existed within the boundaries of the East Side Levee & Sanitary District, and that the entire population, urban and rural, approached 100,000. We may also recognize the recurrent floods to which that territory has been subject, with the attendant dangers, and the necessity for protection against them, both in the city and country. That it was competent for the Legislature to authorize the formation of a municipal corporation to have charge of the work of devising, constructing, and maintaining a system of levees and drainage for the purpose of furnishing the protection needed is undeniable, and it is obvious that such a work is distinct from that of drainage for agricultural purposes.

It is further objected that if not a drainage act, subject to the provisions of section 31 of article 4 of the Constitution, the act is obnoxious to section 22 of article 4. That section prohibits the Legislature from passing local or special laws in certain enumerated cases. Counsel have not mentioned the particular prohibition which applies to this case, and we have not discovered it. The act, on its face, does not purport to be local or special. We do not decide, and have not considered, whether it is so or not. If it be conceded that it is local or special, neither drainage districts nor sanitary districts are within the prohibition of the section of the Constitution referred to. *Owners of Lands v. People*, 113 Ill. 296; *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203.

Section 28 of the act is as follows: "The provisions of this act shall never be construed as authorizing any levee or drainage system for agricultural or mining purposes, but shall be liberally construed for the prevention of overflows and drainage of lands for sanitary purposes, within any sanitary district organized hereunder: Provided, nothing herein contained shall be held to constitute a contract between the State and any municipal corporation organized hereunder, or to prevent the alteration, amendment or repeal of this act, or of any amendment thereof, at any time hereafter." It is contended that this section violates article 3 of the Constitution because it interferes with the right of the courts to construe the statute. It is certainly not unconstitutional for the Legislature to insert in an act a statement of what it is intended to express.

It is urged that the act is unconstitutional because it provides for a special election that is local. The Legislature, in authorizing the district to be created, had the right to declare what officers should manage its affairs, and how, when, and by whom they should be elected or appointed, and it may change the mode of appointment at its pleasure. *People v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L.

R. A. 110; *People v. Olson*, 245 Ill. 288, 92 N. E. 157. It was not necessary that the trustees should be elected at the same time or in the same manner as the officers of other municipalities are elected. It was competent for the Legislature to determine that question, and direct that the officers of this particular class of municipal corporations should be elected, not in accordance with the provisions of the general ballot act or under the supervision of city election commissioners, but in accordance with the requirements of the statute in reference to the election of officers in newly organized cities, as provided in section 8 of chapter 24 of the Revised Statutes, and this was done.

It is insisted that section 24 of the act is unconstitutional because it requires any sanitary district organized under the act to take and pay for the levees, drains and ditches of any drainage district included within the limits of such sanitary district, and that the remainder of the act cannot be sustained without that section. The section is as follows: "In case any sanitary district organized hereunder, shall include within its limits, in whole or in part, any drainage district or districts organized under the laws of this state having levees, drains or ditches which are conducive to sanitary purposes, such drainage district or districts shall have paid and reimbursed to it or them, upon such terms as may be agreed upon by its or their corporate authorities and the board of trustees of said sanitary district, the reasonable cost or value of such levee, drains or ditches, which valuation shall in no case be fixed at less than any unpaid indebtedness incurred by such district or districts in constructing the same. Upon such payment being made, the sanitary district shall have the right to appropriate and use such levees, drains or ditches, or any part thereof, as it may desire, for or in connection with any improvements authorized by this act, and for or in connection with the purposes for which said sanitary district is organized: Provided, no such levee, drain or ditch shall be destroyed, removed or otherwise so used as to impair its usefulness for the purposes for which the same was constructed, without the consent of the corporate authorities of such drainage district. In case the board of trustees of said sanitary district and the corporate authorities of any such drainage district shall be unable to agree upon the compensation to be paid or reimbursed to such drainage district, the same may be ascertained and enforced by any proper proceeding in any court of competent jurisdiction."

Counsel for appellant do not indicate the particular provision of the Constitution which this section is supposed to violate. Their position is, that it requires the sanitary district to purchase and pay for the levees, drains, or ditches of all drainage districts previously organized in the territory of the

sanitary district, and to take charge of the local drainage, to expend money raised by general taxation in paying for improvements which have been constructed by special assessment and which specially benefit the property assessed, and to expend money raised by general taxation in paying the whole indebtedness of a drainage district of which only a part is within the limits of the sanitary district. If this position is correct it does not follow that the Legislature has exceeded its constitutional power. The sanitary district and the drainage districts are all municipal corporations and creatures of the Legislature. By their incorporation they acquire no contract rights. They are merely parts of the machinery employed in carrying on the affairs of the state. They exist only for public purposes, and possess no powers except such as are given them for public or political purposes. The Legislature has the right at all times to regulate and control them, their franchises and their funds, and to alter, modify, or abolish them at pleasure, so that their property is not diverted from the uses and objects for which it was given or purchased. *Bush v. Shipman*, 4 Scam. 186; *County of Richland v. County of Lawrence*, 12 Ill. 1; *Trustees of Schools v. Tatman*, 13 Ill. 27. The Constitution contains no prohibition against the creation by the Legislature of every conceivable description of corporate authorities, and the endowment of them, when created, with all the faculties and attributes of other pre-existing corporate authorities. *People v. Salomon*, 51 Ill. 37. Nor is the General Assembly, in exercising its power to authorize the organization of municipal corporations with powers of taxation for corporate purposes, limited by the boundaries of pre-existing corporations or compelled to adopt their corporate authorities. *Owners of Lands v. People*, supra; *Butz v. Kerr*, 123 Ill. 669, 14 N. E. 671. The burden of constructing and maintaining highways or bridges and the support of paupers may be imposed upon certain classes of municipal corporations and afterward changed and imposed upon others, within the discretion of the General Assembly. *Seagraves v. City of Alton*, 18 Ill. 366; *Town of Fox v. Town of Kendall*, 97 Ill. 72; *Sangamon County v. City of Springfield*, 63 Ill. 66; *Logan County v. City of Lincoln*, 81 Ill. 156; *Board of Supervisors v. People*, 110 Ill. 511. "And, in general, in the absence of constitutional restraint, it has been held that the General Assembly may create, annul, and change municipal corporations, and control and dispose of their property as to it shall seem most in consonance with the public welfare." *Wilson v. Board of Trustees*, supra.

While two municipal corporations cannot have jurisdiction and control, at one time, of the same territory for the same purpose, no constitutional objection exists to the power of the Legislature to authorize the formation of two municipal corporations in the same

territory at the same time for different purposes, and to authorize them to co-operate, so far as co-operation may be consistent with, or desirable for, the accomplishment of their respective purposes. The Legislature has seen fit to authorize the organization of a sanitary district which may include drainage districts already organized, and we are aware of no constitutional prohibition of such action. Section 24 is intended to provide a method of harmonizing the action of the two classes of corporations or of acquiring the works of the drainage district by the sanitary district. No limitation exists, within our knowledge, upon the power of the Legislature to compel the sanitary district to take and pay for the levees and drains within its territory, or to compel the drainage districts to surrender such levees and drains to the sanitary district, so long as the use of such levees and drains for the purpose for which they were constructed is not impaired.

We do not, however, agree with counsel that the section in question requires the sanitary district to take and pay for the levees, drains, and ditches of all drainage districts within its limits. It was intended only to confer upon the sanitary district authority to acquire the levees, drains, and ditches of the drainage district when conducive to sanitary purposes. It recognizes that the purposes of the two classes of districts are different. The works of the drainage district may or they may not be conducive to sanitary purposes. They may or may not be capable of use for the purposes of the sanitary district without impairing their usefulness for the purpose for which they were constructed. These circumstances are for the consideration of the sanitary district, and it may, if deemed advisable, take the levees, drains, and ditches of the drainage district, in which case the drainage district shall be paid the cost or value thereof, but in no case less than any unpaid indebtedness of the district incurred in constructing them. It is true that the funds of the sanitary district are raised by general taxation, and if used in the payment of the cost of the levees, drains and ditches appropriated, will go to pay for improvements paid for by special assessment, and may, in part, relieve lands outside the district of an indebtedness incurred in their construction. If the levees, drains and ditches are appropriated for the use of the sanitary district the sanitary district ought to pay for them, and the property within the sanitary district which had been specially assessed will pay its proportionate amount of the general tax which is assessed in the sanitary district. If the part of the drainage district outside of the general district is relieved of its share of the indebtedness without paying any of the general tax, the sanitary district is not required to take and pay for the levees, drains and ditches if it does not deem it for its advantage to do so.

An act was passed in 1909 (Hurd's Rev. St. 1909, p. 929) for the purpose of curing some supposed defects in the elections by which the sanitary district was organized and the trustees were chosen, and this act is also brought in question by appellant. It is, however, not necessary to consider it, for it concerns only the regularity of the organization of the sanitary district, and that issue, as has been seen, cannot be raised in this proceeding.

The judgment of the county court will be affirmed.

Judgment affirmed.

(207 Mass. 141)

COMMONWEALTH v. MIXER.

(Supreme Judicial Court of Massachusetts.
Essex. Dec. 2, 1910.)

1. CRIMINAL LAW (§ 20*)—ELEMENTS OF CRIME—INTENT.

At common law, an evil intent and an unlawful act must concur to constitute a crime, and it is necessary ordinarily to allege and prove a guilty intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 21, 24, 25; Dec. Dig. § 20.*]

2. CRIMINAL LAW (§ 21*)—STATUTORY OFFENSES—INTENT—REQUISITES.

The Legislature, in the exercise of the police power, may prohibit under penalty the performance of a specific act, and the doing of the prohibited act constitutes a crime; and the moral turpitude or purity of the motive by which the act was prompted, and the knowledge or ignorance of its criminal character, are immaterial on the issue of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 22; Dec. Dig. § 21.*]

3. INTOXICATING LIQUORS (§ 138*)—TRANSPORTATION OF LIQUOR—ILLEGALITY—KNOWLEDGE OR INTENT OF ACCUSED.

Rev. Laws, c. 100, § 49, providing that intoxicating liquor which is to be transported for hire for delivery in a no-license city shall be delivered to the carrier in packages marked by the names of the seller and of the purchaser and with the kind of liquor therein contained, and delivery of such liquor by a carrier shall be deemed to be a sale by the person making such a delivery, does not make intent an element of the offense; and a carrier or its servant may be convicted of illegality transporting intoxicating liquor, though it does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller, who failed to mark the package as required.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.*]

4. INTOXICATING LIQUORS (§ 138*)—KNOWLEDGE OF CHARACTER OF GOODS OFFERED FOR TRANSPORTATION—POWERS OF CARRIER.

The general rule that a carrier cannot ordinarily insist on obtaining knowledge of the character of the goods offered for transportation is modified, where a statute expressly or impliedly confers that right; and Rev. Laws, c. 100, § 49, imposing on the carrier criminal responsibility for transporting intoxicating liquors, clothes the carrier with the power to obtain such knowledge as may protect it or to refuse to take the proffered article for transportation.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.*]

Exceptions from Superior Court, Essex County; Chas. U. Bell, Judge.

Erving H. Mixer was convicted of illegally transporting intoxicating liquor into a city, and he brings exceptions. Overruled.

Henry C. Attwill, Asst. Dist. Atty., for the Commonwealth. James W. Sullivan, for defendant.

RUGG, J. This complaint, under St. 1906, c. 421, charges the defendant with illegally transporting intoxicating liquor into the city of Lynn, where no licenses of the first five classes for the sale of intoxicating liquor and no permits to transport such liquor into the city had been granted. The defendant, a driver in the employ of a common carrier, had upon his load for transportation in Lynn a sugar barrel, not marked by the seller or consignor as required by Rev. Laws, c. 100, § 49, for packages containing intoxicating liquor. There was nothing about the appearance of the barrel to cause suspicion as to its contents, and the defendant was ignorant of the fact that it contained intoxicating liquor. The superior court refused to instruct the jury that unless the defendant knew that the barrel contained intoxicating liquor or from its appearance and all the circumstances ought reasonably to have been put on inquiry as to its contents, he should be acquitted. The question presented is whether this refusal was error. Narrowly stated the inquiry is whether a common carrier or his servant can be convicted of the crime of illegally transporting intoxicating liquor under the statute, when he does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller or consignor who has violated the law by failing to mark such package plainly and legibly with the kind and amount of liquor it contains.

In the prosecution of crimes under the common law apart from statute, it ordinarily is necessary to allege and prove a guilty intent, and as a general principle a crime is not committed if the mind of the person doing the act is innocent. An evil intention and an unlawful action must concur in order to constitute a crime. But there are many instances in recent times where the Legislature in the exercise of the police power has prohibited under penalty the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute. There are

many illustrations of such exercise of legislative power, as, for instance, the selling of milk below a designated standard (*Commonwealth v. Wheeler*, 205 Mass. 384, 91 N. E. 415; *Commonwealth v. Warren*, 160 Mass. 583, 86 N. E. 308); the driving of an unregistered automobile (*Feeley v. Melrose*, 205 Mass. 329, 834, 91 N. E. 306, 27 L. R. A. [N. S.] 1156); being present where gaming implements are found (*Commonwealth v. Smith*, 166 Mass. 370, 44 N. E. 503); obstructing a highway more than five minutes even through unlawful interference by trespassers (*Commonwealth v. New York Central & Hudson River Railroad*, 202 Mass. 394, 88 N. E. 764, 23 L. R. A. [N. S.] 350, 132 Am. St. Rep. 507); bigamy and adultery by marriage with one honestly, upon reasonable ground, but mistakenly, supposed to be single (*Commonwealth v. Mash*, 7 Metc. 474; *Commonwealth v. Thompson*, 11 Allen, 23, 87 Am. Dec. 685; *Commonwealth v. Hayden*, 163 Mass. 453, 457, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468); killing for sale an animal under a designated age (*Commonwealth v. Raymond*, 97 Mass. 567); being present where implements for smoking opium are found (*Commonwealth v. Kane*, 173 Mass. 477, 53 N. E. 919); admitting a minor to a billiard hall (*Commonwealth v. Emmons*, 98 Mass. 6); selling adulterated milk (*Commonwealth v. Farren*, 9 Allen, 489); storing and selling naphtha (*Commonwealth v. Packard*, 185 Mass. 64, 69 N. E. 1067; *Commonwealth v. Wentworth*, 118 Mass. 441); sale of imitation butter inadvertently not wrapped as directed by the employer and required by law (*Commonwealth v. Gray*, 150 Mass. 327, 23 N. E. 47). See, also, *Commonwealth v. Lavery*, 188 Mass. 13, 73 N. E. 884; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; *Commonwealth v. Connelly*, 163 Mass. 539, 40 N. E. 862; *Commonwealth v. Shea*, 150 Mass. 814, 23 N. E. 47; *Commonwealth v. Julius*, 143 Mass. 132, 8 N. E. 898; *Commonwealth v. Dyer*, 128 Mass. 70. This principle has been very frequently applied to statutes respecting intoxicating liquor. In *Commonwealth v. Boynton*, 2 Allen, 160, it was held that one could be convicted of selling intoxicating liquor even though he had no reason to suppose that it was intoxicating. To the same effect see *Commonwealth v. Goodman*, 97 Mass. 117; *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Uhrig*, 138 Mass. 492; *Commonwealth v. Savery*, 145 Mass. 212, 13 N. E. 611; *Commonwealth v. Daly*, 148 Mass. 428, 19 N. E. 209; *Commonwealth v. O'Kean*, 152 Mass. 584, 26 N. E. 97. The sale by a licensed liquor dealer to a minor, though made in good faith and without reason to suspect that the purchaser was below age (*Commonwealth v. Stevens*, 153 Mass. 421, 26 N. E. 992; *Commonwealth v. Finnegan*, 124 Mass. 324), or to one honestly but erroneously supposed to be a guest on the Lord's day (*Commonwealth v. Regan*,

182 Mass. 22, 64 N. E. 407; *Commonwealth v. Joslin*, 158 Mass. 482, 497, 33 N. E. 653, 21 L. R. A. 449; *Commonwealth v. Barnes*, 138 Mass. 511), have all been held crimes under statutes of this nature. This rule prevails generally though not universally throughout the United States. See cases collected in *Haynes v. State*, 118 Tenn. 709, 105 S. W. 251, 13 L. R. A. (N. S.) 559, 121 Am. St. Rep. 1055, *State v. Powell*, 141 N. C. 780, 53 S. E. 515, 6 L. R. A. (N. S.) 477, and *Harper v. State*, 91 Ark. 422, 121 S. W. 737, 25 L. R. A. (N. S.) 669. It was assumed in *Commonwealth v. Riley*, 196 Mass. 60, 81 N. E. 881, 10 L. R. A. (N. S.) 1122, that the crime created by Rev. Laws, c. 100, § 50, of delivery by a regular expressman of intoxicating liquor without entering it in a book belonged to this class.

It becomes necessary to examine the terms and history of the statute upon which the present complaint is founded, and the antecedent enactments of the Legislature touching the general subject, to determine whether it falls in the same class. The local option license law now prevailing was first enacted by St. 1875, c. 99. It contained no provision respecting the transportation of liquors. By St. 1878, c. 207, the transportation of intoxicating liquors into municipalities where licenses were not granted, with intent to sell or having reasonable cause to believe that they were intended to be sold in violation of law, was forbidden, and whoever willfully violated any provision of the law was subject to punishment. In a respect immaterial to the present inquiry, this statute was amended by St. 1879, c. 282. By the consolidation of pre-existing enactments in Pub. St. 1882, c. 100, § 18, the word "willfully" was omitted, and has not since appeared in any statute touching the transportation of intoxicating liquor.

St. 1897, c. 271, required plain and legible marking of the packages with the name of the consignee and the keeping of minute records by the common carrier respecting all packages containing intoxicating liquor. These provisions were re-enacted in Rev. Laws, c. 100, §§ 48-52, both inclusive.

By St. 1906, c. 421, the Legislature made still more stringent and detailed provisions respecting the transportation of liquor into or through no-license municipalities. It was enacted by section 1 of this act, under which this complaint is framed, that "no person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous or intoxicating liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do * * *"; and by section 4 that "any person violating the provisions of this act shall be punished by a fine * * * or by imprisonment * * * or by both, * * * and any violation of the laws relative to the

transportation of intoxicating liquors, by a person holding a permit, * * * shall render such permit void." Sections 2 and 3 of this act make provision for the granting of permits for the transportation of liquors in so-called no-license cities and towns.

It is obvious from these successive enactments that the Legislature has been struggling to make it more and more difficult to transport liquor secretly into cities and towns where licenses are not granted. It was said by Hammond, J., in *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, at page 315, 52 N. E., at page 389, while discussing the purpose of St. 1897, c. 271: "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegal keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection when setting up the fraudulent defense that the liquors found in the possession of the carrier were for delivery by him as such to some person. It is only one of the many statutes which indicate that the policy of the commonwealth is to require that the traffic in liquors in this state shall be open, so that every step shall be exposed to the scrutiny of the authorities, and that the violation of the law may be more easily detected."

The desire of legislative bodies to restrict intemperance by regulation of the transportation and sale of intoxicating liquor is almost universal. It was said in *Scott v. Donald*, 165 U. S. 58, 91, 17 Sup. Ct. 265, 269, 41 L. Ed. 632: "The evils attending the vice of intemperance in the use of spirituous liquors are so great that a natural reluctance is felt in appearing to interfere, even on constitutional grounds, with any law whose avowed purpose is to restrict or prevent the mischief."

No question of constitutionality arises in the present case, for the statute under which this complaint is made is not open to objection in that regard. *Commonwealth v. People's Express Co.*, 201 Mass. 564, 575, 88 N. E. 420, 131 Am. St. Rep. 416.

It is earnestly urged in the present case, however, that the defendant's employer, being a common carrier and as such bound to accept all packages offered to him for transportation, and as a general rule having no right to compel a shipper to disclose its contents to him when there is no reason to suspect that the package contains an illegal or dangerous object (*Crouch v. London & Northwestern Railway*, 14 C. B. 255; *Parrott v. Wells* [the nitroglycerine case] 15 Wall. 524, 21 L. Ed. 206), the statute ought not to be interpreted in such a way as to render him criminally liable if he was in fact innocent of any intent to transgress the law; and it is further pointed out in support of this argument that courts of other jurisdictions have held carriers liable for refusing to

transport liquors contrary to an illegal local ordinance (*Southern Express Co. v. Rose Co.*, 124 Ga. 581, 58 S. E. 185, 5 L. R. A. [N. S.] 619), and where the carrier had reason to believe that it would be illegally sold after delivery (*Crescent Liquor Co. v. Platt* [C. C.] 148 Fed. 894). See cases collected in 6 Cyc. 372, B.

Notwithstanding these considerations, we are not inclined to relax the rule so plainly laid down in many cases, nor to interfere with the policy of the Legislature respecting the regulation of transportation and sale of intoxicating liquors. While the rule may seem harsh at first sight in some of its applications, this raises not a question of judicial construction, but of legislative policy, with which the courts cannot interfere so long as no constitutional guaranty is infringed. Although the severity of the rule "has been criticised with inadequate understanding of the grounds for it" (*Commonwealth v. Regan*, 182 Mass. 22, 25, 64 N. E. 407), they are pointed out with clearness by Holmes, J., in *Commonwealth v. Smith*, 168 Mass. 370, at page 375, 44 N. E. 503, at page 504, in this language: "When according to common experience a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is very desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and in the pursuit of its policy may make the preliminary fact enough to constitute a crime."

The Legislature may say with respect to transportation of liquors that ordinarily common carriers do not transport them without either knowing or having reasonable ground to suspect their nature, or that usually packages containing them give some evidence of their contents to those reasonably alert to detect it, or that directly or indirectly some information generally is conveyed to the carrier as to their character. See, also, *Keller v. United States*, 213 U. S. 138, 150, 29 Sup. Ct. 470, 53 L. Ed. 737. The language of the statute under consideration is plain and unequivocal. It contains no words, such as "willfully" or "knowingly," indicating a vicious intent as a part of the crime created. There is nothing about it to suggest an exception for the benefit of one who inadvertently violates its terms. Its phraseology discloses a legislative determination that society can best be protected against the evil aimed at by a rigorous application of an inflexible rule. There is no distinction in principle between this and the many other statutes construed in the cases we have cited. It must be assumed that the Legislature in enacting this statute in its present form had in mind the construction placed upon similar statutes. The inference is irresistible that it

intended no different meaning or interpretation from that expressed in other laws of like character. Moreover railroads and street railways, common carriers which do not deliver merchandise to houses or places of business, are exempted from the operation of the statute, although they are subject to the provisions of Rev. Laws, c. 100, § 49, as are all shippers of intoxicating liquor, whether by railroad, railway or other carrier. This circumstance tends to emphasize its application to those carriers who deliver goods in such a way as to make especially difficult of detection violations of the law. Evasion of laws of this kind is well known to be more likely to be practiced when small quantities are involved. Taking into account the magnitude of the evils arising from the use of intoxicating liquors and the manifest struggle of the Legislature by successive enactments to regulate its transportation so that secrecy may be prevented, and so that those municipalities which have voted "no license" may be protected from furtive and slyly clandestine efforts to override the popular desire for freedom from its illicit traffic, an exemption ought not to be read into the statute contrary to what seems to be a deliberate legislative purpose based upon grounds of public policy. It follows from what has been said that the carrier has a right to use any reasonable efforts, by the establishment and publication of general rules, by specific inquiry, or in proper cases by the inspection of packages, or otherwise, to ascertain whether intoxicating liquors constitute any part of the goods offered for transportation, and to refuse to take any as to which this right is denied, in order to protect himself against committing the crime created by the statute. The nitroglycerine case (*Parrot v. Wells*, 15 Wall., at page 524, 21 L. Ed. 206) involved only the civil liability to third persons at common law on the ground of negligence of a carrier, who had ignorantly and innocently received for transportation nitroglycerine which exploded in transit. In the opinion, at page 536 of 15 Wall., 21 L. Ed. 206, from the general statement that the carrier has no right to require a knowledge of the contents of packages, instances of special legislation conferring such right are exempted. In *Crouch v. London & Northwestern Railway Co.*, 14 C. B. 255, there was refusal to receive general merchandise offered by transportation merely because of declination by shipper to disclose the contents of the package, but without placing the demand for

such knowledge on the terms of St. 8 & 9 Vict. c. 20, § 105, which authorized the carrier to refuse to receive explosives. It is apparent from what is said by Jervis, C. J., at page 291, that if the refusal to receive had been based upon the terms of this section a different result might have been reached. The general rule upon which the defendant relies to the effect that a carrier cannot insist ordinarily upon obtaining knowledge of the character of goods offered for transportation is subject to a well recognized exception where a statute expressly or impliedly confers that right. The statute with which we are dealing is of that class, and by its imposition of criminal responsibility for transporting the prohibited articles necessarily clothes the carrier with power to obtain such knowledge as may protect him, or to refuse to take the proffered goods. See *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 325; *Connors v. Cunard Steamship Co.*, 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171.

Apparently the Supreme Court of Vermont reached an opposite conclusion in *State v. Goss*, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706. It is to be noted, however, that in *State v. Audette*, 81 Vt. 400, 70 Atl. 883, 130 Am. St. Rep. 1081, the same court has held that an erroneous though honest and reasonable belief in the prior death of an earlier consort of one of two parties to a marriage is a defense to a charge of adultery, thus adopting the rule laid down in *Queen v. Tolson*, 23 Q. B. D. 168, rather than the contrary rule steadily followed in this commonwealth since *Commonwealth v. Mash*, 7 Metc. 474, and *Commonwealth v. Thompson*, 11 Allen, 23, 87 Am. Dec. 635, and generally adopted throughout this country.¹ *State v. Swett*, 87 Me. 90, 32 Atl. 806, 29 L. R. A. 714, 47 Am. St. Rep. 306, related to a different kind of crime occurring under distinguishable circumstances, and may not necessarily be inconsistent with the result here reached; but if it is, we are not disposed to follow it.

Exceptions overruled.

¹ *People v. Spoor*, 235 Ill. 230, 85 N. E. 207, 126 Am. St. Rep. 197; *Farnell v. State*, 126 Ga. 103, 54 S. E. 804; *Cornett v. Commonwealth* (1909) 134 Ky. 613, 121 S. W. 424; *Rice v. Commonwealth*, 106 S. W. 122, 31 Ky. Law Rep. 1854; *Jones v. State*, 67 Ala. 84; *State v. Arrington*, 26 Minn. 29; *Russell v. State*, 66 Ark. 185, 49 S. W. 821, 74 Am. St. Rep. 78; *Davis v. Commonwealth*, 76 Ky. 318; *State v. Zichfeld*, 22 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 63 Am. St. Rep. 800; *State v. Goodenow*, 65 Me. 80; *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706; *Medrano v. State*, 32 Tex. Cr. R. 214, 23 S. W. 684, 40 Am. St. Rep. 776.

(307 Mass. 152)

COMMONWEALTH v. MADDOCKS.

(Supreme Judicial Court of Massachusetts.

Essex. Dec. 5, 1910.)

1. INTOXICATING LIQUORS (§§ 236, 238*) — MAINTENANCE OF LIQUOR NUISANCE BY DRUGGISTS—EVIDENCE—SUFFICIENCY.

On a trial for maintaining a liquor nuisance of a druggist authorized to sell intoxicating liquors on physicians' certificates, evidence held to require the submission of the issue of his guilt to the jury, who were warranted in inferring that one of the purposes for which accused kept his shop was to sell illegally intoxicating liquors therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322, 324-330; Dec. Dig. §§ 236, 238.*]

2. CRIMINAL LAW (§§ 378, 673*)—EVIDENCE—REPUTATION OF ACCUSED.

Where accused charged with maintaining a liquor nuisance put his general reputation in issue, the commonwealth might show that his reputation as to being a law-abiding person as to the liquor law was bad, but the court must direct the jury to use such evidence merely to nullify the evidence of accused's good reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 842, 1597, 1872-1876; Dec. Dig. §§ 378, 673.*]

3. CRIMINAL LAW (§ 799*)—ARGUMENT OF COUNSEL—INSTRUCTIONS.

The action of the court in charging that the counsel for accused in his argument to the jury, wherein he referred to accused's wife and family, and that they would be deeply affected by the conviction of accused, intended to divert the minds of the jury from the proper issues in the case, was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1944-1946; Dec. Dig. § 799.*]

4. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

Where the court merely charged that the requirement of proof of guilt beyond a reasonable doubt was satisfied by proof to that degree of certainty on which a jury would act in important concerns of their own, the refusal to charge the request of accused that the jury must give the benefit of any reasonable doubt to him, and that a greater degree of certainty was required to convict of a criminal charge than might satisfy the jury in their ordinary affairs, etc., was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Exceptions from Superior Court, Essex County; Robert F. Raymond, Judge.

Albert S. Maddocks was convicted of maintaining a liquor nuisance, and he brings exceptions. Sustained.

Two detectives testifying for the commonwealth testified that defendant, who was a retail druggist authorized to sell intoxicating liquors on physicians' prescriptions, sold them gin without a physician's prescription. There was also evidence from police officers, who testified to the seizure of a quantity of liquors from the premises of defendant on that date. There was also evidence that there was found in the cellar of defendant several bottles of Bass' ale with straw coverings on them, and that there was nearby

on the floor of the cellar 75 or more similar straw coverings. Defendant introduced evidence to prove that he did not sell the gin to the detectives; that the quantity of liquors seized was not an excessive quantity but was a reasonable and proper quantity, considering the size of the city and the extent of his trade; that the bottles in the cellar were not covered with straw coverings and that the other straw in the cellar was from bottles of water and other packings of other liquors received in the ordinary course of business. The counsel for defendant in his argument to the jury referred to the fact that he had a wife and family, who should be considered and who would be deeply affected by the outcome of the trial; that he was not saying this to beg for mercy, but to impress on the jury the seriousness of the charge. Defendant objected to the charge of the judge on reasonable doubt, and requested him to charge that the jury must give the benefit of any reasonable doubt to defendant; that a greater degree of certainty was required to convict him of a criminal charge than might satisfy the jury in their ordinary business affairs; and that, if evidence would be explained reasonably on any other hypothesis than that of defendant's guilt, the jury should find him not guilty.

Henry C. Attwill, Asst. Dist. Atty., for the Commonwealth. Frederick H. Tarr, for defendant.

SHELDON, J. 1. There was evidence which required the submission of the case to the jury. They might infer that the coverings discovered in the defendant's cellar had come from bottles with the same contents as those found in the immediate vicinity which were furnished with similar coverings. The quantity of liquors actually upon his premises, with what might thus be found to have been recently disposed of by him, and the fact which also might be found that on the same day he had made an illegal sale of liquor, warranted the inference that one of the purposes for which he kept his shop was to sell illegally intoxicating liquors therein. Commonwealth v. Locke, 145 Mass. 401, 14 N. E. 621; Commonwealth v. McNeff, 145 Mass. 408, 14 N. E. 616. There is nothing in Commonwealth v. Patterson, 138 Mass. 488, or Commonwealth v. Hayes, 150 Mass. 506, 23 N. E. 216, inconsistent with this.

2. We cannot say that after the defendant had put his general reputation in issue, the commonwealth might not show in reply that his reputation as to being a law-abiding person in relation to the liquor law was bad, although we intimate no opinion as to the particular question which was excepted to. The introduction of such evidence would of course call for great care on the part of the judge to see that the jury should not use it as evidence of guilt, but should treat it

merely as meeting and nullifying (so far as it might have any effect) the evidence of the defendant's good reputation. But it was not incompetent. It was so held in *State v. Knapp*, 45 N. H. 143, 157; *Balkum v. State*, 115 Ala. 117, 22 South. 532, 67 Am. St. Rep. 19, and *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832. See the discussion in 1 *Wigmore on Ev.* § 59 et seq. The testimony excluded in *Commonwealth v. Nagle*, 157 Mass. 555, 32 N. E. 861, was as to the defendant's habits and course of action, not as to his reputation itself.

3. It would be difficult to say that the argument addressed to the jury by the defendant's counsel was objectionable. *Commonwealth v. Brownell*, 145 Mass. 319, 323, 14 N. E. 108. If in spite of the disclaimer made it seemed to the presiding judge that there was an effort to appeal unduly to the sympathy of the jury or to divert their attention from the issue, it would be right in charging them to guard against that danger. But it was going altogether too far and was distinctively prejudicial to the defendant to tell the jury that "the remarks were intended by the counsel for the defendant to throw dust in the eyes of the jury and to divert their minds from the proper issue in the case."

4. It might be possible, if there had been no request for further instructions, to sustain the ruling that the requirement of proof of guilt beyond a reasonable doubt is satisfied by proof to that degree of certainty upon which a jury would act in important concerns of their own. This however falls considerably below the statements which were sustained in *Commonwealth v. Leach*, 160 Mass. 542, 546, 551, 36 N. E. 471, now relied on by the commonwealth. And see *Commonwealth v. Sinclair*, 195 Mass. 100, 110, 80 N. E. 799. But the instructions given were very meager; and it requires no reasoning and no citation of authorities to show that the additional instructions asked for by the defendant upon this point embodied correct statements of the law and should have been given.

Exceptions sustained.

(207 Mass. 123)

BISHOP v. BURKE.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 30, 1910.)

1. RECORDS (§ 9*) — LAND COURT — REPORT — EFFECT.

The report of the judge of the land court is, under St. 1905, c. 283, prima facie evidence of the matters therein contained, and on appeal the superior court must find accordingly, unless there is evidence to the contrary.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 9.*]

2. CORPORATIONS (§ 432*) — EXECUTION OF DEEDS—EVIDENCE.

The mere production of a deed duly executed in the name of a corporation by its treas-

urer, with the corporate seal affixed, is some evidence that the execution and delivery of the deed were authorized.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1728; Dec. Dig. § 482.*]

3. DEEDS (§§ 63, 208*) — EXECUTION OF DEEDS — EVIDENCE.

Proof that a deed, executed in the name of a corporation by its treasurer, was by him handed to the grantee in an attempted completion of a sale which the treasurer was authorized to make, and that the deed for more than three months remained in the possession of the grantee, was evidence of its due delivery to him; but, where there was evidence that there had been no absolute unconditional delivery, the question of delivery was for the jury.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 127, 625-633; Dec. Dig. §§ 66, 208.*]

4. CORPORATIONS (§ 426*) — ACTS OF OFFICERS — RATIFICATION.

Where there was no evidence that a corporation or its executive committee intended to adopt blindly whatever had been done by the treasurer of the corporation, in selling corporate property, or that the corporation or the executive committee acted with knowledge of what the treasurer had done in executing a deed for a specified price, the mere acceptance by the corporation of the price was not a ratification of the sale.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1702-1716; Dec. Dig. § 426.*]

Exceptions from Superior Court, Essex County; Jabez Fox, Judge.

Writ of entry brought in the Land Court by Arthur Bishop against Frank L. Burke. The Superior Court on appeal from the Land Court ordered the jury to return negative answers to issues, and defendant brings exceptions. Sustained in part.

The premises had been conveyed in 1878 to the First Universalist parish in Rowley by the Massachusetts Universalist Convention upon condition that, in case the grantee should not maintain preaching in the church edifice, the premises should revert to the grantor corporation. There was a breach of the condition, and a right of re-entry arose. Before an entry was made the Convention executed, December 23, 1907, through its treasurer, a deed of the premises to the tenant, but the deed was not recorded. Subsequently the First parish in Rowley, in February, 1908, sold all its property real and personal at auction and defendant bid in the premises as the highest bidder. Later the corporation Convention executed a new deed of the premises to the tenant, and the old deed was returned. The new deed was dated April 6, 1908, and on the same date the Convention voted to make an entry on the premises, and certificate of such entry was recorded. The land court, found for the tenant, and the case went to the superior court, where issues were framed for a jury as follows:

(1) Was the instrument dated December 23, 1907, authorized by the Convention? (2) Was said instrument duly delivered to ten-

ant? (3) Was the execution and delivery of said instrument to tenant duly ratified?

The court ordered the jury to return an answer in the negative to each of the issues, and demandant excepted.

W. A. Bishop, for demandant. G. B. Blodgett, for tenant.

SHELDON, J. The correctness of the rulings made at the trial depends, as to each one of the issues, upon the question whether there was any evidence tending to prove the affirmative of that issue. The report of the judge of the land court made a prima facie case for the tenant, and required a negative answer to each issue unless there was some evidence to the contrary. St. 1905, c. 288, which had not been repealed when the appeal in this case was taken and entered. It was assumed, although that question is not before us and we express no opinion upon it, that if these issues were found in the affirmative, the effect of the tenant's first deed, from a grantor having then merely the right to enter for breach of a condition and not holding any estate in the land, was merely to extinguish or suspend that right of entry and the condition upon which it depended, and to give an absolute power of disposal to the general owner, under whom the demandant claims. *Thompson v. Bright*, 1 Cush. 420, 428; *Guild v. Richards*, 16 Gray, 309, 317; *Hubbard v. Hubbard*, 97 Mass. 188, 93 Am. Dec. 75; *Hopkins v. Smith*, 162 Mass. 444, 447, 38 N. E. 1122.

1. Without passing at all upon its weight, we are of opinion that there was evidence that this deed was authorized by the Convention. The bare production of the deed, duly executed in its name by its treasurer, with its corporate seal affixed, was some evidence that its execution and delivery had been authorized. *Burrill v. Nahant Bank*, 2 Metc. 163, 35 Am. Dec. 395; *Parker v. Washoe Manuf. Co.*, 49 N. J. Law, 465, 9 Atl. 682; *Crumlish v. Shenandoah Valley Railroad*, 32 W. Va. 244, 9 S. E. 180; *Reed v. Bradley*, 17 Ill. 321; *Smith v. Smith*, 62 Ill. 493, 497. The authority which it could be found had been given to sell this property could be found to include authority to execute whatever deeds were thought necessary to pass the title. *Alger v. Fay*, 12 Pick. 322; *Valentine v. Piper*, 22 Pick. 85, 90, 83 Am. Dec. 715.

2. As to the second issue, the testimony that the deed had been handed to him by the treasurer of the Convention in the attempted completion of a sale which the treasurer was authorized to make, and that it had for more than three months remained in the possession and control of the tenant, was evidence that it had been duly delivered to him. *Ward v. Lewis*, 4 Pick. 518, 520; *Valentine v. Wheeler*, 116 Mass. 478; *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563;

Jones v. New York Life Ins. Co., 168 Mass. 245, 47 N. E. 92. There was also evidence that there had been no absolute unconditional delivery of the deed, but the question was for the jury. Whether the demandant would derive any benefit from prevailing upon this issue if he failed to support the affirmative of one of the other issues, we have not now to consider.

3. The verdict upon the third issue was rightly ordered. It could no doubt have been found that the Convention by accepting the tenant's money ratified the sale to him and all the steps thereto that would have been appropriate for the carrying out of that sale. But it would not follow that it ratified an act of the treasurer which could tend only to prevent the carrying out of the sale which it intended to ratify. And we find no evidence that either the Convention or its executive committee intended to adopt blindly whatever had been done by the treasurer, or acted with knowledge of what he really had done. Unless one of these alternatives were proved, its acceptance of the purchase money would not be a ratification of the act of its treasurer in giving the deed to the tenant. *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634; *Foot v. Cotting*, 195 Mass. 55, 62, 80 N. E. 600, 15 L. R. A. (N. S.) 693. There was such evidence in *Monnahan v. Judd*, 165 Mass. 93, 42 N. E. 555, and *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345.

The verdict upon the third issue must stand; but the demandant's exceptions must be sustained as to the first and second issues, and there must be a new trial upon those issues only.

So ordered.

(83 Oh. St. 19)

BOARD OF COM'RS OF PORTAGE COUNTY v. GATES.

(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

1. DRAINS (§ 34*)—PROCEEDINGS TO ESTABLISH—HEARING OF APPLICATION—POSITION OF COUNTY COMMISSIONERS.

The county commissioners, sitting as a board, in hearing an application on the part of landowners for the establishment of a ditch, as provided by section 4447, and following, of the Revised Statutes, represent the landowners, petitioners, and not the county, where it is found that the improvement is of local interest only, and that the cost and expense should be assessed wholly against the lands benefited. Where the finding is that the improvement is of sufficient importance to the public to justify the payment of damages and compensation, in whole or in part, out of the county treasury, the board may so order, and in such condition the board represents the county, and not exclusively the petitioners.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 34.*]

2. DRAINS (§ 57*)—ESTABLISHMENT—DAMAGES TO LAND—ACTION AGAINST COUNTY BY OWNER OF LAND NOT PARTY TO PROCEEDINGS—SUFFICIENCY OF PETITION.

An owner of land not a party to the proceeding, whose land may have been damaged by the construction of such ditch, cannot recover of the county for such damage where the board fails to find that the ditch will be of sufficient importance to the public to warrant an order for payment of damages and compensation, in whole or in part, out of the county treasury. Hence a petition which seeks recovery in such case against the county which fails to aver such finding and order of payment will be held bad on general demurrer.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 57.*]

3. DRAINS (§ 30*)—ESTABLISHMENT—APPLICATION FOR DAMAGES—LIMITATION.

The application for a ditch under the section cited is in the nature of an action in rem. Hence personal notice of the proceeding to the owner of land which may be affected by the ditch is not indispensable to the legality of the proceeding, and where publication, as required by section 4451a, has been duly made, a person failing to make application for damages within the time limited by the act will be held to have waived his right to the same although he had no actual notice of the proceeding. Cupp v. Commissioners, 19 Ohio St. 173.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 30.*]

(Additional Syllabus by Editorial Staff.)

4. EMINENT DOMAIN (§ 63*)—"TAKING OF PROPERTY."

Any actual and material interference with private property rights is a "taking" of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 161-164; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6851-6862; vol. 8, p. 7813.]

Error to Circuit Court, Portage county.

Action by Henry Gates against the Board of County Commissioners of Portage County. A common pleas judgment of dismissal was reversed by the circuit court, and defendant brings error. Reversed.

The defendant in error, Henry Gates, was plaintiff in the court of common pleas and plaintiff in error in the circuit court. His petition was held bad on demurrer, and his cause dismissed by the common pleas, which judgment was reversed by the circuit court. The board of commissioners brings error, asking a reversal of the judgment of the circuit court and an affirmance of the judgment of the common pleas. The question, therefore, is: Does the petition state a cause of action?

The petition, in substance, avers ownership by the plaintiff below of a tract of six acres of land situate in Portage county, a full description of which is given. On which premises is situated a milldam, race, flumes, water wheels, and a flour and feed mill, all which, with the rights and easements therewith and appurtenant thereto, have been in

existence and continuous use for more than seventy years, and that plaintiff and those under whom he claims title have been the owners of said land and water rights and privileges for more than 70 years, and during all which time said mill has been operated by water power derived from said dam, race, flumes, water wheels, and a stream known as Little Cuyahoga creek, said stream constituting the outlet of what was known as Fritch's Lake. The dam constituted a reservoir for the storage of water for use on the water wheel, and from time immemorial the meanderings of said stream from the upper part of said dam through the nearby lands to Fritch's Lake had so held back the flow of water from the lake when the water was high that the water was gradually brought down to the dam and race, thereby furnishing a comparatively steady amount and ample quantity of water to furnish power with which to operate the mill. The real estate, together with the mill, dam, race, flumes, wheels, and water privileges, was of great value, which consisted largely of the dam, race, flumes, and water rights and in the use of the water as it had been accustomed to flow and did flow during the time the stream was in a state of nature, and up to the time of the acts herein complained of.

On or about February 24, 1905, the owners of certain lands lying between Fritch's Lake and plaintiff's said property filed a petition with the board of county commissioners of Portage county praying for the establishment and construction of a county ditch in and along the stream from Fritch's Lake to plaintiff's milldam; that such proceedings were thereupon had before the board as that it found in favor of the improvement and ordered the ditch constructed according to plans and specifications prepared by the board under the provisions of the county ditch laws, and thereafter, in the fall of 1905, and the spring of 1906, the board, in accordance with the statutes, let contracts for excavating and constructing the ditch in and along said stream on the route petitioned for. Plaintiff was in no way made a party to said proceeding, and was not served with any notice of any hearing thereon; but it is not averred that he did not have actual knowledge of the pendency and character of the proceeding.

Plaintiff further says that the construction of the ditch caused the water of the stream to carry vast quantities of dirt and refuse onto plaintiff's property and into his milldam, thereby completely filling it with mud, dirt, and refuse, and entirely destroying it as a reservoir for the storage of water. Plaintiff further says that the construction of the ditch so accelerated the flow of the water from Fritch's Lake and from the surrounding swamps and low ground that the waters which were formerly held back as a

source of supply to plaintiff's water power as to bring the water down upon plaintiff's dam in vastly accumulated quantities, overflowing the dam and permitting the water to immediately overflow the dam and race, thus depriving plaintiff of the use of the water; that, by reason of the aforesaid acts of defendants, the plaintiff's property rights and easements have practically been taken and destroyed. Plaintiff has in no way been compensated for the property rights so taken for public use, and no proceedings have been had under section 4567a, etc., Revised Statutes, for acquiring plaintiff's rights in the property, and the aforesaid rights and property have thus been taken for public use without compensation within the purview of the Constitution. Damage in the sum of \$5,000 is alleged, and judgment for that sum is asked against the board of county commissioners.

D. B. Wolcott, for plaintiff in error. Wilcox, Parsons, Burch & Adams and Siddall & Hanselman, for defendant in error.

SPEAR, J. (after stating the facts as above). This pleading undertakes to set forth a claim ostensibly against the board of county commissioners, though in reality against the county of Portage, for compensation for private property alleged to have been taken for public use without compensation having been awarded. The constitutional provision invoked (section 19, art. 1) is to the effect that, when private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money. It was the judgment of the circuit court that the petition makes a case by virtue of the clause of the Constitution above cited, and thereupon its judgment of reversal necessarily followed.

To justify this conclusion two propositions must be established: (1) That within the meaning of the above section there has been a taking without provision for opportunity to obtain compensation; and (2) that such taking has been for a public use. Do the averments of the pleading establish these propositions? There is much conflict among the decisions of courts with respect to what is necessary to constitute a taking, many courts holding that a physical seizure or appropriation is essential while others adhere to the doctrine laid down in *Mansfield v. Balllett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 623, that any actual and material interference with private property rights is a taking of property within the meaning of the Constitution. Regarding the rule as thus settled in this state, we do not consider it necessary to discuss the legal proposition. It is, however, of importance to keep in mind that in the present instance there was in fact no actual taking, no seizure, or physical appropriation of any of the property or rights of the plaintiff. We inquire, therefore,

whether such taking in the present case has been without opportunity afforded for ascertainment of damage and payment of compensation, and whether upon the whole the taking has been for a public use within the meaning of the clause of the Constitution cited. This inquiry calls for an examination of certain provisions of the statute providing for the construction of ditches. By section 4450, Rev. St., and following, provision is made for application signed by owners of lots or lands which will be benefited by the proposed improvement to the county commissioners for the establishment of such ditch. The petition is to be filed with the auditor accompanied by a bond. The auditor shall thereupon give notice to the commissioners of the filing of the petition, fix a day for hearing, and prepare and deliver to the petitioners or any of them a notice in writing directed to the landowners affected by the improvement setting forth the substance, pendency, and prayer of the petition. Copies of the notice are to be served on each landowner (that is, owner named in the petition), and return made to the auditor. The auditor shall at the same time give a like notice to each nonresident lot or land owner by a publication in a newspaper printed and of general circulation in the county at least two weeks before the date of the hearing, and no further notice of the petition or the proceeding shall thereafter be required. On the day fixed for the hearing the commissioners shall meet at the place of the beginning of the ditch and hear all competent proof offered, go over the whole line of the ditch, determine the necessity thereof, and, in case they find for the improvement, fix a day for the hearing of application for any appropriations of land taken and damages to said parties affected by the improvement. The surveyor is then required to make a survey of land that will be benefited with an apportionment of the cost of location, and labor of constructing, according to benefits which will result to each, and in apportioning the costs, etc. At any time on or before the day set for hearing any person whose lands are taken or affected in any way by such improvement may make application in writing for compensation or damages, and a failure to make such application shall be deemed and held to be a waiver of all rights thereto. The commissioners shall allow such compensation as they may deem just and equitable, and assess such damages as may accrue to each person making application therefor. When the allowance for compensation and damages is determined, the commissioners shall determine the proportionate benefits to accrue. They may, if they find that the public health, convenience, or welfare will be promoted by the improvement, and that the same is of sufficient importance to the public, cause the damages and compensation which have been assessed to be paid out

of the county treasury, and shall order the same to be so paid, or a portion thereof by the county and the remainder by the benefited landowners, but if such improvement is not of sufficient importance to the public to cause such damage or compensation, or any part, to be paid by the county, they shall determine the proportionate amount thereof which shall be paid by the several landowners. Order shall issue by the auditor accordingly. Provision is also made for appeal by any aggrieved person to the probate court where a jury shall try the issues.

In the absence of allegations to the contrary, the presumption must be indulged that the board, throughout these proceedings, acted strictly in conformity with the requirements of the statute, and this presumption is strengthened by the direct averments of the petition. Therefore it is presumed that written notice was served on all persons named in the petition as landowners or others to be affected by the construction of the ditch, and as to all others, the world at large, the auditor did give a like notice by publication in a newspaper printed and of general circulation in the county for at least two weeks before the day set for the hearing. Thus was the board clothed with jurisdiction and power to conduct legally the proceedings initiated by the filing of the petition and as contemplated by the statute. Being, so far as this petition was concerned, and within the meaning of the statute, a non-resident landowner, the plaintiff received the notice which the statute provides, although, as alleged in his petition, he was in no way made a party to the proceedings and was not served with any notice of any hearing.

The concrete question is, Did the publication of notice so far affect the plaintiff as to debar him from his claim for damages, it being conceded that he made no claim whatever before the board? We regard the question as settled adversely to the claim of plaintiff by previous decisions, and will briefly call attention to some of them.

In *Cupp et al. v. Commissioners*, 19 Ohio St. 173, the plaintiffs' action was to enjoin the construction of a ditch about to be constructed over the land of plaintiffs and others. The statute authorizing the proceeding (58 Ohio Laws, p. 49) was attacked as unconstitutional, in that it provides for the appropriation of land without actually paying or securing compensation. No compensation had been paid or secured plaintiffs for their land taken, and that, although notice of the prayer and pendency of the petition for the ditch and of the time fixed for its hearing, etc., was published agreeably to the requirements of the statute, plaintiffs had no actual notice of the same, nor consented. They made no claim for compensation or damages within the time limited by statute. The statute then in force required publication and notice in a newspaper for four weeks, but did not require written notice to be served

on landowners. Otherwise in general, and as regards the present contention, the statute was similar to the provisions now in force. The court held that personal notice is not indispensable in order to its condemnation, the notice by publication provided being for that purpose sufficient, and that the landowner failing to make application for compensation or damages will be held to have waived his right, although he had no actual notice of the proceeding. It was the opinion of the court that the proceeding was substantially in rem. Welch, J., in the opinion observes that the law of all such proceedings rests in the necessity of the case, and that without the aid of some such proceeding the construction of ditches would be next to impracticable. Some such provision of law seems indispensable, and, without the power to proceed in some such form against the land itself, the right guaranteed to the public by the provision of the Constitution would be of little avail. Owners of land are presumed to know of the existence of the act, and therefore to have notice that their lands are liable at any time, upon four weeks' publication of notice, to be taken for the use of a ditch, and that their nonclaim will be held as a waiver. There is, continues the learned judge, no greater hardship in this implied waiver, after notification beforehand that silence will be taken for consent, than there is in the analogous cases of creditors of a bankrupt or insolvent, or of claimants upon any fund in the hands of a court for distribution who fail to present their claims within the designated time. This case would seem to have been a much stronger one for the claimant than the one at bar, inasmuch as the commissioners might with little effort have learned who the owners of the lands proposed to be actually taken were, while it could hardly be assumed that the board in the present case would be possessed in its own consciousness of prescience to anticipate and make provision for a claim not presented to it, and, at most, a case of mere consequential damages.

Chesbrough v. Commissioners, 37 Ohio St. 508, was an action brought in the common pleas of Putnam county to enjoin the commissioners of Putnam and Paulding counties from constructing a ditch, and from assessing the cost against the plaintiff's land, the ditch being partly in Putnam and partly within Paulding county, and was located and established by a joint session of the two boards. It was claimed that no notice had been given such as the statute requires, and that plaintiff had no actual notice. The court held that the burden was on the plaintiff to show a want of notice. Plaintiff offered in evidence a copy of the proceedings in Putnam county only. What was done in Paulding did not appear except as it was to be inferred from the recitals in the record made in Putnam county, and in the action of the joint boards. These showed notice of

publication in Putnam. For aught that appeared, the records of Paulding showed a like notice in that county. Plaintiff was denied relief.

Another view would seem to be equally fatal to the claim of plaintiff in this case. We are dealing with a question of liability of a county, a claim to be made good, if at all, by taxation upon the property of the people at large. Now, a county is not a body corporate, but rather a subordinate political division, an instrumentality of government, clothed with such powers and such only as are given by statute, and liable to such extent and such only as the statutes prescribe. The board of commissioners acts in such matters as the construction of ditches in a political rather than a judicial capacity, and that body also in such action is clothed with such powers only as the statutes afford. The board represents in general in a proceeding of this character the landowners whose lands are to be benefited by the improvement. In its corporate capacity the county has no special interest in the improvement. It is local in character, not differing in that respect in principle from the establishment of sewers in municipalities. It is only when the proofs adduced show that the health, convenience, or welfare of the public at large, the county, requires the construction of the ditch, that the board is authorized to represent the county in that regard, the provision of statute being that if it be found not only that the public health, convenience, or welfare will be promoted by the improvement, but that the same is of sufficient importance to the public, then the board may cause the damages and compensation which have been assessed to be paid out of the county treasury, or a part thereof to be so paid, but if, in the opinion of the board, the improvement is not of sufficient importance to the public, then the board must fix and determine the proportionate amount thereof which should be paid by the several landowners benefited by the improvement. In the present case that was all that was done. No finding appears which relieves the ditch from being simply a private ditch as between the landowners benefited and the public at large, and in such case the county has no proprietary interest in the ditch. As held in *Commissioners v. Krauss*, 53 Ohio St. 631, 42 N. E. 832, "it belongs to the landowners on whose lands and for whose benefit it was constructed. The commissioners simply acted as a board before whom the necessary proceedings for the construction of the ditch had by the statute to be conducted."

With this understanding of the principles involved in the case, it seems clear that the "taking" in this instance, however unfortunate it may have proven to the plaintiff below, is not a violation of any constitutional right, for, as expressed by Burket, J., in *Dayton v. Bauman*, 66 Ohio St., at page 393, 64 N. E., at page 434: "There is no taking

of private property by the public for public use, but, on the contrary, the public confers a special benefit upon the property and then enforces an assessment not exceeding the benefit so conferred." Nor are these views novel as introducing any new rule of law or of construction. *Grimwood v. Commissioners*, 23 Ohio St. 600, was an action to recover of defendants as commissioners of Summit county damages resulting from the wrongful and negligent construction of an embankment made by order of the defendants in the opening and grading of a highway whereby water was diverted from the natural channel and flowed back on lands of plaintiff. The court held that the action could not be maintained. That is, that the county could not be held liable for such acts of the commissioners, although negligent and working damage. The decision is based upon *Commissioners v. Mighels*, 7 Ohio St. 110, in which case it is held that: "The board of commissioners of a county are not liable in their quasi corporate capacity, either by statute or common law, to an action for damages for injury resulting to a private party by their negligence in the discharge of their official functions." In the opinion Brinkerhoff, J., admits that, if the negligence and injury had been the act of a natural person or the agents of a municipality or other corporation proper, the corporation might have been held, but municipal corporations proper are created by the direct solicitation or the free consent of the people who compose them, while counties are local subdivisions of a state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people, and almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. The logical deduction from the foregoing is that, in the absence of statutory provision entailing liability on a county for acts of its board of commissioners, no such liability exists. Since the foregoing decisions were pronounced statutes have been enacted giving in more or less direct terms a right of action under specified circumstances against the county for the acts or omissions of the board, but, as we have already found, the statutes invoked in this inquiry do not give such right of action under the circumstances of this case.

A construction of the ditch statutes similar to that hereinbefore announced was taken by the circuit court in *Smith v. Griffin*, 6 O. C. D. 232, the action being for breach of bond to complete ditch work. The opinion is by Price, J., now a member of this court. In it the learned judge observes: "A proper understanding of the several sections

of the statute regulating the mode and manner of forcing the construction of ditches in Ohio shows that the expenses of the work, with all its attending costs, from the inception to the final close of the proceedings, shall be borne alone by those who are found and adjudged to be benefited, and the statute carefully guards the rights of those whose lands are so situated that no benefit will accrue to them by reason of the ditch improvement. The entire system of ditch legislation as we now have it proceeds on the theory that those who are to be benefited in some substantial way, and those alone, shall bear the burden of providing the drainage. It is true that, under the provisions of the statute, the enforcement of proper and sufficient drainage of lands in localities requiring it is worked out through application to the board of commissioners, who, together with the engineer and other instrumentalities provided, have charge of the work; yet in the performance of such official duties they are not acting as agents of the county at large, nor can they bind the county at large by any neglect or wrongful act while conducting and managing the execution of the ditch work. If any relationship of agency exists in such a case, they would seem to be more the agents of the parties interested in the drainage, who by petition have invoked the action of the commissioners, than of the taxpayers and people of the county. While the statute authorizes the board of commissioners to appoint an engineer, and provides that the engineer shall let the work and take contracts and bonds for its performance, subject to the approval of the commissioners, it is plain that in the discharge of these statutory duties neither the engineer nor the commissioners are representing the county so as to make all its taxpayers liable for the manner in which they discharge or neglect to discharge their duties, or for breach of such contract as is contained in the petition." Relief was denied, and the judgment was affirmed by this court. 58 Ohio St. 775, 49 N. E. 1110.

Much stress is laid by counsel for defendant in error in their able brief on the case of *Smith v. Commissioners*, 50 Ohio St. 628, 35 N. E. 796, 40 Am. St. Rep. 699. That was an action for damages accruing to abutting land from a change in the established grade of a public road. The relief granted the landowners was distinctly based upon the proposition that the statute having empowered county commissioners to improve any state, county, or township road, or any part thereof, by grading, etc., and the board having exercised the power and in their official capacity having improved the road for the public benefit, the county was liable for damages to abutting lands. The obvious difference between this case and the one at bar is that, while the former embraced a proceed-

ing instituted and conducted for the public benefit, the latter was for private benefit exclusively. Manifestly the decision can have no controlling effect upon the present inquiry. Other cases cited by the counsel have been considered. We do not deem it necessary to extend an opinion already too long by comment upon them more than to say that in our opinion they do not require any modification of the conclusions hereinbefore stated.

Recurring to the introductory statement, we repeat that we are asked to maintain a claim of a property owner against a county. The ultimate question is: Does the petition state a case against Portage county? We hold that it does not. Whether a remedy by injunction might have been awarded the plaintiff had he applied in time to a court of equity we need not inquire, for no such application was made, although, for aught that appears in the petition, the plaintiff may have had actual knowledge of the pendency and purpose of the proceeding before the work had been accomplished or entered upon, and thus opportunity to bring such action.

The judgment of the circuit court will be reversed, and that of the common pleas affirmed.

Reversed.

SUMMERS, C. J., and CREW, DAVIS, SHAUCK, and PRICE, JJ., concur.

(83 Oh. St. 13)

PITTSBURGH, C., C. & ST. L. RY. CO. v. JACKSON.

(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

COURTS (§ 5*)—JURISDICTION—TRESPASS TO LAND.

An action for trespass on lands situated in another state, or injury thereto, cannot be maintained in this state.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 5.*]

Error to Circuit Court, Jefferson County.

Action by Leander Jackson against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the circuit court, defendant brings error. Reversed, and judgment of common pleas affirmed.

Leander Jackson, being the owner of certain lands situated in the state of West Virginia, brought an action in the court of common pleas of Jefferson county, Ohio, against the plaintiff in error. His petition contained two causes of action: First, that the plaintiff in error had unlawfully appropriated to its own use about 20 feet of a right of way extending to a ferry on the Ohio river; and,

second, that said plaintiff in error failed and omitted to provide sewers, ditches, and drains to conduct the surface water from its right of way, by reason whereof the water flowed over the right of way of the said Leander Jackson. He claimed damages in the sum of \$500 on each cause of action. The plaintiff in error filed a demurrer to the jurisdiction of the court, which was submitted to, and sustained by, the court of common pleas. Thereafter, Leander Jackson died, and Albert W. Jackson, as his administrator, was substituted as plaintiff and filed an amended petition in which the causes of action are the same as in the original petition. To this amended petition the plaintiff in error filed a demurrer, alleging: First, that the court had no jurisdiction of the subject of the action; and, second, that said amended petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court of common pleas, the amended petition was dismissed, and judgment was rendered in favor of the plaintiff in error. The circuit court on error affirmed the judgment of the court of common pleas in sustaining the demurrer to the first cause of action, but reversed the judgment of the court of common pleas sustaining the demurrer to the second cause of action. Plaintiff in error seeks to reverse the judgment of the circuit court and to affirm the judgment of the court of common pleas.

Dunbar & Sweeney, for plaintiff in error.
W. C. Brown, for defendant in error.

DAVIS, J. (after stating the facts as above). The circuit court affirmed the judgment of the court of common pleas as to the first cause of action, but reversed it as to the second cause of action. The judgment of the circuit court is defended on the ground that the question involved is definitively settled by the rulings of this court in *Genin v. Grier*, 10 Ohio, 210, and *City of Fostoria v. Fox*, 60 Ohio St. 340, 54 N. E. 370. With this contention we cannot agree.

The cases cited, like all others, should be interpreted with reference to the facts of each case and the questions presented to and considered by the court. In those cases the question now before this court did not arise. In both cases the cause of action asserted accrued within this state, and the question of conflict of jurisdiction between the courts of this state and the courts of another state did not arise upon the record and was not considered by the court. In each case the question was: Which county in this state was the proper forum for the action? That being so, it was answered that the forum must be determined by the statutes of this state, or, as it was expressed by Hitchcock, J., in *Genin v. Grier*: "Whether this distinction between local and transitory actions shall be adhered to must depend upon our own peculiar sys-

tem of jurisprudence." But, obviously, the statutes of this state could not settle a question of jurisdiction between the courts of this state and those of another state.

Hence in *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474, in which the plaintiff complained that the defendant cut a ditch across his farm in Pennsylvania, whereby water was diverted from the plaintiff's mill in Ohio, this court said: "Actions of trespass, and trespass on the case, for injuries to real estate, or land, are local; and in all cases where the act done, and the injury sustained, lie wholly in a foreign jurisdiction, the place of the injury is the forum of the trial. The doctrine is universally recognized as a rule of the common law. But, where the injury is sustained in one state from an act done in another, an action to recover damages for the same may be prosecuted in either."

In a well-considered case, the Supreme Court of Massachusetts said: "It is not denied that trespass *quare clausum fregit* is a local action, and that at common law the courts of this commonwealth have no jurisdiction of trespass upon land in another state or country. The objection is not that an action of which the court has jurisdiction is brought in the wrong county, but that the court has not jurisdiction of the cause of action"; and the court dismissed the action because the cause of action accrued in another state. *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

In *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913, the Supreme Court of the United States declared that: "By the law of England and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or possession of the land itself, is a local action, and can only be brought within the state in which the land lies." The same ruling was made in *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 9 L. R. A. 349, 22 Am. St. Rep. 17.

In 2 *Cooley on Torts* (3d Ed.) 901, it is said: "That actions for trespasses on lands in a foreign country cannot be sustained is the settled law in England and in this country. The decision of Chief Justice Marshall to that effect in the suit brought by Mr. Edward Livingston against Mr. Jefferson, for having forcibly dispossessed him of the batture in New Orleans, has been often followed without question."

We are of the opinion that the ruling of the circuit court is against the great weight of authority, and therefore its judgment is reversed, and the judgment of the court of common pleas is affirmed.

SUMMERS, C. J., and SHAUCK and CREW, JJ., concur.

(200 N. Y. 59)

In re OALLAHAN.

(Court of Appeals of New York. Nov. 22, 1910.)

1. ELECTIONS (§ 135*)—NOMINATION—NOMINATION BY COMMITTEE OF NOMINEE OF ANOTHER PARTY.

Election Law (Consol. Laws, c. 17) § 120, provides that party nominations of candidates can only be made by a convention or by a duly authorized committee of such convention of a political party. Section 121 requires that the party certificate of nomination shall contain the title of the office, and designate the name of the political party which it represented, and that when the nomination is made by a committee the certificate shall contain a copy of the resolution passed at the convention. Section 135 provides that if a nomination is duly declined or the attempt to nominate at a primary fails, or a candidate regularly nominated dies before election day or is disqualified, etc., the committee appointed may make a new nomination to fill the vacancy so created, or may supply defects. Section 136 provides how the certificate shall be executed and filed, and the duty of the Secretary of State, and that when no nomination shall have been originally made by a political party or an independent body, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body authorized to make nominations or to fill vacancies, to nominate or substitute the name of a candidate of another party or independent body for such office. *Held*, that section 136 refers to new nominations to be made where the vacancies have occurred covered by section 135, and not to a case where the committee was acting for the convention in making nomination for officers upon their party's ticket, and, where a committee of a political party was authorized by resolution of its delegates in convention assembled "to make original nominations for justices of the Supreme Court," the nomination made by them was an original nomination by the party, and not invalidated within section 136, because the nominee was also a candidate for the same office on the ticket of another political party.

[*Ed. Note.*—For other cases, see Elections, Dec. Dig. § 135.*]

2. ELECTIONS (§ 120*)—RIGHT OF SUFFRAGE—LEGISLATIVE INTERFERENCE.

The provisions of section 136 (Consol. Laws, c. 17) forbidding the committee of a political party authorized to make nominations to nominate as a candidate for an office on the party ticket, a party who is the candidate of another party for the same office is unconstitutional as an unauthorized exercise of legislative regulations, since electors have a right to vote for any person for a public office, not disqualified, and the Legislature having given power to committees of a political party to make nominations for the party, cannot limit the right of such committee to nominate as its candidate any person qualified for the office.

[*Ed. Note.*—For other cases, see Elections, Dec. Dig. § 120.*]

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application of Patrick E. Callahan to review the action of the Secretary of State. From an order of the Appellate Division (125 N. Y. Supp. 1114) affirming an order refusing to strike from the official ballot, the name of Garret J. Garretson as nominee of the In-

dependence League party for justice of the Supreme Court, there was an appeal. Affirmed.

Edward M. Shepard and William N. Dykman, for appellant. Robert Stewart and Eugene N. L. Young, for respondents.

CULLEN, C. J. While I think the decision of the courts below could well be sustained on the ground of long acquiescence by the public and Legislature in the interpretation of section 136 of the election law (Consol. Laws, c. 17) declared by Mr. Justice Bischoff in *Matter of Gillespie v. McDonough*, 39 Misc. Rep. 147, 79 N. Y. Supp. 182, and while I agree in the opinion of my Brother GRAY on that question, I wish to place my vote on a broader ground. In my opinion the provisions of section 136 forbidding a committee of any party or independent body authorized either to make nominations or to fill vacancies to nominate a candidate of another party or independent body for the same office are plainly invalid and unconstitutional. I shall not discuss the extent of the power of the Legislature to regulate elections other than to say that concededly the power must be so exercised as not to deny or impair the rights of the electors. I shall assume that the Legislature may prescribe in what manner and by what bodies nominations for office may be made. I will assume, also, that the Legislature might have refused to grant committees of parties or of independent bodies the power to make nominations at all, but have required all nominations to be made by conventions. The proposition which I assert is this: That if the Legislature does grant to any convention, committee or body the right to make nominations, it cannot limit the right of such convention, committee, or body to nominate as its candidate any person who is qualified for the office. The electors have the right to vote for whom they will for public office, and this right cannot be denied them by any legislation. *People ex rel. Bradley v. Shaw*, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 606; *People ex rel. Goring v. President, etc., of Wappingers Falls*, 144 N. Y. 616, 39 N. E. 641. Equally, any body of the electors has the right to choose whom it will for its candidate for office, and to appeal to the whole electorate for votes in his behalf. If the Legislature has the constitutional power to prevent a committee of a party from nominating as its own candidate a candidate already in nomination by another party or body, it may equally, if it sees fit, forbid a convention from making such a nomination. It is true that the Legislature may prescribe qualifications for office where there is no constitutional provision on the subject, but it has been settled law from the earliest period in the history of our state that it cannot enact arbitrary exclusions from office. Bar-

ker v. People, 3 Cow. 686, 15 Am. Dec. 322; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; People ex rel. Devery v. Coler, 173 N. Y. 103, 85 N. E. 956. If it cannot enact arbitrary exclusions from office, equally it cannot enact arbitrary exclusions from candidacy for office. What exclusion could be more arbitrary than that one party or organization should not be permitted to nominate the candidate of another. For years the great popular outcry has been against the domination of partisanship in the election of administrative and judicial officers. To some extent the voters have felt the effect of the popular demand, especially this has been the case in this state in reference to the judiciary. For the past nine years every member of this court has been elected on the common nomination of the two great political parties. The same was the case with the election this year, but under the construction of the statute contended for by the appellant, assuming its validity, the candidate of the party which made the latest nomination was not entitled to a place on the ticket of the other party because that party had first held its convention and intrusted the nomination to one of the vacancies to a committee in the hope that there might be presented to the electors two common nominees worthy of the support of all the people and thus avoid division on partisan lines. Personally, I should think it a subject for public congratulation that a candidate was so well qualified for the office he sought as to command the support of other political bodies. But I do not base my argument at all on the claim that the legislation operates against nonpartisanship; that may seem to me an objection, but to others not an objection. I insist that the Legislature has not the right to legislate so as to induce either partisan voting or independent voting. The liberty of the electors in the exercise of the right vested in them by the Constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are, therefore, criminal, such as bribery, violence, intimidation or fraud, cannot be denied.

It has been suggested that committees can more readily make fusions and combinations than conventions. If such is the case what power is there to forbid such fusions and combinations as the electors choose to make? It has also been suggested that a committee may be exposed to corrupt influences. I do not see why corruption might not be used to prevent the indorsement of another candidate as well as to indorse him. But assuming the suggestion well founded, it may be a reason for denying the power of nominating to a committee, but the power cannot be vested in them to be exercised in favor of one class of nominees and against another. Could a provision be upheld that the committee should not nominate a man worth more than a mil-

lion dollars on the theory that he would be more able to corrupt it than a poor man? The fact is plain that the legislative provision is solely intended to prevent political combinations and fusions, and this is the very thing that I insist there is no right to prevent or hamper as long as our theory of government prevails, that the source of all power is the people, as represented by the electors.

A similar question arose in Michigan. A primary election law in that state provided that before the name of any candidate should be placed upon the ballot at the primary election such candidate should make oath that he was a candidate for the office. This provision was held unconstitutional. The court said: "The authority of the Legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. We cannot escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, and it conflicts with the provisions of section 1, art. 18, of the Constitution. * * * This provision precludes the voters from choosing as a candidate one who declines for himself to seek the office." *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60.

It is no answer to this position to say that the law permits conventions to nominate the candidates of other parties, and that, therefore, neither the right of the elector nor that of the candidate is impaired. Legislation to be valid must not only not deprive the elector of his right to vote for whom he will, but for what candidate he will, and it must not discriminate in favor of one set of candidates against another set. Would a statute which authorized a committee to nominate as its own candidate a candidate of either of the two great political parties, but not a candidate of one of the smaller parties, or authorized it to name a black-haired man, but not a red-haired man, be valid? Yet, if the argument by which it is sought to sustain the legislation before us is sound, it would equally support such legislation. It could be said that no right was impaired because conventions were at liberty to nominate red-haired men, though committees were not.

The orders of the Appellate Division and Special Term should be affirmed, with costs.

GRAY, J. I think that the determination below was right, and that the order appealed from should be affirmed. The courts have followed, as I understand, a decision made in 1902 by Mr. Justice Bischoff in *Matter of Gillespie v. McDonough*, 39 Misc. Rep. 147, 79 N. Y. Supp. 182. There a precisely similar situation existed; the committee of the state convention of the Prohibition party nominating as their candidate for the office of Attorney General the candidate of the Dem-

ocratic party for the same office. That decision has been acquiesced in for the past eight years. The Legislature has, repeatedly, had under consideration amendments of the election law (Consol. Laws, c. 17) and, in 1909, revised and consolidated that law; but the provisions of the section (136) in question, then and now, have not been changed. I am clear that when the committee of the Independence League party, duly authorized by resolution of its delegates, in convention assembled, "to make original nominations for justices of the Supreme Court," etc., placed in nomination the respondent, Garret J. Garretson, that was an original nomination by the party, and that it was not invalidated, within the provisions of section 136 of the election law, because Garretson was a candidate for the same office on the ticket of the Republican party. Section 120 of the law is entitled "Party Nominations," and provides that "party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention, of a political party which at the last preceding general election, * * * at which a governor was elected, cast ten thousand votes," etc. The section contemplates that the "party nomination" may be made by the convention, or by its committee appointed for the purpose. The ordinary mind would, irresistibly, infer that the nomination by such committee would be as "original," as though made by delegates in convention. That such was, also, the legislative understanding seems to be apparent from the language in the next section. Section 121, in providing for "Party certificates of nomination," requires that "the party certificate * * * shall contain the title of the office for which each person is nominated, and * * * shall, also, designate * * * the name of the political party which the convention, primary or committee making such nomination represents. * * *

When the nomination is made by a committee, the certificate of nomination shall contain a copy of the resolution passed at the convention," etc. The whole intentment of this section is aimed at the certificate, whereby an original nomination of a candidate is made by a political party, whether made in convention, or by the committee there selected by the delegates for the purpose. When, later, the situation is considered, which may arise from vacancies occurring, we find section 135 enacted to meet it. It is entitled "Filling vacancies in nominations." It provides that "If a nomination is duly declined, or the attempt to nominate at a primary results in a tie, or a candidate regularly nominated dies before election day, or is found to be disqualified, * * * or if any certificate of nomination is found to be defective, * * * the committee appointed on the face of such certificate of nomination * * * may make a new nomination to fill the vacancy so created, or may supply

such defect," etc. Then section 136 follows, whose language gives rise to the question before us, which is entitled "Certificates of new nominations." It provides how "the certificate so made" shall be executed and filed, and what shall be the duty of the Secretary of State upon its filing. Then, immediately, follows in the section the provision that "When no nomination shall have been originally made by a political party or by an independent body for an office, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body authorized to make nominations or to fill vacancies, to nominate or substitute the name of a candidate of another party or independent body for such office; it being the intention of this chapter that, when a candidate of one party is nominated and placed on the ticket of another party or independent body, such nomination must be made at the time and in the manner provided for making original nominations by such party or independent body." I think that this section, when read in the light of the preceding sections, should be regarded as having reference to the "new nominations" to be made, where the vacancies have occurred, which the preceding section 135 has covered in its provisions. If we take the view, which I think proper and reasonable, of section 120, that nominations of party candidates made according to its provisions are original nominations, we have no difficulty in referring the language of section 136 to, and in harmonizing it with, the provisions for making new nominations, made necessary by the happening of the events specified in section 135. The inhibition of section 136 against the selection of a candidate on another ticket for the same office would not apply to a case where the committee was acting for the convention, in making nominations for offices upon their party's ticket. In that case the intentment of section 136, that such a nomination "must be made at the time and in the manner provided for making original nominations by such party," would be satisfied. The intent of the statute may be so inartificially expressed as to give rise to debate; but, when we consider the provisions in their order and in their apparent connection with the subjects of each, we should find no difficulty in interpreting their purport in the way I have indicated. The question has been fully discussed in the opinions rendered by Justice Bischoff, in *Gillespie v. McDonough*, supra, and by Justice Stapleton in the present case, and I deem it unnecessary to speak further. I think that our affirmation should be rested upon the ground stated, as sufficient for the disposition of the appeal. As a majority of my Associates, however, desire, also, to concur with the Chief Judge in the views expressed by him, I shall join with them in holding that the provisions of section 136 are unconstitutional and, therefore, invalid, in forbidding the

committee of a political party, authorized to make nominations, to nominate as a candidate for an office on the party ticket a person who is the candidate of another party for the same office. The power of the Legislature to regulate may not, validly, be stretched so far as to restrict a body, authorized to make nominations for a political party, in its right to select any duly qualified person as a candidate for public office. It cannot deprive the electors of the right to vote for any person for a public office not disqualified under our laws.

I think the affirmance may well be placed upon the first ground discussed; but, if necessary to the affirmance, I shall concur with the Chief Judge's opinion.

HISCOCK, J. I concur for affirmance on the first ground stated by Judge GRAY. The provisions of the election law governing the question now before us are not entirely free from ambiguity and uncertainty. I think, however, that they may fairly be construed as permitting what was done in this case, and in view of the fact that the Legislature for several years has allowed such interpretation by the courts to prevail and be followed by political parties when, independent of the question of constitutionality raised by Chief Judge CULLEN, it could have avoided or prevented the same by a slight amendment of the statute makes me the more ready to adopt this view.

HAIGHT, J. (dissenting). On the 6th day of October, 1910, at a convention of delegates of the Independence League party, held in and for the Second judicial district, a resolution was adopted appointing a committee to make original nominations for three justices of the Supreme Court on the Independence League ticket for that district, and subsequently, on the 7th day of October, at a meeting of that committee, it placed in nomination for the offices aforesaid Garret J. Garretson, Samuel T. Maddox, and Harrington Putnam, who previously, and on the 1st day of October, 1910, had been placed in nomination by the Republican party at its judicial convention held in and for that judicial district. Upon filing the certificate of such nomination with the Secretary of State by the committee of the Independence League, the appellant entered a protest with the Secretary of State, in which he claimed that such nomination made by the committee was void and in violation of the provisions of section 136 of the election law. The protest having been overruled by the Secretary of State, these proceedings were instituted by the appellant, who was the nominee for justice of the Supreme Court in that district by the Democratic party. The question thus presented for determination is as to whether a candidate who has been nominated by a political party for an office can be nominated by a duly authorized committee of a con-

vention of another political party under the election law of our state.

Section 120 of the election law provides that: "Party nominations of candidates for public office can only be made by a convention, or by a duly authorized committee of such convention." It thus will be observed that the convention of a party is its supreme power, and is vested with primary and original power to make nominations of candidates for an office. No committee, primarily or originally, possesses such power. It is only after the convention has duly authorized a committee to make nominations that it is vested with power to do so. Its power is, therefore, delegated and secondary to that of the convention. Section 135 contains provisions with reference to filling vacancies occurring in party nominations by the declination, death, or disqualification of a person nominated, and section 136 contains provisions with reference to the making of a certificate by the committee, the signing and filing of it, and then concludes as follows: "When no nomination shall have been originally made by a political party or by an independent body for an office, or when a vacancy shall exist, it shall not be lawful for any committee of such party or independent body authorized to make nominations or to fill vacancies, to nominate or substitute the name of a candidate of another party or independent body for such office; it being the intention of this chapter that when a candidate of one party is nominated and placed on the ticket of another party or independent body, such nomination must be made at the time and in the manner provided for making original nominations by such party or independent body."

Some confusion appears to exist with reference to the meaning of the word "originally," as appears in the first clause of the statute: "When no nomination shall have been *originally* made by a political party for an office," the contention being that "originally" refers to a nomination made either at a convention or by a committee appointed by the convention. But it appears to me that this question is answered by the statute itself, for in construing it we are bound to give force to all of its provisions, provided they can be harmonized with each other. True, the nomination by a committee is original, in the sense that it is first made. But it must be remembered that the statute has invested the convention with the power to make nominations and that its power is primary and original. When the convention is called for the purpose of making nominations, its power so to do is original, and when it delegates that power to a committee, the committee's action is secondary and subject to the power of the convention. An examination of the provisions of sections 120, 121, and 135, and those under review of section 136, make it clear that the convention

is empowered to appoint two committees, and only two, one to make nominations and the other to fill vacancies. If the convention itself nominates candidates for all the positions to be filled, then no committee to make nominations could be properly appointed, for there would be nothing for the committee to do; and the only committee that would be necessary in such a case would be a committee to fill vacancies. If the word "originally," therefore, refers to nominations made in the first instance by the convention, then all of the provisions which follow become of force and effect. If, however, the word "originally" means the nomination made by a committee, then no force or effect can be given to a portion of the statute which follows: "When no nomination shall have been originally made by a political party * * * for an office, or when a vacancy shall exist." Here we have distinct reference to the two committees which the convention has been authorized to appoint in the preceding sections of the statute, to wit, a committee to make nominations, and a committee to fill vacancies. The statute then proceeds: "It shall not be lawful for any committee of such party * * * to make nominations or to fill vacancies" (here again we have the two functions distinctly referred to, to make nominations and to fill vacancies), "to nominate or substitute the name of a candidate of another party or independent body for such office." And then the statute concludes: "It being the intention of this chapter that when a candidate of one party is nominated and placed on the ticket of another party or independent body, such nomination must be made at the time and in the manner provided for making original nominations by such party or independent body." The time and manner provided for making original nominations, under the statute, is the convention called for that purpose. If the committee to make nominations is to be exempted from the restrictions of the statute, then all of the provisions specifically relating to its functions become meaningless and senseless. If, however, the Legislature referred to a nomination by the convention, then every provision becomes clear and operative. The committee appointed to make nominations, as well as the committee appointed to fill vacancies, possess separate, independent functions; but those functions may be delegated to one committee who is empowered to make nominations as well as to fill vacancies. In such case the limitations of the statute extend to each of the functions of the committee.

The provisions of the statute under review were inserted in the election law in 1896 (Laws 1896, c. 909) § 66. Its purpose was to correct an evil that had made its appearance in the nomination of candidates for office. A number of parties had come into existence in which nominations for office

were made and placed upon the official ballot. Some of these parties, meeting in convention, only made nominations for one or two positions, and then adjourned after appointing a committee to make nominations and to fill vacancies. In some instances rumors were circulated that positions upon such party ballot had been improperly disposed of to candidates upon other party ballots, so that it was not uncommon to find the name of a candidate on three or four columns of the official ballot. This evil the Legislature attempted to correct. If the statute is now to be construed as having no reference to committees appointed to make nominations, then the evil sought to be remedied by the Legislature chiefly fails. It is true that it is conceded that it applies to the committee authorized to fill vacancies, but it was not in the committee that filled vacancies that the evil practice referred to existed. It consequently would follow that the statute is practically meaningless and accomplished no beneficial results.

It is now contended that "originally" means a nomination not made before the time required by the statute for the filing of a certificate of nominations 30 days before election, and that the limitation upon the powers of the committee thereafter applies, whether it be a committee to make nominations or of filling vacancies. I had supposed that the power of a party to make nominations ended with the limitation of time in which the certificate is required to be filed, and that thereafter its power was limited to the filling of vacancies. In order to construe the statute in accordance with the suggestion, it would practically have to be rewritten and reference made to the 30-day clause. It would require something more than the transposing of words and sentences or the substituting of words in order to make the meaning of the Legislature clear.

It has been further suggested that the Legislature had no power to limit a party in making nominations. Assume this to be so. The Legislature in this case has not limited the power of the convention to make nominations of candidates of another party. The convention may do so, or it may appoint a committee to meet a committee of another political party and agree upon candidates who shall be supported by their respective parties. Nor has the Legislature limited the power of a convention to dispense with an annual session and delegate its power to a committee to make nominations for the next succeeding year. But in such a case the committee so appointed becomes the sole and original power to make nominations for that year, and consequently the provisions of the statute do not apply to nominations "made at the time and in the manner provided for making original nominations by such party." All that the Legislature has attempted to do in this case is to regulate the manner in

which nominations shall be made and to specify the extent to which a convention may delegate its powers to a committee. This does not, to my mind, infringe upon any of the constitutional provisions.

The order appealed from should be reversed.

WERNER and WILLARD BARTLETT, JJ., concur with CULLEN, C. J., and GRAY, J. CHASE, J., concurs with CULLEN, C. J., only. HISCOCK, J., concurs, in memorandum, with GRAY, J., only on the ground first stated in his opinion. HAIGHT, J., reads dissenting opinion.

Orders affirmed.

(200 N. Y. 38)

PALTEY et al. v. EGAN.

(Court of Appeals of New York. Nov. 22, 1910.)

1. APPEAL AND ERROR (§ 1176*)—REVERSAL—DIRECTING FINAL JUDGMENT.

Where the trial court reserves decision on a motion to nonsuit and permits the case to go to the jury, and, after verdict for plaintiff and a motion by defendant for a new trial, rules on the motion for nonsuit and dismisses the case, the appellate court, even if it holds the nonsuit error, will not reinstate the verdict and order judgment thereon, thereby depriving defendant of his rights under the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1176.*]

2. APPEAL AND ERROR (§ 263*)—PRESERVATION OF GROUNDS.

Plaintiff is not necessarily bound by the theory on which the case was submitted to the jury, because no exception was taken thereto, where the court later, after verdict for plaintiff, rendered its reserved decision granting defendant's motion for a nonsuit, taking the case from the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

3. LANDLORD AND TENANT (§ 132*)—PREMISES—USE AND ENJOYMENT.

A landlord owes his tenants a duty not to disturb their possession and enjoyment of the premises by any operations he may make on his adjoining property, irrespective of the question of negligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 460; Dec. Dig. § 132.*]

4. LANDLORD AND TENANT (§ 133*)—PREMISES—USE AND ENJOYMENT—PERSONAL OBLIGATION.

This obligation is a personal one and is not discharged by delegating the work to a competent independent contractor.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 465; Dec. Dig. § 133.*]

5. MASTER AND SERVANT (§ 319*)—INDEPENDENT CONTRACTOR—LIABILITY OF MASTER.

Where the work itself causes injury, it is no defense to the proprietor, etc., that he employed a competent independent contractor to perform such work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1259-1260; Dec. Dig. § 319.*]

6. LANDLORD AND TENANT (§ 132*)—PREMISES—INJURIES TO TENANT—ACTIONS—EVIDENCE.

In an action by a tenant for injuries to his possession by the collapse of his building, which occurred through excavations by the landlord on his adjoining lot, evidence held to show negligence on part of defendant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 460-464; Dec. Dig. § 132.*]

7. LANDLORD AND TENANT (§ 132*)—PREMISES—INJURY TO TENANT—PLEADING.

Where a tenant sued for injuries from the collapse of the building caused by the landlord's excavation on an adjacent lot, a complaint, alleging the relation of landlord and tenant, and further setting out in detail the acts and operations causing the collapse, was sufficient to justify a recovery on the theory of the landlord's negligence, though it may have been originally intended to allege cause of action under New York City Building Code, § 22, providing for the protection of property from injury by excavations, etc.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 132.*]

8. ESTOPPEL (§ 68*)—POSITION IN JUDICIAL PROCEEDING.

In such an action, the plaintiffs were not estopped from changing the theory of their case, although on the first trial they proceeded upon the theory of liability under the Building Code, and in the second failed to accept an amendment under the terms imposed by the court.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Adolph Paltey and others against Patrick Egan, impleaded with others. From a judgment of nonsuit, affirmed by the Appellate Division (132 App. Div. 254, 116 N. Y. Supp. 889), plaintiffs appeal. Reversed.

See, also, 122 App. Div. 924, 108 N. Y. Supp. 1143; 124 App. Div. 939, 109 N. Y. Supp. 1140.

This is an appeal from a judgment entered on an order of the First Appellate Division affirming a judgment dismissing plaintiffs' complaint on a motion for a nonsuit. The action was brought to recover damages occasioned by the collapse of a building owned by the defendant and part of which had been leased to plaintiffs.

The defendant was the owner of two buildings, known respectively as No. 65 and No. 67 East Eighth street in the city of New York, and which on their adjacent sides were supported by a common wall. The plaintiffs rented all or part of the third floor of the former building. Thereafter, and while the lease was in force, the defendant undertook to remove the building No. 67 and erect a new one in the place thereof, making a contract with one of the other defendants for so doing, and an excavation estimated at from 8 to 15 feet deep and of considerable length was made next to the wall of No. 65. At first this latter wall was shored up by three

beams running from it across the lot of No. 67 to the wall of No. 69; but, two or three days before the occurrences complained of, two of these supports were taken down and on the morning in question the remaining one. The building No. 65 was 4 stories high and upwards of 90 feet in length. Apparently as the result of these various acts, the wall of the building and a large portion of the building collapsed, and the appellants' goods were injured.

The case has been tried twice. On the first trial it was submitted to the jury solely on the theory that the defendant in violation of the provisions of the Building Code of the city of New York had failed to properly shore up the wall of the building which was left standing, and the judgment in plaintiffs' favor was reversed on the ground that those provisions did not apply to a case where the same person owned the adjoining lots as in this case. On the second trial, the case was submitted by the court to the jury on the theory of negligence in making the excavation independent of said Code provisions; but the submission was limited by holding that defendant, having made a contract to do the work which resulted in the accident, thereby avoided responsibility for anything which was done within the limits of the contract and only became liable for personal negligence outside thereof. At the close of the evidence, the trial judge reserved his decision on the defendant's motion to dismiss the plaintiffs' complaint pending the verdict by the jury. While the submission to the jury, which was doubtless intended to be in accordance with section 1187 of the Code, did not call for a special verdict, but was a general submission, both parties seem to have acquiesced in this method of procedure. When the jury rendered its verdict in favor of the plaintiffs, the defendant made a motion for a new trial under section 999 of the Code; but the trial judge disregarded this and reverted back to and granted the motion for a nonsuit.

Louis J. Vorhaus, for appellants. James Kearney, for respondent.

HISCOCK, J. (after stating the facts as above). As appears by the foregoing statement of facts, the appellants are seeking to recover damages, because, while they were the tenants in a building owned by the respondent, the latter caused the adjoining one also owned by him to be removed and an excavation to be made in such a manner that the former building collapsed and the tenants' property was injured.

They were nonsuited, and it seems desirable in the first instance to correct various erroneous ideas which have accumulated in the minds of counsel on both sides as the result of the practice which was followed by the trial court in reserving its decision on a motion for a nonsuit pending a general verdict and then disregarding the motion for a

new trial and granting the nonsuit. The counsel for the appellants insists that, the reserved motion for a nonsuit having been granted after the jury had rendered a verdict in favor of his clients, we should reinstate the verdict and order judgment thereon if we should think that the motion for a nonsuit ought not to have been granted. Of course this would not be permissible even if justified by the evidence under the court's charge. Counsel for respondent having made a motion for a new trial under section 999 of the Code after the verdict was rendered, and this motion having been disregarded, and, instead, the original motion for a nonsuit having been granted, the respondent would be deprived of his rights under the motion for a new trial if we should now reverse the nonsuit and direct judgment on the verdict. *True v. Lehigh V. R. R. Co.*, 22 App. Div. 588, 48 N. Y. Supp. 86.

On the other side, the respondent contends that, because the appellants took no exceptions to the theory on which the trial judge did tentatively submit the case to the jury, they are bound on this appeal by that theory with all of its restrictions and cannot urge any other one upon which they should have been allowed to go to the jury. This view also is manifestly incorrect. If the judgment appealed from were entered on the verdict, the respondent's argument would be well founded; but it is not. The verdict has been eliminated, and the judgment entered on the direction for a nonsuit, and the ordinary question is presented to us which arises on any nonsuit whether there was any view of the case on which the appellants should have been allowed to go to the jury, and this brings us to the merits of the appeal. The appellants were not required to make specific requests to go to the jury. *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 584, 53 N. E. 507, 47 L. R. A. 246; *First Nat. Bank of Springfield v. Dana*, 79 N. Y. 108; *Trustees, etc., of East Hampton v. Kirk*, 68 N. Y. 459.

This is an appeal resulting from a second trial. On the first trial the appellants hung their hopes of recovery on alleged violations of section 22 of the Building Code, which provides for the protection of property from the effects of adjacent excavation, primarily imposing this duty on the person making the excavation or on the one owning the adjacent property accordingly as the excavation is to be more than 10 feet in depth or not, and further enacting that, if the necessary license is not granted to the one making the excavation and primarily required to take protective measures to go on the adjoining premises for this purpose, then the owner of the adjoining premises refusing to grant such license shall protect the walls and buildings. The determination of the Appellate Division on the first appeal, however, dissipated these hopes of the appellants by holding that those provisions did not apply to a case like the

present one, where the same man owned both properties, and it seems apparent to me that for the reasons fully set forth in the opinion of Judge Patterson (*Paltey v. Egan*, 122 App. Div. 512, 107 N. Y. Supp. 444), and which I shall not take the space to recapitulate, those provisions are not adapted to the regulation of such a situation as arose in this case, where the respondent owned both the property on which the excavation was being made and also the adjacent building in part occupied by the appellants.

Thus driven from their original position, the appellants claim to have adopted and maintained, so that the court was under obligations to submit it to the jury on the present trial, the other theory that respondent, independent of the provisions of the Building Code, violated the obligations which as landlord he owed to his tenants, and thereby caused them injury, and that, in my judgment, is the contention on which they must rely. The disposition of this claim involves the solution of the questions: First, whether there was any such violation; and, second, whether the appellants under their pleadings are in a position to avail themselves of it if it existed.

Unquestionably the respondent owed the duty not to disturb the appellants in their possession and enjoyment of the premises which he had leased to them by any such operations as he undertook on the adjoining lot, and for his violation of this obligation he might have been held liable independent of any negligence. *Snow v. Pulitzer*, 142 N. Y. 263, 38 N. E. 1059.

The complaint, however, does not fairly comprehend any theory of recovery so broad as this. At most—and that question will be further considered—it sets forth a cause of action in negligence. It seems to me, however, that thereby the appellants have simply restricted and minimized the liability of respondent without destroying it; and that a cause of action in negligence for the consideration of the jury was established by the evidence. Assuming, as I do, that the respondent under the complaint was not under obligations to so conduct his removal of the building and his excavation that practically under no circumstances the appellants should be disturbed in their occupation as tenants, he at least was under the obligation to protect his tenants from any unnecessary disturbance and eviction, and for that purpose to see to it that the operations on the adjacent lot were conducted with all reasonable care and prudence. Plaintiffs' complaint, as I shall assume for the present, goes no further than to relieve him from liability in trespass for an interference which could not be foreseen and was not negligent, and charges him still with the duty to exercise care and caution to avoid accidents and disturbance to his tenants. *Judd & Co. v. Cushing*, 50 Hun, 181, 2 N. Y. Supp. 836; *Butler v. Cushing*, 46 Hun, 521.

Ordinarily the respondent might reply, as he does attempt to, that he discharged his obligations by securing a competent independent contractor, and that thereby he has been relieved from responsibility for any negligence except of himself which is not shown to have existed. That defense, however, is not available in this case. The respondent's duty to protect his tenants from disturbance in the course of his building operations was of a personal character, and he could not discharge it by delegating those operations even to a competent independent contractor. *Blumenthal v. Prescott*, 70 App. Div. 560, 565, 75 N. Y. Supp. 710; *Sciolaro v. Asch*, 198 N. Y. 77, 91 N. E. 263.

And very likely a second exception to the general rule militates against him, and that is the one that, where the work itself in the course of which damages are caused creates the danger or injury, the ultimate superior or proprietor is liable to persons injured by a failure to properly guard or protect the work, even though the work is intrusted to an independent contractor. *Downey v. Low*, 22 App. Div. 460, 48 N. Y. Supp. 207.

It is scarcely claimed, and cannot be successfully maintained, that there was not evidence which would have permitted a jury to say that the work which resulted in the collapse of the building wherein appellants had their loft was not negligently conducted. Amongst other things, it appeared that the building which collapsed was of brick, four stories high, and nearly 100 feet deep. The adjacent excavation was estimated to be from 8 to 15 feet deep, extending below the foundations, and at the time of the accident this wall was not shored up or supported in any manner.

The remaining question, as already stated, relates to the sufficiency of the complaint, and I think should be decided in favor of the appellants. It sets forth the relation of landlord and tenant; and then with sufficient completeness details the operations and acts which led up to the collapse of the building. While, as before stated, its allegations may have looked primarily to the provisions of the Building Code as a basis for recovery, they are not limited to those provisions, but are broad enough to permit a recovery on the other theory discussed, and it is significant that both in the opinion of the Appellate Division on the prior appeal and on the present trial reference was made to a recovery on some such theory without any very exact definition of just how it should be presented to the jury. It seems to me, therefore, that, although the appellants have shifted their ground somewhat in order to secure a more effective position than they took on the first trial, they have not stepped outside the lines of their complaint and are not subject to defeat on that ground. Neither did anything occur on the last trial which estops them from adopting their present attitude.

The fact that the appellants applied for

an amendment of their complaint so as more broadly to include their present views, and then failed to accept it under the terms imposed by the court, even assuming that the facts disclosing this are before us, does not estop them from taking their present position, and the case in its controlling features is entirely unlike those of *Wieschel v. Spear*, 47 N. Y. Super. Ct. 223, and *Driscoll v. Downer*, 55 Hun, 531, 9 N. Y. Supp. 129, cited by respondent.

For all these reasons I think the judgment must be reversed, and a new trial granted, costs to abide event.

VANN and WERNER, JJ., concur. CULLEN, C. J., WILLARD BARTLETT and CHASE, JJ., concur in result and in the opinion, except that they think that the provisions of the Building Code inure to the benefit of any one holding an estate in the premises.

Judgment reversed, etc.

(199 N. Y. 499)

ALLERTON v. NEW YORK, L. & W.
RY. CO.

(Court of Appeals of New York. Nov. 15, 1910.)

1. PROPERTY (§ 7*)—SCOPE—RIGHTS OF LAND-OWNER.

An owner of land may impose on it any burden, however injurious or destructive, not inconsistent with his general ownership, not violative of public policy, nor injurious to the property rights of others.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 7.*]

2. TRESPASS (§ 24*)—LEGAL AND AUTHORIZED ACTS—NEGLIGENCE.

A railroad corporation is not liable for a trespass on the land of others which is purely consequential on the doing of a legal and authorized act, unless there is proof of such negligence in the doing of the act as to render the corporation responsible on that theory.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 52; Dec. Dig. § 24.*]

3. RAILROADS (§ 39*)—RIGHT OF WAY—DEEDS—CONSTRUCTION—CHANGE OF WATER COURSE.

Defendant railroad company, having filed a plan of its right of way involving a change in a water course, obtained from plaintiff's grantor a deed for all lands in the town taken or in any manner affected by the construction and operation of the railway, or in process of construction the lines shown on the map of location, also all water rights and privileges of the grantor in the waters of the C. river, and all rights in any dams therein with the right to change or remove the same, and to use or deepen the channel; the grantors in addition allowing the railroad company to construct its roadbed on the line located as it deems proper, and to change the bed of the river, as proposed, and to wholly, if it sees fit, cut off the branch running to the grantor's mill, releasing the railroad company from all damages which may result by reason thereof. *Held*, that the deed conveyed the fee of so much of the grantor's land as was actually taken by the railroad company, with such easements in the remain-

ing land as would be affected by the construction of the railroad, and was not a mere conveyance of the land taken, accompanied by a personal covenant of the grantor in the form of a release by him of all further claims for damages, and hence plaintiff, a subsequent grantee of a portion of the remaining land, could not recover damages for injuries thereto, resulting from flood waters turned on it by defendant's change of the channel of the river.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 161-165; Dec. Dig. § 69.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by D. Dudley Allerton against the New York, Lackawanna & Western Railway Company. From a judgment for plaintiff unanimously affirmed by the Appellate Division (132 App. Div. 943, 117 N. Y. Supp. 1128), defendant appeals. Reversed and dismissed.

Halsey Sayles, for appellant. William H. Nichols, for respondent.

WERNER, J. The plaintiff is the owner of about 40 acres of land, bounded in part by the Conhocton river, in the town of Bath, Steuben county. He complains that the defendant has wrongfully and unlawfully changed and diverted the channel of that river from its former natural course, so as to precipitate upon plaintiff's land large quantities of flood water, debris, and earth, which have torn up, washed out, and flooded his surface soil to his very substantial damage. The defendant has met this complaint (1) with a general denial, (2) with the defense that the plaintiff's damage was occasioned by extraordinary and unprecedented floods which occurred from natural causes over which the defendant had no control, and (3) with the allegation that the defendant acquired from the plaintiff's predecessor in title a grant in the nature of a perpetual easement, under which the defendant had the right to so change and deflect the course of the river as to flood the plaintiff's lands, if that should be the necessary result of a careful, skillful, and proper construction of its railroad and the works incident thereto. That is, in substance, the controversy as outlined in the pleadings and characterized by the evidence.

The trial court took the view that the deed under which the defendant seeks to justify its alleged trespass was not broad enough to convey any easement or interest in the 40 acres described in the complaint, and charged the jury, as matter of law, "that any attempted release of damages, or any actual release of damages as stated in that deed, would not be a covenant running with this 40 acres which would be effectual as against a subsequent purchaser." Under this charge, to which an exception was duly taken, the case was submitted to the jury upon the issue whether the injury to the

plaintiff's land had been occasioned by any act of the plaintiff, or whether it was due wholly to the so-called wrongful and unlawful acts of the defendant. The jury gave a verdict for the plaintiff. From the judgment entered upon that verdict an appeal was taken to the Appellate Division, where there was a unanimous affirmance. As we have not been favored with an opinion setting forth the reasons for the affirmance, we must assume that the Appellate Division assented to the correctness of the trial court's construction of the deed referred to, and that view of the case presents the question which this court is asked to decide upon defendant's appeal. It is essential to an understanding of this question that the salient parts of the deed and the circumstances surrounding its execution should be briefly stated.

In 1881 the defendant was preparing to build its railroad through the town of Bath over a route which embraced a portion of the lands owned by one Hewlett, consisting of a mill and water power on the southerly side of the Conhocton river. At this point there was a sweeping curve in the natural channel of the stream which intersected the proposed line of the railroad in two different places, and would apparently have necessitated the building of two bridges unless the stream should be deflected into a new channel confined wholly to the northerly side of the railroad. When the railroad was afterward built in 1882, the channel of the stream was in fact deflected so as to carry it along the northerly side of the railroad. In 1881 Hewlett was also the owner of 40 acres of land on the opposite side of the river and about a quarter of a mile distant from the mill site above referred to. The defendant, for the purpose of securing such rights as were deemed necessary to enable it to construct its railroad according to the plan shown in the map filed, took a deed from Hewlett for a substantial consideration, which conveyed "all that certain piece or parcel of land situate in the town of Bath, in the county of Steuben, and state of New York, bounded and described as follows, to wit: All lands in said town taken or in any manner used or affected by the construction and operation of the railway now being constructed by the party of the second part, the lines of which are shown on a map of the location of said railway now on file in Steuben county, N. Y., together with all my rights to enter on any such land for purpose of repairing or constructing any water rights, also all water rights and privileges owned, held or enjoyed by the party of the first part or either of them in or to the waters of the Conhocton river, and all rights in or to any dams therein, and rights to maintain, change or remove the same, and all rights to use, alter or deepen the channel; and for value received we hereby permit and

consent to and allow said second party to construct their roadbed on the line as located in such manner as they deem proper, and change the bed of the Conhocton river as proposed by second party, and to wholly, if they see fit, cut off the branch running from White's Channel to my mill (party of the first part), and first party hereby for value received release said company from all damages, claim or claims for damages resulting or which may result by reason of such construction, changing of stream or cutting off the branch or removing of dams."

This deed was executed and delivered in August, 1881. In December of the same year Hewlett conveyed to one Bedell the 40 acres of land situate on the northerly side of the Conhocton river, being the side opposite from that on which the defendant's railroad was constructed, and in 1888 Bedell conveyed the same land to the plaintiff. The grievance complained of by the latter is that the change made by the defendant in the channel of the stream has caused the current thereof to wash away the high bank on the southerly side of the stream opposite his land, causing ice jams in the river which have turned the waters upon his land, carrying with them large quantities of debris and foreign matter, all of which have resulted in cutting away his surface soil and otherwise injuring his lands.

The concrete question, presented by the pleadings and proofs, is whether the plaintiff is entitled to recover of the defendant the damages which he has suffered, and the determination of that question depends, as we have stated, upon the correctness of the construction, by the courts below, of the deed from Hewlett to the defendant. A careful study and analysis of the instrument has convinced us that there is no logical middle ground between the two extremes contended for by the respective parties. It is either a conveyance in fee of so much of Hewlett's land as was actually taken for and occupied by the defendant's railroad, with such easements in such remaining land as should be affected by the construction or operation of the railroad; or it is simply a conveyance of the land actually taken, accompanied by the mere personal covenant of the grantor in the form of a release by him of all further claims for damages. We think the latter view, adopted by the courts below, is untenable. Language could hardly be more broad or sweeping than that used by the grantor. He conveyed all his right, title, and interest in "all lands * * * taken or in any manner used or affected by the construction and operation of the railway * * * the lines of which are shown on a map of the location." The map shows that it was a part of the plan to change the course of the river, and the deed expressly gives the grantee the right to "change the bed of the Conhocton river as proposed." This lan-

guage clearly indicates the purpose of the grantor to convey every right and interest in all his lands that might be actually taken for the roadbed or that might be affected by the use of the road as constructed, and this use includes such changes in the bed of the river as were contemplated by the plan set forth on the map referred to. That is the plain import of the deed which, under fixed and familiar rules, is to be construed most strongly against the grantor. *Elphinstone on Interpretation of Deeds*, rule 21, p. 94; *Devlin on Deeds* (2d Ed.) § 848. The context of the deed is quite in harmony with the explicit terms of the railroad law, under which railroad corporations are expressly authorized to acquire easements in lands (*Railroad Law* [Laws 1890, c. 565] § 7, subd. 4), and brings the case at bar fairly within the principle applied in *Van Rensselaer v. Albany & W. S. R. R. Co.*, 62 N. Y. 65, where it was held that an instrument, containing covenants not unlike those in the deed from Hewlett to the defendant, was a grant of the privilege to maintain an embankment which occasioned landslides and deposits of earth upon *Van Rensselaer's* land. In view of the very comprehensive stipulations in the deed from Hewlett to the defendant, it is a circumstance of minor importance that the parcel of 40 acres now owned by the plaintiff happens to be situate on the opposite side of the river at some distance from the place where the defendant's railroad actually runs over the other lands formerly owned by Hewlett. Geographical location might be of controlling influence if the deed did not by its very terms embrace all of the grantor's land and provide for the very contingency which has resulted in the condition from which the plaintiff's damage has arisen. The right given to the defendant, to change the course of the river in accordance with the plan indicated on the map filed, was one which Hewlett was competent to convey. The owner of land may impose upon it any burden, however injurious or destructive, not inconsistent with his general right of

ownership, if such burden is not in violation of public policy, and does not injuriously affect the property rights of others. It was one of the contemplated results of Hewlett's grant to the defendant that new and possibly burdensome conditions were to be created, even if the plan were most properly, carefully, and skillfully executed. That was one of the things for which Hewlett was paid the substantial sum of \$4,000, as is shown by the clause in the deed releasing the defendant from "all damages, claim or claims for damages, resulting or which may result" to any of the grantor's land in the town of Bath, affected by the changing of the stream. That, we think, is the only reasonable and logical deduction to be drawn from Hewlett's deed to the defendant, which is phrased in such comprehensive terms as to clearly convey notice of record to the plaintiff when he subsequently purchased the 40 acres of land described in the complaint.

This view of the case necessitates the reversal of the judgment; and the complaint must also be dismissed, for the plaintiff's action is based wholly upon the theory that the defendant's acts were inherently wrongful and unlawful, and not upon any claim of negligence in the construction or maintenance of the works which the defendant erected. In that regard the case at bar is like the case of *Gordon v. Ellenville & K. R. R. Co.*, 195 N. Y. 187, 88 N. E. 14, where we held that a railroad corporation was not liable for a trespass, purely consequential upon the doing of a legal and authorized act, unless there were allegations and proof of such negligence in the doing of the act as to render the corporation responsible upon that ground.

The judgment should be reversed, and the complaint dismissed, with costs to the defendant in all the courts.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and CHASE, JJ., concur.

Judgment reversed, etc.

(175 Ind. 35)

CHICAGO & E. R. CO. v. LUDDINGTON
et al. (No. 21,541.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. STATUTES (§ 222*)—CONSTRUCTION—GENERAL RULES—INTENTION OF LEGISLATURE—PRESUMPTION.

In construing a statute it will be presumed that the Legislature did not intend to make any change in the common law beyond what it explicitly declares in either express terms or by unmistakable implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.*]

2. STATUTES (§ 158*)—CONSTRUCTION—REPEAL BY IMPLICATION.

A statute will be construed so as to avoid as far as possible any repeal of existing laws by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. § 158.*]

3. STATUTES (§ 222*)—CONSTRUCTION—CONSTRUCTION WITH REFERENCE TO COMMON LAW.

Statutes should be construed with reference to the principles of common law, for it is not to be presumed that the Legislature intended to make any innovation further than is absolutely required, and it is presumed that no innovation is made unless stated in express terms or clearly implied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 301; Dec. Dig. § 222.*]

4. RAILROADS (§ 108*)—ESTABLISHMENT—DAMAGES—STATUTE.

In view of the facts that repeal by implication is not favored, and that the Legislature is presumed not to intend to change the common law, unless such a change is expressly made or clearly implied, Burns' Ann. St. 1908, § 6142, which makes a provision in regard to assessing the benefits or injuries caused by the establishment of drains to easements held by railroads, will be taken not to have abrogated the common-law duty of railroads to maintain their roads so as not to interfere with the use of either existing drains or future drains established by the state.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 333-336; Dec. Dig. § 108.*]

On petition for rehearing. Petition overruled.

For former opinion, see 91 N. E. 939.

Johnston & Bartholomew, U. Z. Wiley, A. H. Jones, W. O. Johnson, A. C. Harris, H. R. Kurrle, J. B. Peterson, and Stuart, Hammond & Simms, for appellant. H. H. Loring, for appellees.

MONKS, J. Appellant concedes in its petition for a rehearing that the duty of railroads as to highway crossings, whether established before or after the railroad was built, was correctly stated in the opinion of the court, but insists that the duty of railroads as to public drains where the railroad crosses said public drain is not now the same as it is at highway crossings, because said common law was changed as to such drain crossings by section 3 of the drainage law of 1907 (Acts 1907, p. 513), being section 6142, Burns' Ann. St. 1908. The part of said section necessary to the determination

of this question requires the drainage commissioners to "assess the benefits or damages, as the case may be, to each separate tract of land to be affected thereby and to easements held by railway or other corporations as well as to cities, towns or other public or private corporations, including any land, rights, easements or water power injuriously or beneficially affected and to report to the court under oath as directed." Substantially the same provision in regard to assessing the "benefits or injury" to easements held by railroads was contained in section 3 of the drainage law of 1881 (Acts 1881, p. 399), being section 4275, Rev. St. 1881, and in section 3 of the drainage law of 1885 (Acts 1885, p. 133), being section 5624, Burns' Ann. St. 1894. There is nothing in said drainage laws of 1881, 1885, and 1907 that in plain and unequivocal terms in any way affects, changes, abrogates, or repeals the common law as to the duty of railroads when the railroad crosses public drains. Does said section 3 (6142), supra, repeal the common law as to said duty of railroads, by implication? Since 1807 the common law has been in force in this state by virtue of legislative enactment. Section 236, Burns' Ann. St. 1908; *Stevenson v. Cloud*, 5 Blackf. 92. It will be presumed that the Legislature does not intend by a statute to make any change in the common law beyond what it explicitly declares either in express terms or by unmistakable implication. The construction of a statute will be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question. *Endlich*, Interp. Stat. § 127; *Black*, Interp. of Laws, 110; 2 *Lewis' Sutherland Stat. Const.* §§ 454, 455; *Maxwell*, Interp. of Laws (2d Ed.) 96; 28 *Am. & Eng. Encyc. of Law* (2d Ed.) 662-665; 8 *Cyc.* 373-376; *State v. Wilson*, 43 N. H. 415, 82 *Am. Dec.* 163; *Chadbourn v. Chadbourn*, 9 *Allen (Mass.)* 173; *State v. Pule*, 12 *Minn.* 164 (*Gil.* 99); *Jennings v. Comm.*, 17 *Pick. (Mass.)* 82; *State v. Norton*, 23 *N. J. Law*, 39; *Goodwin v. Thompson*, 2 *G. Greene (Iowa)* 329; *State v. Dalton*, 134 *Mo. App.* 517, 525-530, 114 *S. W.* 1132, and cases cited.

As said in *Chadbourn v. Chadbourn*, supra, at pages 173, 174, of 9 *Allen (Mass.)*: "Repeals are not to be favored by implication, and courts of law are scrupulously careful not to sanction such repeals, unless the intention of the Legislature to abrogate the previously existing law is clearly manifest. Whenever it is apparent that a different purpose may be attained without essentially impairing the effect of the operative words of the statute, that construction is to be adopted which will leave the common law or an earlier enactment in force."

It was said in *State v. Norton*, supra, at pages 40, 41, of 23 *N. J. Law*: "When the common law and a statute differ, the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
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mon law gives place to the statute, only where the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. 1 Black. Com. 89. It is a rule of exposition that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if the parliament had had that design, it is naturally said that they would have expressed it. Dwarria on Stat. 695."

There is nothing in said section 3 (section 6142), supra, showing any intention on the part of the Legislature to repeal the common law as to the duty of railroads at public drain crossings, but said section can be construed under the authorities above cited so that the common law as to such duty of railroads and said section can both stand. It is evident, therefore, that said section 3 (section 6142), supra, did not repeal the common law as to the duty of railroads at public drain crossings as claimed by appellant.

Petition for rehearing overruled.

(175 Ind. 10)

HINESLEY et al. v. CRUM et al. (No. 21,581.)

(Supreme Court of Indiana. Dec. 14, 1910.)

1. APPEAL AND ERROR (§ 1008*)—QUESTIONS OF FACT—DETERMINATION—CONCLUSIVENESS.

In proceedings to improve a drain, whether the drain established and constructed was on the line of a natural water course and constituted an improvement thereof, and whether the objectors had an easement for the drainage of their land on and over the land of petitioners and others into such water course, were questions of fact for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1008.*]

2. DRAINS (§ 71*)—IMPROVEMENT—ASSESSMENT—COLLATERAL BENEFITS.

Under the rule that property owners may be assessed for collateral and indirect benefits conferred by the improvement of a drain, it does not follow from the fact that the drain improved was constructed along a natural water course, or that objectors had an easement to drain their lands across the lands of petitioners, that objectors were not benefited by, and could not be assessed for the improvement petitioned for.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74; Dec. Dig. § 71.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

In proceedings to improve a drain at the expense of the landowners benefited, whether the lands assessed would be benefited by the improvement and the amount of such benefit were questions of fact to be passed on first by the drainage commissioners, and afterwards by the court on the trial of remonstrances,

and the court's findings, if sustained by evidence, would not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

4. DRAINS (§ 73*)—IMPROVEMENT—FAILURE TO CLEAN.

In the absence of proof that a drain, if cleaned, would be sufficient without improvement, it was no answer to a property owner's assessment for improving the drain that one of the lower proprietors failed to clean his allotment, and that the work of improvement, though done under the guise of new work, was in fact an attempt to compel others to contribute to the expense of removing obstructions from the existing ditch.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

5. DRAINS (§ 53*)—DUTY TO CLEAN—FAULT OF LOWER OWNERS—EFFECT.

The failure of lower proprietors to clean their allotment of a drain excuses a similar default on the part of an upper proprietor, as expressly provided by Burns' Ann. St. 1908, § 6161.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 64; Dec. Dig. § 53.*]

6. DRAINS (§ 78*)—IMPROVEMENT—ASSESSMENT OF BENEFITS.

Where a drainage commissioner testified that the commissioners first determined the cost of constructing the drain in question, and then assessed the lands drained a sufficient amount to cover the cost, and that in his judgment the construction of the drain would increase the market value of the land assessed by the amount of the assessment, an objection that the assessment was made regardless of benefits was unsustainable.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 78.*]

7. DRAINS (§ 36*)—DRAINAGE ASSESSMENT—IRREGULARITY—EFFECT OF JUDGMENT.

Where, on appeal from a drainage assessment, the court on affirming the report of drainage commissioners, as modified and rendering judgment in favor of petitioners, found that the land assessed had been benefited to the amount of the various assessments, the fact that the commissioners ascertained the cost of the improvement before levying the benefit was not ground for reversal.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 36.*]

Appeal from Circuit Court, Clinton County; Joseph Combs, Judge.

Proceedings by Silas W. Crum and others against Daniel Hinesley and others to improve a drain. From a judgment imposing assessments for the improvement, Daniel Hinesley and others appeal. Affirmed.

Guenther & Clark and Joseph Claybaugh, for appellants. Thomas M. Ryan and James V. Kent, for appellees.

MONKS, J. This proceeding was brought by appellees in the court below, under section 19 of the drainage law of 1907 (Laws 1907, c. 252), being section 6174, Burns' Ann. St. 1908, for "the changing, improving and extending of a certain drain already established by tiling and covering the said existing drain and changing the line thereof wherever it might be necessary to make an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

effective drain," etc. It appears from the record that there has been a public drain established and constructed commencing on what is known as the "stoms" land, and extending thence in a northwesterly direction a distance of two miles or over to Middlefork creek. The first proceeding was commenced by appellant Hinesley in 1873, in which a part of said drain was established and constructed. In 1877 he brought another proceeding whereby the drain of 1873 was extended south on the Stoms' land, and was continued a few feet further north. In 1883 a drain was established and constructed along the line of said ditch constructed in 1877, commencing at the south side of the Stoms' land and extending to a highway running east and west, known as the "Middlefork Gravel Road." At a later date a public drain was established commencing at said gravel road at the end of the drain of 1883, and extending in a northwesterly direction to said Middlefork creek. In 1886 appellant Hinesley, on that part of his land adjoining the Stoms' land on the north, together with the owners of the land above him, placed tile in the bottom of said drain, and made a blind or closed drain of it. A short time afterwards the tile was extended north across a north and south highway to a point on the land of one Bosworth. By this proceeding it is proposed to tile and otherwise improve said public drain, as above stated, commencing at the end of the tiling on the Bosworth land, and extending thence down said drain about 7,300 feet, and also to tile a branch or lateral drain for about 1,300 feet. The petition was referred to the drainage commissioners. Afterwards the drainage commissioners filed their report, which was in favor of said improvement. Appellant Hinesley filed his separate remonstrance against said report and against each of the assessments of benefits against each of his tracts of land. Appellants other than Hinesley also filed their separate remonstrance against each of the assessment of benefits against each of their tracts of land. To these remonstrances appellees filed a general denial. A trial by the court resulted in a finding against each of the appellants on each of the grounds of remonstrance. Appellant Hinesley filed a separate motion for a new trial. Appellants other than Hinesley also filed a separate motion for a new trial. These motions for a new trial were overruled, and judgment rendered approving and confirming the assessments of benefits against each of appellants, and establishing the proposed work. The only errors assigned call in question the action of the court in overruling each of said motions for a new trial.

The following causes for a new trial are assigned in each of said motions and are urged as grounds for reversal: "(1) The finding of the court is not sustained by sufficient evidence, (2) The finding of the court

is contrary to law." Appellants contend under said causes for a new trial that the evidence shows that said drain from its commencement on the Stoms' land to the point where it empties into Middlefork creek was a natural water course before it was improved under the drainage laws of the state, and "that, being a natural water course, they have the right to drain their lands into and through the same onto the lands of the petitioners and others, and that such lands are charged with the burden of the water so cast upon them through said natural water course, and that the servient owners are bound to take care of the water so cast upon them, and that, therefore, their lands are not benefited by such improvement, and cannot be assessed therefor." Said appellants further claim under said causes for a new trial that the evidence shows "that they have for more than 20 years before this proceeding was commenced, and during all of said time, thrown the water from their lands through open and tile drains into said drain over and across the lands of the petitioners, and thereby have acquired and gained such right by prescription, and therefore their lands are not subject to any assessment of benefits for the making of said improvement." Whether said drain which was constructed under said drainage proceedings was or was not on the line of a natural water course and an improvement thereof, and whether or not appellants had an easement for the drainage of their lands on and over the lands of the petitioners and others as claimed by appellants, were questions of fact to be determined by the court on the trial of the case. For aught that appears from the record, the trial court found both of these questions against the contentions of appellants. We cannot say from the evidence, as against the finding of the court against appellants, either that there was a natural water course (New Jersey, etc., *R. Co. v. Tutt*, 168 Ind. 205, 211, 212, 80 N. E. 420), or that appellants had such an easement (*Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. Rep. 568; *Clay v. Pittsburgh*, etc., *R. Co.*, 164 Ind. 439, 445, 446, 73 N. E. 904) by prescription as claimed by them. If a natural water course existed as claimed by appellants, or if each of them has an easement to drain his lands across the lands of the petitioners as claimed, it does not follow as a matter of law that their lands are not benefited by and cannot be assessed for the improvement petitioned for in this case. It is not necessary that the benefits be direct and immediate to justify an assessment. Not only may collateral or indirect benefits be considered, but future possibilities, if any, may also be considered. *Soady v. Wilson*, 3 Ad. & El. 249, 263, 264; 4 Nev. & M. 777, 1 H. & W. 256, 30 Eng. Com. L. Rep. 130, 136, 137. This court has pointed out some things that may be considered in determin-

ing what lands are benefited and the amount thereof in *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700. See, also, *Oliver v. Monona County*, 117 Iowa, 43, 55, 56, 90 N. W. 510. Whether the lands of appellants would be benefited by said improvement and the amounts of such benefits were questions of fact first passed upon by the drainage commissioners, and afterwards by the court on the trial of the remonstrances of appellants, and, as there was evidence to sustain said findings of the court, we cannot under the well-settled rule disturb them.

Appellants also complain that appellee Crum has failed to clean his allotment of the open ditch as it now exists, and that, under the guise of a new work, he cannot compel others to contribute to the expense of removing such obstruction when the existing ditch, if properly cleaned and repaired, would effectually drain his lands and dispense with the necessity of the proposed improvement, citing *Beery v. Driver*, 167 Ind. 127, 132, 76 N. E. 967. But this case does not apply because it nowhere appears that said drain, even if cleaned, would be sufficient; indeed, the evidence would warrant a finding to the contrary. Moreover, it appears that the lower owners have failed to clean their allotments. This excuses appellee Crum. Section 6161, Burns' Ann. St. 1908.

Appellants contend that, as the drainage commissioners first determined the cost of the proposed drain and apportioned the same to the lands they believed would be affected thereby regardless of the benefits sustained by said lands, the judgment of the court below must be reversed. This, if true, furnished no ground for the reversal of the judgment. But, if it did, the evidence does not show that the drainage commissioners assessed the lands regardless of benefits. Mr. Sharp, one of the drainage commissioners, testified on cross-examination that the drainage commissioners first determined what it would cost to construct the drain, and then assessed the lands drained a sufficient amount to cover the cost. The same witness testified, however, that in his judgment the construction of the drain would increase the market value of the lands assessed the amount of the assessment. Other witnesses testified that appellants' real estate would be benefited by the improvement to the amount of the assessment and the lower court by affirming the report of the commissioners, as modified, and, entering judgment in favor of the petitioners (appellees here), found that said lands would be benefited to the amount of the various assessments. This being true, the irregularity, if any, committed by the drainage commission in ascertaining the cost of said improvement before levying the benefits, is not cause for reversal.

Finding no available error, the judgment is affirmed.

(175 Ind. 227)

O'TOOLE et al. v. TUDOR et al. (No. 21,577.)¹

(Supreme Court of Indiana. Dec. 13, 1910.)

1. APPEAL AND ERROR (§ 1036*)—REVIEW—HARMLESS ERROR.

Where, on an appeal from an order of the board of county commissioners granting a petition for the improvement of drains, it appeared that certain parties who should have been made defendants were not joined, and the circuit court without remanding the action, gave them notice and brought them in, and the parties thus joined did not complain, the persons remonstrating were not prejudiced, regardless of whether this action was erroneous, as they did not base their remonstrance on lack of parties, and it would in no way benefit them to have the case remanded.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1036.*]

2. APPEAL AND ERROR (§ 971*)—DISCRETION OF TRIAL COURT—OPINION—EVIDENCE—COMPETENCY OF WITNESS.

The competency of witnesses to express an opinion as to the efficacy of putting tiles in open drains is a matter largely within the discretion of the trial court, and such a discretion will not be presumed to have been abused, regardless of whether the witnesses are called experts or nonexperts, where they testify from personal knowledge and experience.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852, 3853; Dec. Dig. § 971.*]

3. JUDGMENT (§ 267*)—MOTION IN ARREST—VERIFICATION.

The verification of a motion in arrest gives it no added efficacy.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 267.*]

4. JUDGMENT (§ 266*)—MOTION IN ARREST—GROUNDS.

A motion in arrest must be based on matters appearing in the record, or which should and do not appear.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.*]

5. DRAINS (§ 50*)—ESTABLISHMENT—PETITION TO CHANGE.

Burns' Ann. St. 1908, § 6174, provides that application for the change, improvement, or extension of an existing public drain should be made to the circuit court or superior court or board of county commissioners, as the case may be, etc. Held, that such a proceeding should be brought in the tribunal which originally ordered the ditch established.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 50.*]

6. DRAINS (§ 50*)—PETITION TO CHANGE—JURISDICTIONAL AVEEMENTS.

The failure of petition for improvement of a drain, addressed to the board of county commissioners and made under Burns' Ann. St. 1908, § 6174, to aver that the tribunal to which it is addressed was the one which originally established the drain, is not a jurisdictional defect, and such petition will not be held insufficient when challenged for the first time by motion in arrest or in the Supreme Court.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 50.*]

7. DRAINS (§ 38*)—REMONSTRANCE—TAXATION OF COSTS—BRINGING IN NEW PARTIES.

Where those making a remonstrance against the improvement of a drain, etc., before the board of commissioners, did not base it upon nonjoinder of necessary parties and on losing, appealed to the circuit court, and on the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied.

in the circuit court the nonjoinder appeared, and the court remanded the report to the board for an amendment, and brought in the other parties on notice, assessing the costs of notice against the petitioners, costs will not be allowed the remonstrators up to the time of amendment.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 38.*]

8. DRAINS (§ 38*)—REMONSTRANCE—ATTORNEY'S FEES FOR PETITIONS.

Where a remonstrance denied the public utility of a proposed drain, the allowance of attorney's fees to those of the petitioners for all work done in that litigation held proper under the direct provisions of Burns' Ann. St. 1908, § 6144.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 38.*]

Appeal from Circuit Court, Howard County; L. B. Nash, Special Judge.

Appeal by Thomas J. O'Toole and others from a judgment of the circuit court affirming a judgment by the Board of Commissioners granting a petition by Steven B. Tudor and others to improve a certain drain over the remonstrance of appellants. Affirmed.

Harness, Moon & Voorhis, for appellants. Overton & Joyce, John B. Joyce, and Blackledge, Wolf & Barnes, for appellees.

MONTGOMERY, J. Appellees petitioned the board of commissioners of the county of Howard for the tiling of a certain open drain known as the "William G. Cook ditch" and its tributaries. The matter was duly referred to the drainage commissioners, who reported in favor of the proposed work, and provided for the widening and deepening of the ditch into which the tile was to empty for a distance of 8,800 feet from the outlet. The owners of lands through which the enlarged outlet passed were not named in the report, and no assessment of benefits or damages was made against such lands. Appellants appeared before the board in due time, and filed remonstrances against the proposed work, alleging (1) that their lands would not be benefited to the extent of the assessments made; (2) that the total cost would exceed the aggregate benefits; (3) that the work would not be of public utility, and (4) would not be sufficient to drain the lands to be affected. These issues were tried before the board and decided in favor of appellees, and the work ordered constructed. Appellants appealed to the circuit court, where upon retrial it was developed for the first time that the owners of lands through which the outlet to be enlarged would pass had not been made parties to the proceeding. Appellants thereupon moved that the cause be remanded to the board of commissioners, but the court overruled this motion, continued the hearing until September 15, 1909, ordered said landowners by name to be made parties, directed the drainage commissioners to meet at a designated time and

place and amend their report so as to include said parties and their lands to be affected, and required the petitioners to cause 10 days' notice of the hearing of such amended report to be given to each of the new parties, all of which was accordingly done. The new parties named then appeared in the circuit court and filed a waiver of service of such notice, and of all right to remonstrate against the drain, and consented that the same might be ordered constructed as proposed in the report of the drainage commissioners. The court thereupon made his finding against the remonstrators, and in favor of the petitioners for the construction of the work as proposed, and approving the assessments as made in the report of the drainage commissioners. Motions for a new trial and in arrest of judgment were overruled.

It is alleged that appellees' petition does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling appellants' motion to remand, for a new trial, in arrest, and to modify the judgment. It is provided that on the transfer of a ditch proceeding to the circuit court on appeal that court "shall have the power to hear and determine such matters as if it originated in such court." This has been construed to apply to such issues only as were raised before the board. The board of commissioners had jurisdiction over the general subject of tiling certain drains affecting lands wholly within the county. The defect in this proceeding was a lack of jurisdiction over the persons of certain interested parties. Such a defect the court had inherent power to cure, provided its action did not injuriously affect or abridge the rights of the parties concerned. The action of the court below in causing the proceedings to be amended and other persons to be brought in requisite to make its judgment binding and conclusive upon all lands and parties affected was not erroneous under the circumstances shown. The only parties in position to complain waived all rights, and voluntarily consented to the construction of the proposed work. The remanding of the cause to the board of commissioners could not have benefited appellants, and the overruling of their motion to remand was as to them plainly harmless, if it were conceded to be erroneous.

In their motion for a new trial appellants complained of the admission of testimony by certain witnesses as to the adequacy of the tile to carry the water from the lands to be drained. The only objection made to the introduction of this testimony was that the witnesses were not shown to be competent to express an opinion. Each of these witnesses had previously testified to a personal knowledge of and experience with drains which were formerly open, and later filled with tile 22 inches and under in size, and

as to the number of acres thereby drained. It is immaterial whether these witnesses are styled as experts or nonexperts. Their competency to express an opinion was largely in the discretion of the trial court, and there is no well-defined standard by which to measure and determine the qualifications to give opinion evidence. We are safe in holding that the court did not abuse his discretion in overruling the objection made. *Romona, etc., Stone Co. v. Shields*, 173 Ind. 68, 88 N. E. 595; *City of Ft. Wayne v. Coombs et al.*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82. The petition for the proposed improvement alleged that the petitioners were owners of real estate in Howard county affected and drained by the system of drainage heretofore constructed under the laws of the state, and known as the "William G. Cook and Amos W. Butler ditches" and all their tributaries, and that the Butler ditch is a tributary of the Cook ditch; that in the opinion of the petitioners a specified part of said drainage system in the county can be more economically kept in repair and be rendered more efficient by tiling and covering the same, and the public health be thereby improved and certain public highways benefited; that the costs, damages, and expenses will be less than the benefits resulting to the owners of land likely to be benefited thereby; that the proposed improvement will affect certain lands in the county, particularly described; that the petition is filed under the laws of the state providing for the tiling, change, improvement, or extension of any work of drainage constructed under the laws, or any former laws of the state; and that the drainage sought to be improved was originally constructed under drainage laws of the state.

Appellants filed a verified motion for an arrest of judgment because (1) it did not appear from the petition that either of the ditches to be improved had been originally established by the board of commissioners; (2) the Amos W. Butler ditch was established by the Howard circuit court; (3) the report of the drainage commissioners provides for the construction of open ditch work not embraced in the petition; and (4) the owners of land through which such open work extends were not notified or brought into court until after the trial on appeal in the circuit court.

The verification of the motion in arrest gave it no additional efficacy. A motion in arrest of judgment must be founded on matters apparent upon the face of the record, or which should, but do not, so appear. The second, third, and fourth specifications of the appellants' motion in arrest present no question for decision. The only question is, Must the petition for tiling affirmatively allege that the drain to be tiled was originally established by the board of commissioners? Boards of commissioners are given jurisdiction over the construction of ditches, which,

with the lands, highways, easements, public grounds, cities, towns, or township to be affected thereby, are wholly within one county. Section 6161, Burns' Ann. St. 1908. An application for the change, improvement, or extension of an existing public ditch should be made to the circuit or superior court, or board of commissioners, as the case may be, of the county in which the proceedings were had for the construction of such work. Section 6174, Burns' Ann. St. 1908. This section has been construed to mean that a proceeding to tile a drain should be brought in the tribunal or court which originally ordered the ditch established. *Rinker v. Hahn*, 92 N. E. 729. Members of boards of county commissioners are usually not lawyers, and strict rules of pleading are not ordinarily required in proceedings before these tribunals. The statute governing this proceeding requires that "the form and contents of such petition and other provision in relation thereto shall, so far as applicable, be the same as provided in section two of this act for the original petition for the construction of the work." Section 6174, Burns' Ann. St. 1908. We have already shown that all the usual allegations of ditch petitions are contained in appellees' petition, and, further, that the drains and lands to be affected by the proposed work are in Howard county. Proceedings for the establishment of public highways are in a general way similar to those for the establishment of public drains by boards of commissioners. It has been expressly held that a petition to vacate a public highway need not allege the jurisdictional facts that it is signed by 12 freeholders of the county, 6 of whom reside in the immediate neighborhood of the highway proposed to be vacated, although such facts must be proved. *Aetna Life Ins. Co. v. Jones*, 178 Ind. 149, 89 N. E. 871. It is provided that a board of commissioners shall not act upon a petition to establish, vacate, or change a public highway, without first requiring a cost bond, if an adverse report had been previously returned upon the same matter. In reply to a contention similar to appellants' that a cost bond was jurisdictional in such a case, and the proceeding void without it, this court said: "Boards of commissioners are given a general jurisdiction over the subject of laying out and establishing highways, and are authorized to take jurisdiction of a particular case upon the filing of a prescribed petition after the giving of specified notice. A board, doubtless, might do so, but is not required to take judicial notice that the route described in a pending petition is the same as that contained in a former proceeding, and found not to be of public utility. The identity of the two routes should ordinarily be brought forward by some interested party to stay the pending proceeding, since the fact will not be apparent in the particular case, but must be shown by evidence dehors the record. If a party de-

sires to challenge the jurisdiction of a judicial tribunal over his person, or over the subject-matter of a particular case, on grounds not apparent from the face of the record, he must do so at the earliest opportunity or his objection will be regarded as waived." *McKaiz v. Jordan*, 172 Ind. 84, 87 N. E. 974.

In the case before us no fact affirmatively appears from the record indicating lack of jurisdiction in the board over the proceeding. It is our conclusion that a declaration in the petition that the ditch to be improved was established and constructed by order of the board is not indispensable, and a petition will not be held insufficient for lack of such averment when challenged for the first time in this court or by motion in arrest of judgment. It follows that the court did not err in overruling appellants' motion in arrest.

Appellants moved the court to adjudge and tax costs against appellees prior to the time of referring the report to the drainage commissioners for amendment, and this motion was denied. This ruling was proper, since appellants had made no objection on the ground of defect of parties or lack of jurisdiction before the board, and did not appeal and succeed on such an issue in the circuit court. The court had required the new parties to be notified by the petitioners at their own expense, and this was all the remonstrators could fairly demand. It appeared from the evidence that the services employed in the preparation of papers and other work of a general character in connection with these proceedings and which had been done chiefly by the township trustee were of the value of \$200, and the services of attorneys for petitioners in litigating the issues formed by the remonstrances were of the value of \$1,000. The court denied any compensation for services performed by the township trustee, but allowed \$1,000 for the services of appellees' attorneys. Appellants moved the court to reduce the allowance for attorney's fees to the amount which would be reasonable and proper for the work done in the cause independently of litigation, which motion was overruled. The remonstrances denied the public utility of the proposed work and its capacity to drain the lands affected, as well as the amount of benefits assessed against particular tracts of land. It is manifest, therefore, that the foundation for the petition was assailed and fought throughout the entire proceeding. The statute provides that the commissioner or other person charged with the execution of the work shall pay the costs not otherwise adjudged, and incidental expenses, "including reasonable attorney's fees of the petitioner in the preparation and presentation of the petition, and the prosecution of the same and for such services as may be necessary in any stage of the proceedings, not exceeding four

per cent. of the assessed benefits as approved by the court in all drains in which the assessed benefits are greater than one thousand dollars (\$1,000.00)." Section 6144, Burns' Ann. St. 1908. Appellants' counsel contend that this statute should be held to include only fees for the work done by an attorney which is in substance done in behalf of all parties interested. Reference is made to the statutory provision for attorney's fees in actions for partition. That statute is materially different from this. Appellants' argument should be addressed to the Legislature rather than to the courts. This enactment has been amended and broadened so as to authorize the allowance of attorney's fees for necessary legal services at any stage of the proceedings, and it seems clear to us that the court did not err in allowing fees for litigation designed not only to modify assessments, but to defeat and overthrow the entire petition and contemplated improvement.

No harmful error is made to appear, and the judgment is accordingly affirmed.

(175 Ind. 3)

F. W. COOK INV. CO. v. EVANSVILLE TERMINAL RY. (No. 21,771.)

(Supreme Court of Indiana. Dec. 14, 1910.)

1. STREET RAILROADS (§ 3*)—INCORPORATION—NATURE—POWERS.

A corporation empowered to construct, equip, and operate a street and interurban railway was none the less a street and interurban railway corporation, because it was also authorized to promote plans for the creation and distribution of electricity and other heat, light, and power.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 3.*]

2. EMINENT DOMAIN (§ 10*)—EXERCISE OF RIGHT—AUTHORITY.

A corporation formed under the Voluntary Associations Act of March 9, 1901 (Acts 1901, c. 127), providing for the organization of corporations, did not derive any authority from such act to condemn real estate for railroad or other purposes, nor did such right exist without express statutory authority.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 10.*]

3. EMINENT DOMAIN (§ 10*)—RIGHT TO CONDEMN LAND—STREET RAILROADS.

Burns' Ann. St. 1908, § 5630 et seq., providing for the organization of street railroads, as amended, did not confer on such corporations authority to condemn land for railroad purposes.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 10.*]

4. EMINENT DOMAIN (§ 13*)—EXERCISE OF RIGHT—CORPORATIONS.

In determining whether a corporation is entitled to exercise the right of eminent domain, the charter statute, under which it was organized, or whether it was organized as a private, or quasi public corporation, is not material; the exclusive test being whether the purpose or proposed use was a public one.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 51-54; Dec. Dig. § 13.*]

5. EMINENT DOMAIN (§ 10*)—RIGHT TO CONDEMN LAND—STREET RAILROAD COMPANIES.

A corporation organized under the Voluntary Associations Act of March 9, 1901 (Acts 1901, c. 127), as amended by Act March 7, 1903 (Acts 1903, c. 93), providing for the organization of corporations generally, authorized to promote, and operate a street and interurban railroad, and to promote plants for the creation and distribution of electric and other heat, light, and power, was authorized to condemn land required for railroad purposes by Acts 1901, c. 207, providing that any street railroad company heretofore or hereafter organized under the laws of the state of Indiana, desiring to construct or acquire any street railroad, or interurban street railroad, may condemn real estate, etc.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 10.*]

Jordan, J., dissenting.

Appeal from Circuit Court, Vanderburgh County; A. Gilchrist, Judge.

Condemnation proceedings by the Evansville Terminal Railway against the F. W. Cook Investment Company. Judgment for plaintiff, and defendant appeals. Affirmed.

George A. Cunningham, for appellant. Robinson & Stilwell and Funkhouser & Funkhouser, for appellee.

HADLEY, J. Action by appellee to condemn real estate for use in the construction of its street and interurban railroad. Appellee was duly organized under the Voluntary Associations Act of March 9, 1901 (Acts 1901, c. 127), and the amendment or supplement thereto approved March 7, 1903 (Acts 1903, c. 93).

The single question involved in this appeal is this: Is appellee a corporation authorized by law to exercise the right of eminent domain?

The first section of the act of March 9, 1901 (section 4286, Burns' Ann. St. 1903), which the above act of March 7, 1903, amends, provides that, "any number of persons, not less than three, may voluntarily associate themselves by written articles of association, signed and acknowledged by each person who may be a member at the time of organization, specifying: * * * Then stating what the articles of association shall contain. The second section of the act provides "that such associations may be formed for one only of the following purposes." This is followed by a list of more than 30 purposes for which such association may be formed. The twenty-eighth section provides that from the time the certificate is issued by the Secretary of State and the articles recorded in the recorder's office, such association "shall be deemed and held to be a corporation, and shall have and possess all the rights, powers, and privileges given to corporations by common law," etc.

Prior to 1901 there had been many acts, original and amendatory, regulating the organization of voluntary associations, and it

is clear that, in framing the act of March 9, 1901, the Legislature attempted and intended to revise, consolidate, abridge, and perfect the legislation on that subject. By the act of March 9th, as many as 12 distinct previous acts on the subject, and all other laws inconsistent therewith, were specially repealed. But it is just as plain that the legislature next following attempted, and intended, to extend the privileges of the voluntary associations act to other and additional industries and activities.

The title and first section of the supplemental act of 1903 is as follows:

"An act authorizing the formation of corporations under the provisions of 'An act concerning the organization and perpetuity of voluntary associations, repealing all laws in conflict therewith, legalizing the organization of certain associations organized under former laws, and declaring an emergency,' approved March 9, 1901, for certain purposes not therein named, and declaring an emergency.

"Section 1. Be it enacted by the General Assembly of the state of Indiana, That any number of persons, not less than three, may voluntarily associate themselves into a corporation in the manner set forth in an act entitled: 'An act concerning the organization and perpetuity of voluntary associations, repealing all laws in conflict therewith, legalizing the organization of certain associations organized under former laws, and declaring an emergency,' approved March 9, 1901, with all the rights and privileges granted by said act, and subject to all the provisions thereof to promote, finance, construct, equip, rent and operate, in the state of Indiana or elsewhere, street and interurban railroads, and plants for the creation and distribution of electric and other heat, light and power, and in connection therewith to take, own, hold, negotiate, sell or otherwise dispose of and deal in stocks and securities of other companies, and to do all other things needful or connected therewith."

We are advised by the above title that the purpose of the act was to authorize the formation of corporations under the act of 1901, "for certain purposes not named" in the latter act. In the body of the act it is made clear that among the certain purposes not named in the former act, and to which the supplemental act relates, is to authorize the formation of corporations "to promote, finance, construct, equip, rent, and operate in the state of Indiana, street and interurban railroads * * * and to do all other things needful or connected therewith."

Neither the act of 1901, nor that of 1903, confers any right upon any corporation organized thereunder to condemn real estate, and if such power exists, it must be found in some other statute; for it cannot be implied. *Gas Company v. Harless*, 131 Ind. 446,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

29 N. E. 1062, 15 L. R. A. 505; 2 Elliott R. R. § 957.

When the persons organizing appellee company had complied with the provisions of the above statutes, the associations which they had formed became, by the express terms of the statute, a corporation, and having decided to engage in the promotion, construction, equipment, and operation of a street and interurban railroad, by the express provisions of the act of 1901, the corporation became a street and interurban railroad corporation. Because appellee announces in its articles of association its further purpose, "to promote plants for the creation and distribution of electric and other heat, light, and power," will make no difference. If it engages in the latter—that is, if it pursues the business of creating and distributing light and heat in respect to the latter—it would also be a "light and heat" company.

It is held in *County of Randolph v. Post*, 93 U. S. 502, 23 L. Ed. 957, that a corporation with authority to "construct, complete, and operate a railroad" is not the less a railroad company because it is also a coal, or a mining, or a furnace, or a manufacturing company. *Seymour v. City of Tacoma*, 6 Wash. 147, 32 Pac. 1077.

As before stated, a corporation formed under the voluntary associations act derives no authority from that act to condemn real estate for railroad or any other purpose, and no such right exists without express statutory authority. Neither did the act of 1861, authorizing the organization of street railroads, nor any of its many subsequent amendments, convey any such right. Section 5630 et seq., Burns' Ann. St. 1908. So we must, of necessity, look to some other statute, or deny the right altogether.

And right here it is well to note that, in considering the right to eminent domain, the charter statute, or whether the corporation was organized as a private, or quasi public corporation, is not important. The prime and exclusive test may be said to be: Is the purpose, or proposed use, a public one? If the use is calculated to promote the public welfare, the law will not stop to inquire whether the applicant is organized under this or that statute authorizing such organization. The Legislature has been generous, if not politic, in providing those desiring to form a corporation for the transaction of almost every kind of business a choice of statute under which to organize. For instance: Corporations to buy and sell merchandise; to carry on a transit and transfer business; to buy and sell real estate; to construct buildings; to create and furnish light, heat, and power; to sink and operate oil and gas wells for the manufacture and distribution of artificial gas, and doubtless many others may be organized, either under the Manufacturing and Mining Act (section 5062 et seq., Burns' Ann. St. 1908) or under the Voluntary Associations

Act (section 4283 et seq., Burns' Ann. St. 1908). Corporations may also be formed for the maintenance of cemeteries under the act of 1879 (section 4433 et seq., Burns' Ann. St. 1908), or under the voluntary associations act, *supra*. No general power to exercise the right of eminent domain is given by any provision of the manufacturing and mining act. Companies organized thereunder to do a business of a quasi public character, such as water works, distribution of oil, gas, heat, light, power, etc., are given the right to condemn by special provision. It is the business, and not the statute, of organization, that determines the right of eminent domain.

Street and interurban railroad companies have the right to condemn, and the language of the statute conferring the right is significant. It was passed in 1901 (Acts 1901, p. 461, Burns' Ann. St. 1908, § 5675). At the time of its passage there had been upon the statute books an elaborate statute, since 1861 (Acts 1861, p. 75), for the organization of street railroad companies, but the companies that might have the superior right were not confined to those organized under the street railroad law of 1861. The language of the new act of 1901 is in these words: "That any street railroad company heretofore, or hereafter organized under the laws of the state of Indiana," and desiring to construct or acquire any street railroad, or interurban street railroad, may condemn real estate.

The legislative sense is made even plainer in other acts relating to the same subject. In conferring the power upon oil companies, the language of the act is, "that all companies, corporations, and voluntary associations now organized under the laws of the state of Indiana, or which may hereafter be organized thereunder," shall have the right, etc. Acts 1897, p. 263 (section 5159, Burns' Ann. St. 1908).

With respect to gas companies enjoying the right, a late statute, clearly recognizing that such a corporation may exist under more than one law, disposes of the subject thus: "That whenever any corporation, or voluntary association organized under the laws of the state of Indiana, or which may hereafter be incorporated thereunder for manufacturing and distributing gas," etc. Acts 1907, p. 840 (section 5144, Burns' Ann. St. 1908).

It, therefore, seems only material that an applicant for the right under discussion shall be able to show that it is a duly organized corporation, authorized by some law of Indiana to exist and to do the things declared in its articles.

We have heretofore seen that appellee, being duly organized as a corporation, under the voluntary associations act of 1901, as supplemented by the act of 1903, is by the express terms of the statute a corporation, and being organized "to promote, construct, and operate" a street and interurban railroad is, therefore, a street and interurban railroad

company, and within the terms of section 5675, supra. "Railroad companies," says Judge Elliott, "are companies, or associations, organized for the purpose of constructing, maintaining, and operating railroads." 1 Elliott R. R. § 1.

But while there seems no doubt of appellee's right to seek the voluntary associations act of 1903 for organization purposes, it is very clear that having adopted as its business and purpose of organization the promotion, construction, equipment, and operation of a street and interurban railroad—a business specially regulated by another and different statute—it thereby assumes and subjects itself to all the additional duties and responsibilities imposed by the street and interurban statutes as fully, and in all respects, as if its organization had been under the latter statutes. Such an organization can find no refuge in the voluntary associations act from a burden, or delinquency, under the street and interurban acts.

Judgment affirmed.

JORDAN, J., dissenting.

(175 Ind. 21)

EVANSVILLE, S. & N. RY. CO. v. EVANSVILLE TERMINAL RY. (No. 21,781.)

(Supreme Court of Indiana. Dec. 16, 1910.)

1. EMINENT DOMAIN (§ 262*)—APPEAL—FINDINGS BY TRIAL COURT—REVIEW.

In condemnation proceedings whether petitioner had made a bona fide effort to agree with defendant was a jurisdictional question of fact, the determination of which will be accepted on appeal, where there is evidence to support it.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 685; Dec. Dig. § 262.*]

2. EMINENT DOMAIN (§ 205*)—CONDEMNATION PROCEEDINGS—EFFORT TO AGREE—FINDINGS—EVIDENCE.

Evidence held to sustain a finding by the trial judge that petitioner had made a bona fide effort to agree with defendant prior to the institution of condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 205.*]

Appeal from Circuit Court, Warrick County; Roscoe Kelper, Judge.

Condemnation proceedings by Evansville, Suburban & Newburg Railway Company against Evansville Terminal Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

George A. Cunningham, Iglehart & Taylor, Hatfield & Heminway, and Geo. D. Hellman, for appellant. Robinson & Stilwell and Funkhouser & Funkhouser, for appellee.

HADLEY, J. This was a proceeding by appellee to condemn a crossing over appellant's

railroad for the use of appellee in the construction and operation of a railroad.

Appellee is a corporation, organized under the voluntary associations act of March 9, 1901 (Acts 1901, c. 127), and supplement thereto of March 7, 1903. Acts 1903, p. 180 (section 4286, Burns' Ann. St. 1903).

The main question presented challenges the right of appellee, as a creature of the voluntary associations act, to condemn real estate. This identical question was considered and decided in favor of appellee in the *F. W. Cook Investment Company v. Evansville Terminal Railway* (No. 21,771, decided December 14, 1910) 93 N. E. 279, and upon the authority of that case the like question presented here must be determined against appellant.

Appellant also insists that the evidence does not show that appellee made a bona fide effort to agree with appellant, with respect to a purchase of said right of crossing, before commencing this proceeding. Whether the effort made was sufficient, or in good faith, was a jurisdictional question of fact for the presiding judge, and his affirmative finding on this point must be accepted by this court as controlling under the state of the evidence appearing in the bill of exceptions. There is but little conflict in the evidence upon the point.

It is, in substance, shown by both parties that Mr. Funkhouser, a duly authorized representative of appellee, on the afternoon of September 14, 1908, called upon Mr. Mulhausen, the general superintendent of appellant, at the company's office in Evansville, and made known to him that the object of the call was to ascertain if their respective companies could come to an agreement with respect to the crossing of appellant's railroad, with appellee's railroad, then in process of construction. A general conversation was held on the subject, but Mulhausen expressed himself as unprepared to submit a proposition, for the reason that he did not know just how the crossing would affect his company's road, and particularly as to the angle at which it was proposed to effect the crossing. Mulhausen inquired for a blue print showing the particulars of the crossing, and Funkhouser not having one proposed to procure one and have it at his office next morning at 9 o'clock, and the parties separated with the agreement that Mulhausen would call next morning at Funkhouser's office, examine the blue prints, and submit a proposition. And to avoid his waiting, it was agreed that when Funkhouser arrived with the blue print, he should call and give Mulhausen notice, by telephone, of his arrival. Funkhouser reached his office next morning about 9 o'clock with the blue prints and at once called for Mulhausen over the telephone, and was answered that he had gone out, and that Funkhouser should call another phone,

which being called, information was given that he was not there. Funkhouser then again called Mulhausen's office, and left word for him when he came in to call the former at his office. Funkhouser called Mulhausen at his office as many as three more times, without results, and about 11 o'clock of the same morning a boy delivered to Funkhouser, at his office, the following letter: "Evansville, Ind., Sept. 15, 1908. Mr. Albert Funkhouser, City—Dear Sir: Resuming the conversation had between you and me late yesterday afternoon, you stated to me that the Evansville Terminal Railway Company want to cross the Evansville, Suburban & Newburg Railroad, but did not state the exact point of crossing, and you did not have any blue print or other proper description of the proposed crossing so that I would be able to form any opinion concerning it. I thereupon asked you if you had any blue print of the proposed crossing. You said 'No,' but you would have such blue print by 9 o'clock this morning, and I asked if you would furnish me a copy of such blue prints, and you said no, you would not, but that I could come to your office and see it if I wanted to. I have no desire to place any unnecessary obstruction to the crossing of our railroad by any other railroad company authorized by law to cross, and I am perfectly willing to fairly consider and discuss with you, or any representative of your company, any crossing which you propose to make, but I submit that you should furnish to me for the use of my company a proper description of the manner of crossing, including a blue print. In your statement to me you gave no such description. Until I am able to see what your company proposes to do, you cannot expect from me any further answer. Yours truly [Signed] Gus Mulhausen, Mgr."

Mulhausen admitted, on cross-examination, that he promised Funkhouser to call at the latter's office about 9 o'clock a. m. and examine the blue print of the proposed crossing, and that he neither called, nor sent by telephone or otherwise, any explanation, and instead went to see his attorney and spent the forenoon with him up to the time the foregoing letter was prepared and sent by boy to Funkhouser. This proceeding was begun on the evening of the same day the letter was received.

It is true that events followed each other rapidly after the matter of agreement was taken up, but the conduct of Mr. Mulhausen, in failing to keep his promise to call and examine the blue prints, or send any explanation of his conduct, and the spirit of the letter he subsequently sent to Funkhouser, considered together, may reasonably be construed as indicating a feeling of hostility to any further discussion of the crossing question, and we think the court was warranted in arriving at that conclusion.

Judgment affirmed.

(175 Ind. 707)

REITZ et al. v. EVANSVILLE TERMINAL RY. (No. 21,772.)

(Supreme Court of Indiana. Dec. 15, 1910.)

Appeal from Superior Court, Vanderburgh County; A. Gilchrist, Judge.

Condemnation proceedings by Evansville Terminal Railway against Joseph F. Reitz and others. Judgment for plaintiff, and defendants appeal. Affirmed.

George A. Cunningham, for appellants. Robinson & Stilwell and Funkhouser & Funkhouser, for appellee.

HADLEY, J. Action by appellee to condemn real estate of appellants, for use in the construction of a street and interurban railroad.

The single question arising in this appeal was fully considered and decided in *F. W. Cook Investment Company v. Evansville Terminal Railway* (No. 21,771, decided December 14, 1910) 93 N. E. 279, and upon the authority of that case, this appeal cannot be sustained.

NESS v. BOARD OF COM'RS OF MARSHALL COUNTY. (No. 7,481.)¹

(Appellate Court of Indiana, Division No. 1. Dec. 14, 1910.)

1. COUNTIES (§ 118*)—CONTRACTS—BIDS.

Under Burns' Ann. St. 1908, § 5897, forbidding the board of county commissioners to entertain any bid for the building or repairing of the courthouse unless the bid is accompanied by an affidavit of the bidder, etc., a bidder for the repairs of the courthouse who failed to make the affidavit cannot complain because another bid complying with the statute was accepted, though the commissioners gave a wrong reason for their action.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

2. COUNTIES (§ 118*)—CONTRACTS—BIDS.

Where the specifications for the repairs of the courthouse of a county and the instructions to bidders and the blank forms submitted called for separate bids on items specified, a bidder who submitted an aggregate bid for all the work, without bidding separately on any item, did not comply with the specifications and instructions, and, under Burns' Ann. St. 1908, § 5868, providing that no alteration in the form of a bid shall be permitted, the bid could not be accepted.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

3. OFFICERS (§ 107*)—STATUTORY POWERS—EXERCISE—CONTRACTS—BIDS.

Where the statute provides the manner in which an officer exercising statutory powers shall enter into a contract binding on the municipality, the manner so prescribed must be strictly followed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 177; Dec. Dig. § 107.*]

4. COUNTIES (§ 162*)—REPAIRS ON COURTHOUSE—APPROPRIATIONS—NECESSITY.

Where the council of a county in making appropriations for the repairs of the courthouse specifically directed how the money appropriated should be expended, without making any provision for the construction in the courthouse of a room for the surveyor, a contract for the construction of a surveyor's room in the building was void, under Burns' Ann. St. 1908, § 5942, prohibiting the county commissioners from binding the county beyond the amount appropriated for the purpose.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 221; Dec. Dig. § 162.*]

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
²Second petition for rehearing granted, 96 N. E. 548. Third petition for rehearing denied. All Appellate Court opinions superseded by opinion in Supreme Court, 93 N. E. 33. Rehearing denied, 96 N. E. 1002.

5. COUNTIES (§ 196*)—CONTRACTS—SUIT TO SET ASIDE—LACHES.

Where, at the time of the letting of a contract for repairs of the courthouse of a county, a taxpayer objected to the contract on the ground that the bid for the work had been altered, and his attorney notified the county commissioners and the bidder that, if the law was as he thought it was, the performance of the contract would be resisted in the courts, a delay of 10 days in instituting a suit to enjoin the performance of the contract on the ground of its invalidity did not amount to laches barring relief.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

6. COUNTIES (§ 196*)—CONTRACTS—SUIT TO SET ASIDE—COMPLAINT.

Where the complaint in a suit to enjoin the performance of a contract for the repairs of the courthouse of a county set forth the facts showing the invalidity of the bid, and the contract entered into thereon, and specifically asked that the performance of the contract be enjoined by reason thereof, the complaint was sufficient against a demurrer, though it contained surplusage and statements indicating that performance of the contract should be enjoined because it was not let to the lowest bidder.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.*]

7. COUNTIES (§ 118*)—CONTRACTS—VALIDITY—BIDS.

A contract for repairing a county courthouse is invalid where there were no plans and specifications for the work at the time of the submission of bids therefor, and where it was not known from the bid of the successful bidder the exact character of the work he intended to do.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

8. COUNTIES (§ 118*)—CONTRACTS—BIDS.

The specifications for the repairs of a courthouse, and the instructions to bidders and the blank forms submitted, called for separate bids on items specified. A bidder who used the form supplied inserted after each bid the words, "this bid conditional upon being awarded all the work." The condition attached to the bid on the general contract was, "this bid and bond is filed conditional that I am awarded all of the work that is to be performed under the general specifications." Held, that the quoted words inserted after each bid applied only to the work covered by the bid, and a contract awarded the bidder was not invalid because thereof.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 189; Dec. Dig. § 118.*]

9. COUNTIES (§ 122*)—REPAIRS OF COURTHOUSE—APPROPRIATIONS—NECESSITY.

Where the council of a county, in making appropriations for repairs of the courthouse, specifically directed how the money appropriated should be expended, without making any provision for the construction of a room for the surveyor, and separate bids were asked for and received on this particular work, the contract for the work specially provided for by the appropriation was not rendered invalid because it also covered the work of constructing a room for the surveyor, since the amount for the latter work was separable from the other portions of the contract, and equity would enjoin the performance of the contract only so far as it called for the construction of a room for the surveyor.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 122.*]

10. APPEAL AND ERROR (§ 1154*)—ENTRY OF JUDGMENT.

In a suit to enjoin the performance of a contract for the repairs of the courthouse of a

county, where the evidence as to the construction of particular part of the work, illegal because not provided for by the council of the county in making appropriations for the repairs, is wholly documentary, the Supreme Court has authority, in the interest of justice, under Burns' Ann. St. 1908, § 702, to direct judgment restraining performance of the contract so far as it called for such work, but permitting performance of the balance of the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4497; Dec. Dig. § 1154.*]

On petition for rehearing. Granted, and former opinion modified, and judgment reversed in part and affirmed in part.

For former opinion, see 91 N. E. 618.

Harley A. Logan and L. M. Lauer, for appellant. E. C. Martindale, Chas. Kellison, and Miller & Dowling, for appellee.

HADLEY, P. J. On January 23, 1909, the board of commissioners of Marshall county presented to the county council of said county a petition and estimate for the repair and remodeling of the courthouse of said county. In this petition it was stated, among other things, that the board proposed to prepare a room in the basement of the courthouse for the county surveyor. Acting upon this petition, the county council made an appropriation as follows: "That there be appropriated out of the county funds of said county the following sums * * * for repair of courthouse, including heating apparatus therefor and other necessary repairs, \$15,000. * * * Said appropriation of \$15,000 is to be used or expended on the courthouse as follows: Repairing or reroofing, remodeling tower with illuminating dial, painting outside, and painting and decorating inside, repairing old floors or putting in new ones, if necessary, on first floor."

On the 10th of February, the county council made an order specifically authorizing the construction of three toilet rooms on the second floor, and for the rewiring for electric lighting. And on June 5th said council made a further order specifically authorizing the repair and remodeling of the windows, provided the whole cost did not exceed the whole amount of the appropriation. Acting upon these various appropriations, the board of commissioners entered into agreements with certain architects to prepare plans and specifications for the repairs and changes that were to be made. These specifications were prepared and filed in the auditor's office, as required by law.

Notice was given of the letting of the contract, as provided by law, and June 7, 1909, was fixed as the date when the bids would be opened. The plans and specifications divided the work into four parts: The general contract and the heating, the plumbing and the electric wiring contracts, and provided for the construction of a surveyor's room in the basement, as a part of the general con-

tract. It was also provided that bidders in bidding upon the general contract should bid separately upon the specifications for construction of the surveyor's room, and bids in the alternative for wood and tile floor and metal and tile roofing. Also separate bids should be made upon the heating, plumbing, and electric wiring. These instructions were set out in the published notices to bidders. The notice to bidders also stipulated that each bid should be accompanied by a noncollusion affidavit, as required by section 5897, Burns' Ann. St. 1908.

The auditor prepared forms, with the approval of the board of commissioners, for bids to be furnished to possible bidders, in accordance with section 5958, Burns' Ann. St. 1908, § 41, Acts 1899, p. 343. The form for the bid on the general contract was as follows:

"Blank Bid for General Contract.

"To the Honorable Board of Commissioners of Marshall County.

"Gentlemen: We propose to do the remodeling of your court house according to plans and specifications prepared by Griffith & Fair, Architects, Ft. Wayne, Ind., on the General Contract as follows:

"1st. For all the work called for in the plans and general specifications, excepting the new floor for the entire first story, the new roof, the finishing off of the surveyor's office, stairways, etc., to connect the same, changing sash, glass, etc., and fancy decorating, \$.

"2nd. Oak floor as specified for the entire first floor, \$.

"3rd. Terrazzo floor and marble sanitary base, \$.

"4th. Galvanized iron roof as specified, without any additional sheathing or extra supports, \$.

"5th. Tile roof as specified with additional sheathing, etc., \$.

"6th. Surveyor's Office finished up in the room where the present boiler is now located, \$.

"7th. Remodeling windows with new sash, plate glass, etc., according to specifications, \$.

"8th. Fancy decorating for the court room according to special design submitted, for the sum of \$.

"[Signed]"

"And for the steam heating as follows:

"Blank Bid for the Steam Heating.

"To the Honorable Board of Commissioners of Marshall County.

"Gentlemen: I propose to do the steam heating according to plans and specifications prepared by Griffith & Fair, Architects, Ft. Wayne, Ind., for the sum of \$.

"[Signed]"

The blanks for the bids for the plumbing and for the electric wiring were in the same form as that for the steamheating.

Upon the general contract appellant and Everly & Wallace bid without change, except that appellant did not bid on the eighth specification of said bid for decorating the courtroom. Appellee O'Keefe used the form supplied, but inserted in his bid the words: "This bid and bond is filed conditional that I am awarded all of the work that is to be performed under the general specifications." He also bid on the eighth specification, "on design to be submitted, \$300." And on the contract for the wiring, heating, and plumbing appellant, Everly & Wallace, and two others bid separately on the blanks as prepared and furnished by the auditor, without change or alteration. But appellee O'Keefe inserted after each of said bids the words: "This bid conditional upon being awarded all the work." And in his bid on the heating contract, before stating the amount, he also inserted the words: "Using old boiler and new valves." Each of said bidders filed with his bids a noncollusion affidavit, but the affidavits of all but appellee O'Keefe were made in conformity with section 5959, Burns' Ann. St. 1908, § 42, Acts 1899, p. 342, instead of section 5897, as designated in the notice and required by the statute. Appellee O'Keefe filed a noncollusion affidavit in conformity with section 5897.

The contract for the whole work was let to O'Keefe. The reason for the letting of the contract to O'Keefe, as stated by the commissioners and the county attorney at the time, was that appellant had failed to bid on one item of the contract, namely, item 8, for the decoration of the courtroom. Appellant contended at the time that there were no specifications or plans on file for this work, and therefore he could not bid the same; and in this contention he was unquestionably correct, there being nothing in the specifications to indicate the kind or character of such a decoration, whether it was to be paper, oil, water color, or calcimine, or whether it was to be in colors or conventional or special design, or plain tints. Appellee O'Keefe recognized this deficiency, and he inserted in his bid, "Design to be submitted." But even thus, the commissioners did not know from the bid of O'Keefe which of the various forms of materials for decoration he intended to use. There being no plans and specifications for this work, the contract with O'Keefe therefore is invalid.

The contract for the whole work was entered into on June 8, 1909, and on June 18th appellant instituted this suit, as a taxpayer, seeking to enjoin appellee O'Keefe from performing said contract and to enjoin the appellee board from paying out any money thereon. Upon final hearing, the court enjoined the performance of the eighth specification, viz., the decoration of the courtroom,

but refused to enjoin the performance of the remainder of the contract. Appellant filed bond and took this appeal.

It is now insisted that the bids of appellant and the other bidders, except O'Keefe, were properly rejected, for the reason that a proper noncollusion affidavit was not filed. Section 5897, Burns' Ann. St. 1908, being section 5 of an act of the General Assembly of 1907 (see Acts 1907, p. 580), provides: "No bid for the building or repairing of any courthouse * * * shall be received or entertained by the board of commissioners of any county in this state, unless such bid shall be accompanied by an affidavit signed and sworn to by the bidder and each of his agents or representatives present at the time of filing such bids, specifying, etc." Then follows specifically what statements such affidavit must contain.

Under the provisions of this section, it is quite clear that the commissioners were prohibited from receiving the bids of appellant and the other bidders, except O'Keefe, on account of their failure to comply with the same. The statute is prohibitive, and appellant has no right to complain, even though a wrong reason was given for a proper act. But it is also insisted that the bid of appellee O'Keefe was invalid and should not have been received by the board.

Section 5958 provides: "In all cases where any county officer is authorized by this act to receive bids for any purpose, it shall be the duty of the county auditor to prepare and furnish to possible bidders printed forms on which all bids shall be submitted. No alteration or erasure in the form of said bid from that prescribed by the auditor, with the approval of the commissioners, shall be permitted, and no bid shall be received which does not comply with this provision."

Appellant insists that the stipulations which O'Keefe added to each of his bids made them all conditional upon his receiving all of the work, and was such an alteration as came within the prohibition of this section and rendered them invalid, and the board therefore had no right to receive or consider them. That the added stipulations were alterations cannot be denied. Whether such alterations were of such substantial character as to bring it within the prohibition of the statute is the point at issue. The specifications, the instructions to bidders, and the blank forms submitted, each called for separate bids upon the various classes of work, viz.: The general contract which should contain alternative bids upon different grades of flooring and roofing, and a separate bid upon the surveyor's room, the heating contract, the plumbing contract, and the wiring contract. The forms prescribed contemplated that the whole of the work, under the specifications of each class, should be covered by one contract. Upon each of these separate classes, each bidder was notified to

compete with the others. This was the common ground upon which all were required to meet and to permit a bidder to select another and different ground and to submit another and different proposition from that specified, and different from that which other bidders were notified would be considered, certainly would not conform to the definition of competition.

It is contended that by the conditions attached to his bids, O'Keefe did not bid separately on anything; that his bid was simply an aggregate bid for all the work in all the classes; that he did not offer to construct either class separately. If this contention is sustained, then it must be clear that his bid did not conform to the specifications, the notice or forms of bids provided by the auditor, and was therefore not a valid bid and should not have been received and considered by the board.

The underlying purpose of these restrictive statutes, in relation to the letting of contracts by public officers, is that there shall be full and free competition in the bidding. Board, etc., v. Pashong, 41 Ind. App. 69, 83 N. E. 383. And it is well established that where the statute prescribes the manner in which an officer or board, exercising purely statutory powers, shall enter into a contract binding upon the municipality, the manner or method so prescribed must be strictly followed. Board v. Pashong, supra; Board, etc., v. Gillies, 138 Ind. 667, 38 N. E. 40; Wrought Iron Bridge Co. v. Board, 19 Ind. App. 679, 48 N. E. 1060; Zorn v. Warren-Scharf, etc., Co., 42 Ind. App. 213, 84 N. E. 509.

But appellees argue that the added words in O'Keefe's bid should be limited to the work upon which each bid was made, and they argue, with reason that since such construction is reasonable, is in accordance with the general plan of bidding, and the bid in each case was accepted by the board, then we must presume that the officers charged with the duty of passing upon the bids so construed them. If, then, we construe the words, "This bid conditional upon being awarded all the work," added to the bids on plumbing and electric wiring, as applying only to the work covered by the bid in which it was inserted, it is apparent that they neither added to nor took from the force and effect of the bid. The condition attached to the bid on the general contract is clearly thus limited; the language being, "this bid and bond is filed conditional that I am awarded all of the work that is to be performed under the general specifications." In view of the fact that such a construction is in accord with the general plan of the bidding, and is the construction that must have been given the added words by the board of commissioners, else it would have been compelled under the law to have refused to consider them, we are of the opinion that such construction must be given them by this

court. Thus construed, the alteration in no way changed the nature or character of the bids, since all bidders were invited to and did bid upon the whole of the work in each class, except that some failed to bid on the decoration of the courtroom. The bids of O'Keefe were not invalid by reason of said alterations.

Appellant also insists that the performance of O'Keefe's contract should be enjoined for the further reason that there was no appropriation for the construction of the surveyor's room. Section 5942, Burns' Ann. St. 1908, provides: "No board of county commissioners, officers, agent or employé of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriation, are declared to be absolutely void."

It will be observed that the county council, in making the appropriation for the repairs on the courthouse, specifically directed how the money thus appropriated should be expended. It made no general appropriation for repairs, but made specific appropriation for specific repairs, and in these enumerated items there is no item that could possibly be construed as covering the construction of the surveyor's room. There was no appropriation for this work, and therefore the contract for the construction of the surveyor's room is void. *State v. Board*, 165 Ind. 262, 74 N. E. 1091.

The question now arises whether this invalidates the whole contract. We are of the opinion that it does not. Separate bids were asked for and received on this particular work. The amount is easily separable from the other portions of the contract. It would be capacious, indeed, to destroy the validity of the contract covering this great amount of work for this small item of invalidity where, as here, it is easily separable from the general contract.

It is, however, insisted by appellees that appellant was guilty of laches in not earlier instituting his suit. Whether the defense of laches can be interposed in a case like the present, we do not determine. The record discloses that at the time of the letting, appellant was present and objected to the contract being given appellee, among others, upon the ground that his bid had been altered, as above indicated, and appellant's attorney at that time notified appellees that if the law was as he thought it to be, the performance

of the contract let thereunder would be resisted in the courts. Ten days thereafter this suit was brought. It would therefore appear that the proceeding was as timely as could ordinarily be expected, under all the circumstances.

It is also insisted by appellees that the appellant's complaint is not sufficient. The complaint is long and contains a great amount of surplusage and many statements that would indicate that appellant had an idea that the performance of the contract should be enjoined, for the reason that the contract was not let to the lowest bidder; but there was no motion to make the complaint more specific or definite and certain. The complaint does set forth the facts necessary to show the invalidity of O'Keefe's bid and the contract that was entered into thereon, in so far as they apply to the construction of the surveyor's room and decorating of the courtroom, and it specifically asks that its performance be enjoined by reason thereof. The complaint is therefore sufficient to withstand a demurrer.

There is no dispute as to the facts here set out, and it is thereby shown that that portion of the contract of O'Keefe is invalid and void as to the construction of the surveyor's room and decoration of the courtroom, and that its performance should be enjoined to that extent, but that the contract is valid in all other particulars. The court below enjoined the decoration of the courtroom only. Having failed to enjoin the construction of the surveyor's room, the judgment is not comprehensive enough.

This proceeding is wholly an equity proceeding. The evidence pertaining to the construction of the surveyor's room and decoration of the courtroom, upon which this decision rests, is wholly documentary. The litigation involves the remodeling and repair of a courthouse. The work had been partially done before the litigation started. The building now stands in an incomplete state, endangering public records and interfering with public business, and justice does not require that a new trial be granted. But it is our view that justice will best be subserved if the judgment of this court be such as to terminate further litigation, and under this state of affairs we are empowered, by section 702, Burns' Ann. St. 1908, to do this.

It is therefore the order of this court that the judgment be reversed, in so far as it denies an injunction against the construction of the surveyor's room, and the court below is directed to enter judgment perpetually enjoining the construction of the surveyor's room. In all other respects the judgment of the court below is affirmed.

(248 Ill. 32)

PEOPLE ex rel. **GISH**, County Collector, v. **LAKE ERIE & W. R. CO.**

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 28*)—POWERS OF MUNICIPAL CORPORATIONS.

Municipal corporations and local governmental subdivisions of the state have no inherent power to levy taxes, that power being inherent in the Legislature, and absolute, except as restrained by the Constitution; and if any grant of power to tax is made by the Legislature to municipal corporations or local authorities, they must be able to show their warrant for the exercise of the power in the words of the grant, which are to be strictly construed, the presumption being that the state has granted in clear and unmistakable terms all it has intended to grant at all.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 60; Dec. Dig. § 25.*]

2. HIGHWAYS (§ 127*)—ROAD AND BRIDGE TAX—AUTHORITY TO MAKE ADDITIONAL LEVY.

Section 14 of the act in regard to roads and bridges in counties under township organization (Hurd's Rev. St. 1909, c. 121) authorizes commissioners of highways, if a greater levy than 36 cents on each \$100 is needed in view of some contingency, to certify such tax to the board of town auditors and the assessor, and provides that, if a majority of the entire board consent in writing, an additional levy, not exceeding 25 cents on each \$100 of the taxable property of the town, may be made. *Held*, that there is no power to levy a tax in excess of 36 cents on \$100 of taxable property for any of the ordinary purposes of a road and bridge tax, and the contingency contemplated is some extraordinary event in the nature of a casualty, which does not happen in the ordinary course, and the certificate of the commissioners must state that the tax is desired to meet a contingency, and state what the contingency is, and a certificate not specifying any extraordinary event, but merely reciting that repairs for bridges and roads and the building of certain culverts were necessary "on account of rains and floods," either of which might not be unusual, is insufficient, and not a legal basis for the additional tax.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 884; Dec. Dig. § 127.*]

Appeal from Woodford County Court; John F. Bosworth, Judge.

Action by the People, on relation of L. C. Gish, County Collector, against the Lake Erie & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Stevens, Miller & Elliott (John B. Cockrum, of counsel), for appellant.

CARTWRIGHT, J. The county court of Woodford county overruled the objection of appellant, the Lake Erie & Western Railroad Company, to the excess of the road and bridge tax above 36 cents on each \$100 of the assessed valuation of its property in the town of Montgomery, and entered judgment and order of sale as applied for by the appellee, the county collector. From the judgment this appeal was prosecuted.

The facts were stipulated as follows: At the semi-annual meeting of the commission-

ers of highways, held on September 7, 1909, they made and presented to the board of auditors and assessor their certificate that "on account of rains and floods" it would be necessary to make a levy, in addition to the levy of 36 cents on each \$100 valuation, to the amount of \$1,700 for the purpose of building certain culverts and repairing certain bridges and roads mentioned in the certificate, and building two bridges across creeks specified therein, and they asked leave to make an additional levy of 25 cents on each \$100 of taxable property. The board of town auditors and assessor thereupon gave their written consent to an additional levy of 25 cents on each \$100, specifying the same purposes mentioned in the certificate. The commissioners then made a certificate that they required for road and bridge purposes and for the payment of outstanding orders drawn on their treasurer the rate of 36 cents on each \$100, and also required the rate of 25 cents on each \$100 for the purpose of building said culverts and repairing said bridges and roads and building said bridges, all of which were specified in the certificate. These papers were filed in the office of the town clerk, and he delivered to the county clerk his certificate that the commissioners of highways had filed in his office a certificate, together with the necessary consent of the board of town auditors and assessor, by which they required the rate of 61 cents on the \$100 valuation for road and bridge purposes and for the payment of any outstanding orders drawn on them by their treasurer. A tax was extended by the county clerk by virtue of this certificate.

Municipal corporations and local governmental subdivisions of the state have no inherent power to levy taxes. Commissioners of Highways v. Newell, 80 Ill. 587. That power is inherent in the Legislature, and absolute, except as restrained by the Constitution (City of Bloomington v. Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487); and if any grant of power to tax is made by the Legislature to municipal corporations or local authorities, they must be able to show their warrant for the exercise of the power in the words of the grant, which are to be strictly construed. The reasonable presumption is that the state has granted, in clear and unmistakable terms, all it has intended to grant at all. Cooley on Taxation, 209. Section 14 of the act in regard to roads and bridges in counties under township organization (Hurd's Rev. St. 1909, c. 121) authorizes commissioners of highways, if in their opinion a greater levy than 36 cents on each \$100 is needed in view of some contingency, to certify the same to the board of town auditors and the assessor, and, if a majority of the entire board consent in writing, an additional levy, not exceeding 25 cents on each \$100 of the taxable property of the town,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

may be made. There is no power to levy a tax in excess of 86 cents on \$100 of taxable property for any of the ordinary purposes of a road and bridge tax, and the contingency contemplated is some unusual or extraordinary event in the nature of a casualty, which does not happen regularly and in the ordinary course. *People ex rel. v. Cairo, Vincennes & Chicago Railway Co.*, 281 Ill. 438, 83 N. E. 116; *People ex rel. v. Elgin, Joliet & Eastern Railway Co.*, 243 Ill. 546, 90 N. E. 1080. The certificate of the commissioners must state that the tax is desired to meet a contingency, and state what the contingency is. *St. Louis, Alton & Terre Haute Railroad Co. v. People ex rel.*, 224 Ill. 155, 79 N. E. 664.

The certificate of the commissioners in this case does not specify any particular or extraordinary event, and there is nothing in it which shows that the repairs of bridges have become necessary on account of anything out of the usual and ordinary course of events. The supposed contingency mentioned is "rains and floods," and rains are usual and ordinary events necessitating repairs, and what may be called floods, on account of heavy rains, are not unusual. Such repairs as are specified may become necessary as a result of heavy rains and consequent floods at any time, and the building of the two bridges over the creeks is not connected in any way with any contingency. A particular flood may be so extraordinary in its nature and consequences as to authorize the additional tax; but, if so, it must be specified in the certificate. The certificate did not comply with the requirements of the statute, and was not a legal basis for the additional tax.

The judgment is reversed, and the cause remanded to the county court, with directions to sustain the objection.

Reversed and remanded, with directions.

(247 Ill. 414)

WATSON v. COON et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. WORDS AND PHRASES—"NONRESIDENT."

A "nonresident" is one who is not a resident of a particular place, and the term may be used indiscriminately to describe one who does not reside in a particular country, or state, or county, or any of the smaller subdivisions of territory made for governmental purposes, and the word may as well refer to one not residing in a county as to one residing outside of the state.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, pp. 4823-4825; vol. 8, p. 7733.]

2. PARTNERSHIP (§ 195*)—ACTIONS—VENUE—STATUTES.

Under Practice Act 1907 (Laws 1907, p. 447) § 13, providing that a copartnership, the members of which are nonresidents, but having a place of business in the county in which suit may be instituted, may be sued, and service of process may be had in the county on the copartnership, by serving the same on any agent

thereof, an action may be brought against a firm having a place of business in the county, though the partners are nonresidents of the county, but residents of the state, and service of process on the agent of the firm in the county is sufficient, notwithstanding section 6, making it unlawful to sue any defendant out of the county where the latter resides or may be found.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 368; Dec. Dig. § 195.*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, De Witt County; W. G. Cochran, Judge.

Action by John Watson against E. G. Coon and another, partners under the firm name of Coon Bros. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendants appeal. Affirmed.

Owen & Owen and Barry & Morrissey, for appellants. Herrick & Herrick, for appellee.

VICKERS, J. Appellee brought an action of assumpsit in the circuit court of De Witt county against E. G. and James S. Coon, partners doing a general grain business under the name of Coon Bros. The defendants did not reside in, nor were either of them found or served with process in, De Witt county. Their principal place of business and residence was in Champaign county, but they maintained a place of business in De Witt county in charge of Thomas Conners as their agent. The sheriff of De Witt county served the summons upon Thomas Conners as agent of the defendant partnership; and made the following return of service: "I have duly served this writ on the within named E. G. Coon and James S. Coon, partners doing business under the firm and style of Coon Bros., by reading the same to and at the same time delivering a true copy thereof to Thomas Conners, agent of said copartnership, at its place of business in said county of De Witt, the within named E. G. Coon and James S. Coon being nonresidents of and not found in my county, as I am therein commanded, this 24th day of September, 1908." The defendants below appeared in court, and, limiting their appearance for that purpose, entered their motion to quash the return of the sheriff on the ground that the same was void, contrary to the statute, and failed to give the court jurisdiction of the persons of the defendants. This motion was overruled, and the defendants excepted. A rule was then entered upon them to plead, but the defendants elected to stand by their motion, and thereupon were defaulted, and a jury was impaneled to assess the damages, and a verdict and judgment for \$938.86 were rendered against the defendants. This judgment has been affirmed by the Appellate Court for the Third District, and the cause is brought to this court upon a certificate of importance granted by the Appellate Court.

Without stopping to consider whether the question involved was properly raised by a

motion to quash the return, instead of a plea in abatement, we are disposed to regard the question as properly presented and determine the question of jurisdiction, which was the basis of the certificate of importance granted by the Appellate Court.

Section 13 of the practice act of 1907 provides as follows: "A copartnership, the members of which are all nonresidents, but having a place or places of business in any county of this state in which suit may be instituted, may be sued by the usual and ordinary name which it has assumed and under which it is doing business and service of process may be had in such county upon such copartnership by serving the same upon any agent of said copartnership within this state." Laws 1907, p. 443. Section 6 of the practice act of 1907 is the same as section 2 of the old practice act, with an amendment added providing against the use of dummy defendants to obtain jurisdiction of nonresident defendants. That section provides that "it shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found," etc.

Appellants contend that, construing sections 6 and 13 together, the word "nonresidents" found in section 13 should be held to mean persons who are not residents of the state; that to construe those words as including a copartnership, the members of which were all nonresidents of the county in which the suit was brought, would, in effect, deprive appellants of the right to be sued in the county in which they reside, which is given by section 6 of said act. The whole controversy turns on the meaning of the word "nonresidents" in section 13 of our present practice act. A nonresident is a person who is not a resident of a particular place. The term may be used indiscriminately to describe one who does not reside in a particular country or state or county, or any of the smaller subdivisions of territory made for governmental purposes. The word may as well refer to one not residing in a county as to one who resides beyond the boundaries of the state. *Gardner v. Girtin*, 69 Ill. App. 422; *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307.

It must be presumed that the Legislature intended to give litigants some substantial and additional right by passing section 13. If, as appellants contend, service can only be had under said section upon the members of a copartnership all of whom are nonresidents of the state, there would be no substantial difference in proceeding under said section and under our attachment act, which provides a means by which the property of nonresident defendants in this state may be made subject to their debts. It is a matter of common knowledge that many copartnerships, especially those engaged in dealing in grain, coal, lumber, and other like commodities, transact business in many of the counties of the

state other than the county where the partners reside, and that such business is transacted by establishing agents in the different counties where its business is carried on. Prior to the enactment of section 13 a plaintiff residing in Alexander county having a claim against a partnership all of the members of which resided in Cook county was compelled to bring his suit in Cook county because the members of the firm resided there and could not be sued out of the county of their residence, notwithstanding the litigation grew out of a transaction with an agent in Alexander county and all of the witnesses thereto also resided in such county. It has long been the law of this state that a corporation could be sued and jurisdiction obtained in any county in the state and service had upon an agent of such corporation. We think that the intention of the Legislature in passing section 13 was to place copartnerships upon a basis somewhat similar to corporations.

The court below had jurisdiction of the persons of appellants, and there is no error in the judgment of the Appellate Court, affirming the judgment of the lower court.

Judgment affirmed.

(247 Ill. 388)

HENNESSY v. PORCH.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. ELECTIONS (§ 299*)—CONTESTS—COUNTING OF BALLOTS—JURISDICTION OF COURT.

The object of a contest of an election is to ascertain who actually received a majority of the votes, and, when the court undertakes to count the ballots, it will count them all correctly, and declare what the ballots show on their face.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 307; Dec. Dig. § 299.*]

2. ELECTIONS (§ 299*)—CONTEST—PETITION—JURISDICTION.

Where the petition in an election contest alleged mistakes in counting the ballots sufficient to change the result, the court undertaking to recount the ballots must count all the ballots, and declare the result according to their legal effect.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 306, 307; Dec. Dig. § 299.*]

3. ELECTIONS (§ 194*)—BALLOTS—ILLEGAL MARKING.

A ballot properly marked for a candidate must be counted for him, though parallel lines were drawn through the name of the candidate for another office and the name of another written beneath it, and though the name of the latter was written in the blank space in the petition column under that office, where it is apparent that the voter was making an honest effort to vote and not to mark the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

4. ELECTIONS (§ 194*)—BALLOTS—ILLEGAL MARKING.

A ballot marked with a cross in each square of a ticket must be counted, though some of the crosses have double lines, and though the cross in the square opposite the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

name of a candidate has a third line making a character something like the letter "A."

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

5. ELECTIONS (§ 180*)—BALLOTS—ILLEGAL MARKING.

Where there was no cross in the square opposite the name of a candidate on a ticket or in the circle at the head of the ticket, the ballot could not be counted for him.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 151-153, 157; Dec. Dig. § 180.*]

6. ELECTIONS (§ 194*)—BALLOTS—ILLEGAL MARKING.

A ballot properly marked for a candidate must be counted though it contains straight lines not making distinct crosses in the squares before the names of the candidates on the other ticket, and which contestant claims are distinguishing marks, as the lines are merely ineffectual attempts to express the voter's choice.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

7. ELECTIONS (§ 194*)—BALLOTS—ILLEGAL MARKING.

A ballot properly marked as to one candidate for a public office is properly counted for him, though the voter in writing the name of a person above the words designating another office failed to properly vote for him, since his attempt cannot be deemed a distinguishing mark of the ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 104.*]

8. ELECTIONS (§ 194*)—BALLOTS—ILLEGAL MARKING.

A ballot properly marked for one candidate for a public office cannot be counted, where the initials "J. E. O." appear under the name of another office, because the initials constitute an identifying mark, though a person named "J. E. O'Connor" received votes for such office.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 166, 167; Dec. Dig. § 194.*]

9. ELECTIONS (§ 180*)—BALLOTS—ILLEGAL MARKING.

A ballot cannot be counted for a candidate, where the lines on it do not cross in the square in front of his name.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 152; Dec. Dig. § 180.*]

Appeal from Kankakee County Court; A. W. De Selm, Judge.

Election contest by Frank J. Hennessy against Carl T. Porch. From a judgment for contestant, contestee appeals. Affirmed.

H. K. & H. H. Wheeler, for appellant. Small, Brock & Merrill and J. Bert Miller, for appellee.

DUNN, J. At the election for town officers in the town of Otto, in Kankakee county, on April 5, 1910, the appellant and the appellee were candidates for supervisor, and the appellant was declared elected by a vote of 158 to 157 for his opponent. This appeal is from the order of the county court, upon a contest of the election, which declared that the appellee was elected.

The petition alleged that the appellee was elected by a majority of all the legal votes cast, but that one ballot which bore distinguishing marks and should not have been

counted at all was by the mistake of the judges counted twice for the appellant, and two or three ballots which were not marked for any one for supervisor were counted for the appellant, and prayed for a recount of all the votes cast at the election. It is insisted on the part of the appellant that the court could only reject one ballot for him on account of distinguishing marks because only one such ballot was alleged, but that it did reject four; that there was no evidence that any ballots were counted for the appellant which were not marked for any person for supervisor; and that the court could only render a judgment on such points as were set out in the petition.

The petition alleged mistakes made in counting the ballots sufficient to change the result of the election. One method of ascertaining whether such mistakes existed was to count the ballots in court. The object of the contest of an election is to ascertain who actually received a majority of the votes, and, when the court undertakes to count the ballots, it will count them all correctly, and declare what the ballots show on their face. It is impossible ordinarily for a contestant to state fully and with particularity the precise errors, and all of them, existing in the counting of the ballots of an election. When he states a case showing that errors have occurred in the counting of the ballots, and when the court undertakes to recount them, all the ballots will be counted and the result declared according to their legal effect.

The errors argued call in question the action of the court with reference to the counting of a number of ballots. All the ballots cast at the election were counted on the hearing. There were 299 to which no objection was made, 153 of which were counted for the appellee and 146 for the appellant. Of the 16 which were objected to, 3 were counted for the appellee, 8 for the appellant, and 5 were rejected; the result being that appellee received 156 votes and appellant 154. It is insisted that each one of the three ballots counted for the appellee, being Nos. 1, 2, and 3, was improperly so counted. The ballots were printed in two columns, the one on the left, headed "Caucus," having a full list of township officers except constable, for which office a blank line was left at the bottom of the ticket. The column on the right was headed "Petition," and in it appeared only the name of appellant as a candidate for supervisor, the names of the other five offices to be filled being printed with a blank line below each for writing in the name of the person voted for. J. E. O'Connor received 57 votes for assessor, G. L. Gardner 33 votes for collector, and M. W. Nordmeyer 97 votes for highway commissioner, though their names did not appear upon the printed ballot. Ballot No. 1 was voted for the appellee. The objection made to it is that it bore a

distinguishing mark. Parallel lines are drawn through the name of John Heeler, the caucus candidate for highway commissioner, and the name of Martin Nordmeyer is written beneath. The name of Martin Nordmeyer is also written in the blank space in the petition column under the title "For highway commissioner," and a cross is marked in each of the squares before that office. It is apparent that the voter was making an honest effort to vote for Martin Nordmeyer for highway commissioner, and not attempting to indicate who voted the ballot, and, whether or not he succeeded in legally indicating his choice for highway commissioner, his ballot ought not to be rejected as to a candidate for whom he did express a choice in the manner required by the statute. *Winn v. Blackman*, 229 Ill. 198, 82 N. E. 215, 120 Am. St. Rep. 237. Ballot No. 2 was marked with a cross in each square of the caucus ticket. Some of the crosses have double lines. In ballot No. 6 the cross in the square opposite the name of the appellee has a third line, making a character somewhat like the letter "A." This third stroke may easily have been inadvertently made. These ballots were properly counted for the appellee. *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; *Winn v. Blackman*, supra.

The court properly refused to count ballot No. 19 for the appellant because there was no cross in the square opposite his name or in the circle at the head of his ticket.

Ballots Nos. 10 and 15, which were rejected, should have been counted for the appellant. Objection was made to No. 10 because it had straight lines, not making distinct crosses, in the squares before the names of the candidates on the caucus ticket, which it is said constitute distinguishing marks. We regard them as careless and ineffectual attempts to express the voter's choice. Ballot No. 15 has the name "M. W. Nordmeyer" written just above the words "For highway commissioner" under the heading "Petition," with no mark in the square opposite. We regard this as an ineffectual effort to vote for Mr. Nordmeyer and not as a distinguishing mark.

Ballot No. 4 should have been counted for the appellee. It is in the same condition as No. 15, except the name written in is that of Mr. Gardner, and is written on the caucus ticket.

Ballot No. 8 was properly marked as a vote for appellant, but was properly rejected by the court on account of the characters appearing on its face, which constitute a distinguishing mark. These characters are said by the appellant to be the initials "J. E. O." of J. E. O'Connor, who received 57 votes for assessor. They may as well be the initials of the voter himself as of a candidate. Whether the characters were intend-

ed to represent those letters or not is very uncertain, but, if so, they have no tendency to indicate in any legal way the choice of the voter among the candidates. The voter has not attempted to write in the name of a candidate and the characters constitute a ready means of identifying his ballot.

Ballots Nos. 7 and 18, which were counted for the appellant, should have been rejected because the lines upon them do not cross in the square in front of his name. *Parker v. Orr*, supra; *Winn v. Blackman*, supra.

To the 153 votes counted for the appellee without objection should be added ballots Nos. 1, 2, 4, and 6, making his total vote 157. To the 146 votes counted for the appellant without objection should be added ballots Nos. 10 and 15 and the 8 ballots counted for him by the court, except Nos. 7 and 18, making his total vote 154.

The judgment of the county court will therefore be affirmed.

Judgment affirmed.

(247 Ill. 366)

GOODRICH v. BUSSE et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HAWKERS AND PEDDLERS (§ 1*)—POWERS—ORDINANCES.

Under Hurd's Rev. St. 1909, c. 24, art. 5, § 1, empowering cities to regulate traffic and sales on the streets, and to license, regulate, and suppress peddlers, a city may by ordinance prohibit peddlers on the streets from advertising their wares by public outcry.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CONSTITUTIONAL LAW (§ 208*)—EQUAL PROTECTION OF THE LAWS.

An ordinance prohibiting peddlers on the streets of a city from advertising their wares by public outcry, but permitting peddlers on licensed amusement grounds and parks to do so, is not invalid as discriminating against peddlers on streets, because the conditions surrounding peddlers on amusement grounds and parks and on streets are different, so that there is a reasonable basis on which to rest a classification.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 658; Dec. Dig. § 208.*]

3. CONSTITUTIONAL LAW (§ 293*)—DUE PROCESS OF LAW.

An ordinance prohibiting peddlers on the streets of a city from advertising their wares by public outcry merely regulates the business of peddlers while pursuing their calling on the streets of the city, and it does not deprive a peddler of his right to engage in the business of peddling on the streets, and the ordinance does not deprive a peddler of his property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 825-830, 835-846; Dec. Dig. § 296.*]

4. CONSTITUTIONAL LAW (§ 92*)—VESTED RIGHTS.

One conceded to have the right to sell fruit and vegetables on the streets and alleys of a city has no vested property right to make a public outcry on the streets by advertising his goods, and the city may by ordinance prohibit peddlers from advertising their wares by

public outcry, and thereby prevent a public nuisance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 178-180; Dec. Dig. § 92.*]

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Suit by August O. Goodrich against Fred A. Busse and others. From a decree of dismissal, complainant appeals. Affirmed.

Darrow, Masters & Wilson, for appellant. Edward J. Brundage, Corp. Counsel, Clarence N. Boord, and John J. Bellman, for appellees.

HAND, J. This was a bill in chancery filed by the appellant in the circuit court of Cook county, on behalf of himself and all other persons in the city of Chicago similarly situated, for an injunction to restrain the mayor and police department of the city of Chicago from enforcing in said city, against him and all other persons engaged in peddling fruits and vegetables in the city of Chicago, the provisions of section 1450 of the Municipal Code of said city, as amended on November 29, 1909, in force January 1, 1910; which reads as follows: "That excepting in amusement grounds, parks, halls, and other places duly licensed in accordance with the ordinances of the city, no person shall make, or cause, permit, or allow to be made, any noise of any kind by crying, calling or shouting, or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn or similar mechanical device, for the purpose of advertising any goods, wares or merchandise or of attracting the attention or inviting the patronage of any person to any business whatsoever."

The bill averred that appellant was engaged in peddling fruits and vegetables in the city of Chicago; that he owned and used in said business a horse and wagon; that he purchased fruits and vegetables upon Market street, in said city, from wholesale dealers, and that with his horse and wagon, loaded with fruits and vegetables, he drove through the streets and alleys of said city for the purpose of making sales of such fruits and vegetables; that in order to attract customers to his presence, and the fruits and vegetables which he had for sale, it was necessary that he make a noise by calling or shouting; that 1,800 persons in the city of Chicago were engaged in peddling fruits and vegetables, and that in said city there were 6,000 peddlers; that numerous prosecutions and convictions had been had under said ordinance; and that appellant had been arrested and was being prosecuted by the city authorities in the municipal court of the city of Chicago for a violation of said section of said Municipal Code.

A demurrer was interposed by the city to the bill, and sustained, and the bill was dismissed for want of equity; and the judge before whom the case was tried having certified that the constitutionality of said section 1450 of the Municipal Code was involved, and that in his opinion the public interest required that the constitutionality of said section of the Municipal Code be passed upon by the Supreme Court, an appeal has been prosecuted to this court.

It is contended that said section of the Municipal Code is void, first, for unreasonableness; and, secondly, by reason of the fact that it is in conflict with the Constitutions of the state of Illinois and of the United States.

Section 1, art. 5, c. 24, Hurd's Revised Statutes of 1909, in part provides that the city council is empowered and authorized by ordinance: "Twentieth—To regulate traffic and sales upon the streets, sidewalks, and public places. * * * Forty-first—To license, tax, regulate, suppress, and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals, and other exhibitions, shows and amusements, and to revoke such license at pleasure."

It has been held by this court (*Gundling v. City of Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230, and *Spiegler v. City of Chicago*, 216 Ill. 114, 74 N. E. 718) that an ordinance may derive its validity from several different grants of power, and that its validity does not necessarily depend upon any single clause or section of the statute concerning the power of the municipality to legislate upon the subject covered by the ordinance. We think, therefore, that the section of the Municipal Code now under consideration may be sustained under the grant of power to the municipalities of this state which authorizes them to pass ordinances for the regulation of traffic and sales upon the streets and alleys of such municipalities and to regulate, suppress, and prohibit hawkers and peddlers within such municipalities.

The appellant contends that the ordinance is unconstitutional for the reason that it unjustly discriminates against the business of the appellant in this: That it permits a person, whose business is confined to amusement grounds, parks, halls, and other places duly licensed by the city, to advertise his wares by public outcry, while the appellant is prohibited from so advertising his fruits and vegetables upon the public streets and alleys of the city. We think this contention is without force, for the reason that the appellant is not prohibited from selling or advertising for sale his fruits and vegetables in the places excepted from the operation of the section of the Code by public outcry, if he desires to frequent those places for the

purpose of making sales, and it would seem clear that the conditions which surround amusement grounds, parks, halls, and other places duly licensed by the city so far differ from the conditions which are found in and upon public streets and alleys of the city of Chicago that such differences would furnish a reasonable basis upon which to rest a classification which would support said section of the Municipal Code. It is obvious that persons frequent the places excepted from said section of the Municipal Code for reasons wholly different from those which influence the citizen when he builds his house or place of business upon the public streets or uses the public alleys of the city. At the one place the visiting public anticipates and expects there will be noise and confusion, while upon the streets and alleys of the city, outside of the noise and confusion incident to travel, it may well be expected order and quiet will be maintained. Especially is this true in a great city like Chicago, where a large per cent. of its working people perform services at night and sleep during the day, and who, during their hours of rest in the daytime, should be protected by the city from being disturbed by the shrill outcries of fruit and vegetable peddlers as they pursue their calling throughout the city.

In *City of Chicago v. Brownell*, 146 Ill. 64, 34 N. E. 595, it was urged an ordinance was discriminatory which permitted bookmaking within the inclosure of incorporated fairs or racetrack associations and prohibited bookmaking elsewhere. The court, on page 69 of 146 Ill., and page 595 of 34 N. E., said: "If it were admitted that the ordinance, by implication, sanctions bookmaking, etc., within the actual inclosures of fair or racetrack associations that are incorporated under the laws of the state, etc., it does not appear that defendant in error, or any one else, is discriminated against. If any one can lawfully engage in that business in those places at such times, for anything appearing in this ordinance, defendant in error and all other persons so disposed can do the same. On the principle that a city council may discriminate between different localities within the city limits in granting license to sell intoxicating liquors, 'making no distinction between persons, but between places, only,' as was held in *City of East St. Louis v. Wehrung*, 46 Ill. 392, this ordinance would be valid in any view which can be taken of it."

We do not think the ordinance is void by reason of the fact that the business of appellant is discriminated against, or will be discriminated against, by its enforcement.

Neither have we been able to discover that this ordinance is in conflict with the federal Constitution, in that it deprives the appellant of his property without due process of law. The appellant is not deprived of the right (as is contended by his counsel) to en-

gage in the business of peddling fruits and vegetables upon the streets and alleys of the city of Chicago. The utmost the ordinance does is to regulate the business of the appellant, and all persons who are similarly situated, while pursuing their calling upon the streets and alleys of the city. This the city clearly has the right to do by the express provisions of the statute (*Lauder v. City of Chicago*, 111 Ill. 291, 53 Am. Rep. 625); and, the ordinance being within the power conferred upon the city, we think it is valid.

While it may be conceded that the appellant has the right to sell fruits and vegetables upon the public streets and alleys of the city, clearly he has no vested property right resting in him to make a noise upon the streets of the city by advertising his fruits and vegetables by public outcry in such places, any more than he would have the right to advertise such articles by any other means upon the streets and alleys of the city, the result of which would be to disturb the peace and quiet of the neighborhood in which he pursues his calling. It is apparent the advertising of the articles usually handled by peddlers upon the streets and alleys of the city by public outcry, especially if 6,000 persons were engaged at one time in so advertising the articles which they were offering for sale, would soon, if not immediately, become, if not controlled, a public nuisance, and one which would urgently demand abatement.

The recent case of *New Orleans v. Fargot*, 116 La. 370, 40 South. 735, is directly in point. The charter of the city of New Orleans empowered and authorized the city council to pass ordinances "to preserve the peace and good order of the city" and "to suppress all nuisances." Acts 1902, p. 434. The city passed an ordinance which provided that peddlers and hawkers should not outcry for sale of fruits, game, fish, and other products usually sold in the market, in the streets and thoroughfares of the city. In sustaining the ordinance the court said: "In the exercise of police power the city council has some discretion. The ordinance was not wanton nor arbitrary. A person engaged in peddling and hawking fruits has no right to bawl away in a manner that is annoying to others. The mere fact of selling was not the cause of the prosecution, but the manner of the peddler or hawker in offering to sell, which was, as we are led to infer by the charge and by the surrounding circumstances, loud and boisterous and within the terms of the ordinance, which sought to regulate the occupation and keep it in such bounds as that it would not be felt to be a nuisance. We are not concerned with the right or authority of the city council to prohibit the peddling and hawking of wares; but we do think that that body has the right and authority to put a stop to loud and boisterous

outcries of overzealous and anxious sellers of goods and wares on the public street."

From a careful examination of the questions involved in this case, we are of the opinion section 1450 of the Municipal Code of Chicago is a valid ordinance, and that the circuit court did not err in dismissing appellant's bill. The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(247 Ill. 500)

FRANKLIN COUNTY v. BLAKE et al.
(Supreme Court of Illinois. Dec. 21, 1910.)

ESCHEAT (§ 6*)—PROCEEDINGS—NATURE—LAW OR EQUITY.

Under Act March 24, 1874 (Hurd's Rev. St. 1909, c. 49), providing for the escheat of land, the proceedings for such relief are purely statutory, and can only be prosecuted in a court of law.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 7, 17, 24; Dec. Dig. § 6.*]

Appeal from Circuit Court, Franklin County; William H. Green, Judge.

Bill by Franklin County to escheat certain property to the county, in which William B. Blake and others appeared. From a decree sustaining a demurrer to the amended bill, and dismissing the same, complainant appeals. Affirmed.

G. A. Hickman and W. F. Spiller, for appellant. Hart & Williams, for appellees.

COOKE, J. This is a bill in chancery, filed by the state's attorney of Franklin county on behalf of that county, seeking to have certain real estate therein described decreed to be vested in Franklin county. The suit was evidently intended to be brought under the act of 1874 in relation to escheats. The defendants named in the bill were served by the ordinary chancery summons. The prayer of the bill was for scire facias, returnable to the next term, requiring the defendants to show cause why the legal title to the real estate in question should not be vested in the county of Franklin, that certain deeds therein named be set aside as clouds upon the title, that the county of Franklin be put into possession of the premises, and for general equitable relief.

Appellees filed a general and special demurrer to the bill, which was sustained. Appellant was given leave to amend, and, upon demurrer being sustained to the amended bill, again took leave to amend. Demurrer was filed to the second amended bill, and sustained. Appellant elected to stand by its amended bill, and a decree was entered dismissing the bill. From this decree, appellant has appealed.

The subject-matter of this bill does not come within the jurisdiction of a court of chancery, and the demurrer was properly

sustained. Proceedings by a county for escheated property are purely statutory, and can be prosecuted only in a court of law. Act to Revise the Law in Relation to Escheats, approved March 24, 1874; Hurd's Rev. St. 1909, c. 49.

As the court had no jurisdiction to entertain the bill, the decree dismissing the same will be affirmed.

Decree affirmed.

(247 Ill. 333)

CITY OF CHICAGO v. MORELL.

(Supreme Court of Illinois. Dec. 21, 1910.)

CONSTITUTIONAL LAW (§ 83*)—CIVIL RIGHTS —ARREST FOR "DEBT."

An action to recover a penalty for violating an ordinance is a civil action, though commenced by affidavit and warrant, and the penalty imposed is not a "debt," within the meaning of the Constitution, so as to prohibit its enforcement by arrest and imprisonment; and hence an ordinance requiring licenses to run certain vehicles, including automobiles, was not unconstitutional for imposing a penalty of fine and imprisonment for noncompliance therewith.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150-151½; Dec. Dig. § 83.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

Error to Municipal Court of Chicago; Judson F. Going, Judge.

Andrew W. Morell was convicted for violating the wheel tax ordinance, and he brings error. Affirmed.

Kruse & Peden and R. C. Merrick, for plaintiff in error. Edward J. Brundage, Corp. Counsel, and Clarence N. Boord (Edwin H. Cassels, of counsel), for defendant in error.

HAND, J. The plaintiff in error, Andrew W. Morell, was convicted of a violation of the wheel tax ordinance of the city of Chicago in the municipal court of Chicago, and was fined \$25 and costs and ordered committed to the house of correction until the fine and costs were paid, and he has sued out this writ of error to reverse said judgment.

The only question raised upon this record is the constitutionality of the wheel tax ordinance of the city of Chicago. The position of the plaintiff in error, as defined in his brief, is that said ordinance is unconstitutional for the reason that it is a revenue ordinance, and imposes a penalty for its violation, which may be enforced by arrest and imprisonment, which, it is argued, amounts to the enforcement and collection of a tax—which, it is said, is a debt—by arrest and imprisonment. In *Harder's Fire Proof Storage & Van Co. v. City of Chicago*, 235 Ill. 58, 85 N. E. 265, and in *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073, the constitutionality of the wheel tax ordinance of the city of Chicago was sustained. The question

here raised, however, was not there considered.

The law is well settled in this state that an action to recover a penalty for the violation of a municipal ordinance is a civil action, and, although commenced by affidavit and warrant, it is not a criminal proceeding, and the penalty imposed for the violation of such an ordinance is not, within the meaning of the Constitution, a debt. *Webster v. People*, 14 Ill. 365; *Town of Partridge v. Snyder*, 78 Ill. 519; *City of Chicago v. Kenney*, 35 Ill. App. 57; *Rich v. People*, 66 Ill. 513; *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213. The proceeding in which plaintiff in error was arrested, fined, and ordered imprisoned was not a proceeding to collect the wheel tax upon his automobile, as it seems to be his view; but it was a proceeding commenced against him to collect the penalty imposed by the ordinance for using his automobile upon the streets of the city of Chicago without having complied with the wheel tax ordinance, and had he paid the fine imposed upon him and the costs adjudged against him he would not have had the right to run his automobile upon the streets of the city of Chicago without, first taking out a license under the wheel tax ordinance. We think, therefore, it is clear that the city had the right to enforce said ordinance against the plaintiff in error by fine and imprisonment.

The plaintiff in error relies upon *State v. Green*, 27 Neb. 64, 42 N. W. 913, and three other cases decided by the Supreme Court of Nebraska, to sustain his contention. The cases from that state referred to are out of line with the adjudications in this and other states (*St. Louis v. Sternberg*, 69 Mo. 289; *St. Louis v. Green*, 70 Mo. 562; *Johanson v. Mayor*, 114 Ga. 428, 40 S. E. 322; *Salt Lake City v. Christensen Co.*, 34 Utah, 38, 95 Pac. 523, 17 L. R. A. [N. S.] 898; *Cousins v. State*, 50 Ala. 113, 20 Am. Rep. 290; *Matter of Guerrero*, 69 Cal. 88, 10 Pac. 261; *Stewart v. Potts*, 49 Miss. 749; *People v. Mulholland*, 82 N. Y. 324, 37 Am. Rep. 568; *State v. Cohen*, 84 N. C. 771; *Ex parte Schmidt*, 2 Tex. App. 196; *Commonwealth v. Byrne*, 20 Grat. [Va.] 165); and they have been overruled by the Supreme Court of Nebraska in the late case of *Rosenbloom v. State*, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922.

The judgment of the municipal court will be affirmed.

Judgment affirmed.

(247 Ill. 462)

BORG v. STRAUSS.

(Supreme Court of Illinois, Dec. 21, 1910.)

1. TRIAL (§ 404*)—FINDING OF FACT OR CONCLUSION OF LAW.

Plaintiff and defendant entered into a written agreement in October, 1903, by which plaintiff was to enter defendant's employment for

one year without compensation until defendant should obtain certain contracts, when he was to receive a stated sum per month, and the plaintiff remained in the employ of defendant until June, 1905. In assumpsit to recover for services, there was evidence tending to show a verbal agreement in November, 1904, that plaintiff should receive compensation. Section 61 of the practice act (*Hurd's Rev. St. 1909*, c. 110) requires the court, in a case tried without a jury, to find specially on any material question of fact which shall be submitted in writing by either party before argument, and the court held as a question of law the proposition submitted by the defendant, to the effect that if the plaintiff entered into the employment under a written agreement for one year from October, 1903, and remained until June, 1905, without written agreement as to compensation, the plaintiff's right to compensation after that time was governed by the written agreement. *Held*, that such proposition was not a finding of fact, but a finding of law applicable to the facts as they might be found.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 958; Dec. Dig. § 404.*]

2. MASTER AND SERVANT (§ 9*)—DURATION OF CONTRACT.

Where one continues in the employ of another after the expiration of a written contract, upon a verbal agreement made thereafter, the rights and liabilities of the parties are not governed by the written agreement.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 11; Dec. Dig. § 9.*]

3. APPEAL AND ERROR (§ 1095*)—REVIEW—FINDINGS OF FACT BY INTERMEDIATE COURT.

Where the Appellate Court has found the evidence sufficient to support a finding and judgment, the Supreme Court cannot disturb the judgment on the ground that it was contrary to the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. § 1095.*]

Certiorari to Appellate Court, First District, on Appeal from Municipal Court of Chicago; John H. Hume, Judge.

Action by Fred G. Borg against J. B. Strauss. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant brings certiorari. Affirmed.

McInerney, Power & Byrnes, for plaintiff. Kremer & Greenfield, for defendant.

FARMER, J. This suit is an action in assumpsit, brought by defendant in error against plaintiff in error to recover for services performed. The case was tried in the municipal court of the city of Chicago without a jury, and resulted in a judgment being rendered in favor of the defendant in error for \$1,151.90. Plaintiff in error appealed from the judgment to the Appellate Court for the First District, and that court affirmed the judgment. Upon the petition of plaintiff in error this court granted a writ of certiorari, and the record is brought here for review.

Both parties are civil engineers. Plaintiff in error was the inventor and designer of an "improved bascule bridge, an improved viaduct, and other improvements," and had let-

ters patent thereon. He and defendant in error entered into a written agreement October 15, 1903, for one year, wherein it was stipulated that defendant in error was to work for plaintiff in error as an assistant engineer in charge of the office and of such engineering work as plaintiff in error was carrying on from time to time, but defendant in error was to receive no compensation for his services until plaintiff in error should obtain a satisfactory contract or contracts for the design and erection of one or more of his bridges or elevated structures, and when such contract had been obtained plaintiff in error agreed to pay defendant in error \$140 per month, dating from May 1, 1903, to the time when such contract was obtained. Defendant in error remained in the service of plaintiff in error until June 15, 1905; during which time he did considerable work in preparing drawings for bridges and other structures for plaintiff in error, who was endeavoring to obtain contracts. No other written agreement was entered into between the parties during the period of service rendered by defendant in error for plaintiff in error; but defendant in error testified that about November, 1904, he had a conversation with the plaintiff in error about his future compensation, and that plaintiff in error then agreed, verbally, to pay him \$150 per month, unconditionally. This was denied by plaintiff in error. Defendant in error introduced in evidence as an exhibit a paper which was as follows:

18	1358.30
140	400
720	
18	1758
2520	
900	
3420	
1758	

1662 due to May 1st, 1905.

By Mr. J. B. Strauss, May 16, 1905.

He testified that the paper was in the handwriting of the plaintiff in error, except the words, "Due to May 1st, 1905. By Mr. J. B. Strauss, May 16, 1905;" that it was made in his presence by plaintiff in error and delivered to him about May 16, 1905. He also testified that plaintiff in error said the figures "18" represented months and the figures "140", dollars; that the figures "900" represented dollars, and plaintiff in error said it was six months at \$150 per month. The written words on the paper referred to were written there by defendant in error, and he testified he wrote them in the presence of plaintiff in error. Plaintiff in error testified, when asked whether the figures on the paper were in his handwriting: "I don't think those figures were made by me, but I wouldn't say definite. They don't look like my figures. I don't think I ever made that. I don't know."

At the conclusion of the evidence plaintiff in error submitted to the court a number of propositions of law, two of which were held and the others refused. One of the propositions held was as follows:

"If the court finds, from the evidence, that the plaintiff, by verbal agreement with the defendant, continued in the employ of the defendant after October 15, 1904, the date mentioned therein for the expiration of the written contract in evidence between said parties dated October 15, 1903, and up to the 15th day of June, A. D. 1905, without any further or other agreement as to the compensation to be received by the plaintiff for his services, then the court is requested to hold, as a proposition of law, that the rights and liabilities of said parties, and each of them, as to the compensation to be received by the plaintiff from the defendant up to said 15th day of June, 1905, are governed and controlled by the terms of said written agreement."

The theory of plaintiff in error in the trial court was that no new arrangement or agreement was ever made by the parties at the expiration of the written contract, and that defendant in error, by continuing in the service of plaintiff in error, impliedly agreed to do so for another year under the terms of the written agreement, and that by leaving plaintiff in error's employment before the expiration of that period he abandoned the contract and was not entitled to recover. The error complained of is that the court, in the proposition above quoted, found the facts as contended for by plaintiff in error, but misapplied the law. Section 61 of the present practice act (Hurd's Rev. St. 1909, c. 110) requires the court, in a case tried without a jury, to "find specially upon any material question or questions of fact which shall be submitted in writing by either party before the commencement of the argument." The proposition held by the court was construed by the Appellate Court to be one of law, and not one of fact. In this we think the Appellate Court was right. By that proposition the court did not pretend to make a finding of facts, but merely stated the law applicable if the facts were found to be as contended for by the plaintiff in error. Evidently the court found the facts otherwise. If defendant in error continued in the service of plaintiff in error after the expiration of the written contract, upon the verbal agreement testified to by him, then the rights and liabilities of the parties would not be governed by the written agreement.

We do not think there is any error of law in this record that would justify the reversal of the judgment. As to the facts, the Appellate Court said in its opinion: "The evidence is, we think, sufficient to warrant and support the finding and judgment." And we could not disturb the judgment on the ground that it was contrary to the evidence, and it is therefore affirmed.

Judgment affirmed.

(247 Ill. 453.)

PEOPLE ex rel. EHRHARDT, County Treasurer, v. CHICAGO & A. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 44*)—LIMITATION OF AMOUNT —"TAXING DISTRICT."

Where a town includes a city and school district which overlap in part, and in such part the tax levy exceeds the maximum rate of 8 per cent., and under the amended revenue law, providing that certain taxes are to be extended at full rate and others not to be reduced below a certain minimum per cent., the town tax rate is the only one subject to reduction, the reduction must apply to the entire town, and not merely to the part where the excess exists, as a "taxing district," within the meaning of the law, is the municipality which levies the tax that is to be scaled, since the opposite construction would render the statute violative of Const. art. 9, § 9, requiring that all municipal taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 44.*]

2. CONSTITUTIONAL LAW (§ 48*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

It is the duty of courts, when possible, to construe statutes so as to uphold them, rather than so as to render them unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

Appeal from Will County Court; George J. Cowing, Judge.

Application by the People, on the relation of August Ehrhardt, Treasurer and ex officio Tax Collector of Will County, for judgment for unpaid taxes. Heard on objections by the Chicago & Alton Railroad Company. From a judgment overruling the objections, the railroad company appeals. Reversed and remanded, with directions.

J. L. O'Donnell, T. F. Donovan, and J. A. Bray (Winston, Payne, Strawn & Shaw, of counsel), for appellant. George A. Barr, State's Atty. (W. H. Stead, Atty. Gen., and Simeon W. King, of counsel), for appellee.

VICKERS, C. J. The county treasurer of Will county, as collector of taxes, applied to the county court, at its June term, 1910, for judgment for unpaid taxes for the year 1909. The Chicago & Alton Railroad Company filed objections to certain taxes for which judgment was sought, and among them to an item of \$482.27, being a part of the town tax levied against the property of the railroad company in Reed township, which amount had not been paid. The county court overruled the objections and entered judgment for the sum of \$482.27 and costs. The railroad company has perfected an appeal to this court from that judgment.

The objection to this tax is that it is excessive to the amount of the difference between \$1.38 per \$100 and 75 cents per \$100. The valuation of appellant's property in Reed township is \$76,551. Computed at the

rate of excess, which is 63 cents, the amount of taxes for which appellant claims it is not liable is \$482.27. The part of Reed township in which the tax rates are highest is within the limits of school district No. 6 and the city of Braidwood. The school district and the city overlap, but neither is entirely within the limits of the other. The tax rates levied for the year 1909 against property situated both in the city of Braidwood and school district No. 6 were:

State tax	\$.35 per \$100.
County tax40 "
Town tax	1.38 "
Road and bridge tax.....	.36 "
City of Braidwood tax.....	2.25 "
Educational tax	1.50 "
School building tax.....	.29 "
Total tax rate.....	\$6.63 "

Under section 2 of the amended revenue law of 1909 (Laws 1909, p. 323), some of these taxes are excluded from scaling or reduction. Those so excluded are:

State tax	\$.35
Road and bridge tax.....	.36
School building tax.....	.39
Total	\$1.10

Deducting this amount from the total tax rate of \$6.63 leaves a balance of \$5.53, which must be reduced to 3 per cent., which is the maximum rate.

The amended revenue law provides that certain taxes are to be extended at full rate, and others not to be reduced below a certain minimum per cent. Under this law the only tax which is subject to reduction is the town tax rate of \$1.38. The only question in this case is whether the \$1.38 town tax should be scaled for the entire township, or only in that portion of school district No. 6 and the city of Braidwood where the excess rate exists: In other words, the question is whether the whole township is a "taxing district," within the meaning of this law, or whether the school district is the taxing district in which the rates are to be scaled. The court below held that the school district was the taxing district. We are of the opinion that this ruling is erroneous. A taxing district, within the meaning of this law, is the municipality which levies the tax that is to be scaled. If the appellee's contention be allowed to prevail, the result would be that one portion of Reed township would be paying town taxes at the rate of \$1.38 per \$100 valuation, while other portions of the same township would only pay 75 cents per \$100. This construction would render the statute unconstitutional. Section 9 of article 9 of the Constitution requires that all municipal taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. By scaling the town taxes in Reed township to 75 cents

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

per \$100, the uniformity required by the Constitution will be preserved. If the scaling should be limited to some other municipality, within or partly within such township, less than the township, the uniformity of rates would be destroyed.

It is probably true, as suggested on argument, that the construction which we have given to section 2 of the Junil law may have the effect of depriving municipalities of a large part of their revenue. If such be the effect, it is a matter for the Legislature to consider, and not for the courts. It is the duty of courts, when possible to do so, to adopt such a construction of statutes as will uphold them, rather than one which would render them unconstitutional. This court has heretofore sustained the constitutionality of the amended revenue law of 1909. *Booth v. Opel*, 244 Ill. 317, 91 N. E. 458; *Town of Cicero v. Haas*, 244 Ill. 551, 91 N. E. 574.

The county court erred in not sustaining the objection to the excess of taxes in Reed township. The judgment of the county court of Will county is reversed, and the cause remanded to that court, with directions to enter a judgment sustaining the objections to the tax involved.

Reversed and remanded, with directions.

(243 Ill. 46.)

PEOPLE v. STEINHAUER.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. INTOXICATING LIQUORS (§ 215*)—WRONGFUL SALE—INFORMATION—"SALE."

An information alleging wrongful sale of intoxicating liquor was not objectionable for failure to charge its delivery, since an allegation of a sale imports a delivery.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 253-260; Dec. Dig. § 215.*]

2. CRIMINAL LAW (§ 629*)—WITNESSES—NOTICE TO ACCUSED.

Prosecutor is not restricted to the witnesses whose names are furnished to accused, as it is within the discretion of the court to allow other witnesses to testify.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

3. CRIMINAL LAW (§ 629*)—WITNESSES—DISCLOSURE.

Where, in a prosecution for the sale of liquor in anti-saloon territory, defendant did not deny making a sale of liquor to M. other than that alleged in the information, and there was no reason to suppose that he could or would have disputed the facts testified to by M. concerning such sale, had he known before the trial that M. would testify, the court did not err in refusing to sustain defendant's objection to M.'s testimony, because his name was not disclosed by prosecutor as a witness for the state before trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1420-1429, 1432-1436; Dec. Dig. § 629.*]

4. INTOXICATING LIQUORS (§ 14*)—REGULATION.

The liquor traffic is subject to such police regulation as the Legislature may see fit to

adopt, and under this rule Local Option Law, § 13 (Hurd's Rev. St. 1909, c. 48, § 87), prohibiting the taking of orders in anti-saloon territory for the sale or delivery of intoxicating liquor, and providing that the taking of such orders shall constitute unlawful selling, is constitutional.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 14.*]

5. SALES (§ 161*)—DELIVERY TO CARRIER.

While in the case of an ordinary sale of personal property, where there is to be a delivery to the purchaser, in the absence of statute, or agreement as to the place of delivery, the court has by judicial decision made a delivery to a common carrier a delivery to the purchaser, it is competent for the parties to provide otherwise, or for the Legislature to declare by statute what shall be a delivery, in the absence of such agreement.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 877-890; Dec. Dig. § 161.*]

Error to Appellate Court, Fourth District, on Appeal from Fayette County Court; *Harry Higbee*, Judge.

Fred Steinhauer was convicted of selling liquor in anti-saloon territory, and he appealed to the Appellate Court, where the judgment was affirmed, and he brings error. Affirmed.

John A. Bingham and E. B. Spurgeon, for plaintiff in error. W. H. Stead, Atty. Gen., and Will P. Welker, State's Atty. (Albert & Matheny, of counsel), for the People.

CARTWRIGHT, J. The plaintiff in error, Fred Steinhauer, was found guilty by a jury, in the county court of Fayette county, on the first and second counts of an information charging him with sales of intoxicating liquor in the township of Vandalla, which was anti-saloon territory, and the court sentenced him to imprisonment in the county jail 20 days and to pay a fine of \$100 and costs. The Appellate Court for the Fourth District affirmed the judgment.

The first ruling of the county court complained of is the refusal to quash the information. There were four counts; but, as plaintiff in error was not found guilty under the third and fourth, their averments are not material. The objection made to the first and second counts is that they merely charged the plaintiff in error with selling intoxicating liquor, and did not allege a delivery of the liquor. To allege a sale is to allege a fact including all such acts as are necessary to constitute a sale. It was not necessary to allege each step of the process by which a sale might be completed.

The plaintiff in error lived in Vandalla, which was anti-saloon territory, and kept a saloon in Altamont. He took orders for whisky in Vandalla, and delivered it by express from his saloon in Altamont to the purchasers. One sale was made to Charles Kurtz, who came into a car in Vandalla where the defendant was sitting and gave him a dollar, telling him to send him a quart

of whisky, and the whisky was delivered by express. A second sale was proved by testimony of Floyd Miller, and when he was produced as a witness objection was made to his testifying, on the ground that plaintiff in error had no notice that he would be a witness. The state's attorney had furnished to the attorneys for plaintiff in error a list of witnesses which did not include the name of Miller. The court overruled the objection, and counsel say that the defendant was thereby compelled to meet the testimony of Miller, which he was not prepared to meet, and they say: "This sort of practice should not be tolerated by courts of a civil nation, as it savors too much of the Spanish Inquisition, and we feel should be promptly and most positively condemned." The practice of allowing a witness to testify whose name does not appear in the list furnished to the accused has not been regarded in a light so unfavorable; but, on the contrary, it has been held by this court in numerous cases, beginning in 1841 with the case of *Gardner v. People*, 3 Scam. 83, that the prosecutor is not restricted to the witnesses whose names are furnished, and even in the most serious crimes it is within the discretion of the court to allow other witnesses to testify. The sale to Miller was not denied by the plaintiff in error, who testified in his own behalf, and there is not the slightest reason to suppose that he would or could have disputed the facts testified to by Miller, if he had known before the trial that Miller would testify. The court was right in overruling the objection. Miller met plaintiff in error on the street in Vandalla, and told him, when he went to Altamont, to send him a half a gallon of whisky. The whisky was received by express, and was afterward paid for by Miller. The guilt of defendant was established, and the jury could not have found otherwise.

It is argued, however, that the taking of an order for liquor in anti-saloon territory, the delivery of the liquor to an express company in saloon territory, and the receipt of the same and payment therefor by the purchaser in anti-saloon territory, is not an offense against the law. If it is not, it must be because section 13 of the local option law (Hurd's Rev. St. 1909, c. 43, § 37) violates some constitutional provision and is void, since that section provides that the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of any intoxicating liquors shall be held to be an unlawful selling. Counsel do not point to any provision of the Constitution which is violated by that section, but devote a lengthy argument to the propositions that in ordinary sales the title does not pass until there is a delivery, unless there is an agreement that the property is to remain in the possession of the vendor; that even then the title does not pass unless the property is sep-

arated from the bulk of other property of the same kind; that in this case it was not intended that the whisky should remain in the possession of the vendor; and that consequently there was no completed sale until the delivery to the express company, which took place in saloon territory.

The liquor traffic is subject to such police regulations as the Legislature may see fit to adopt, and it cannot be doubted that it is within the power of the Legislature to prohibit the taking of orders in anti-saloon territory for the sale or delivery of intoxicating liquors. That has been done by providing that such taking of orders shall constitute an unlawful selling within the meaning of the act. In the case of an ordinary sale of personal property not regulated by statute, and where there is to be a delivery of property to the purchaser, if there is no agreement as to the place of delivery or what shall constitute a delivery, the courts, by judicial construction, hold that a delivery to a common carrier is a delivery to the purchaser; but it is entirely competent for the parties to provide otherwise, or for the Legislature to provide by statute what shall be a delivery in the absence of an agreement. Section 13 does not define or create an independent offense (*People v. Young*, 237 Ill. 196, 86 N. E. 589); but it does provide that transactions such as were proved in this case shall constitute an unlawful selling of intoxicating liquor within anti-saloon territory. What has been said disposes of every question raised in the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 623)

GLOBE BREWING CO. v. AMERICAN MALTING CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. CERTIORARI (§ 85*)—GROUNDS—RIGHT OF REVIEW—SUIT—AMOUNT.

Practice Act (Hurd's Rev. St. 1909, c. 110) § 121, which limits the right to issue a writ of certiorari in actions *ex contractu* and cases sounding in damages to cases in which the judgment, exclusive of costs, exceeds \$1,000, applies only to the judgment in the trial court, and not to that of the Appellate Court.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 50; Dec. Dig. § 85.*]

2. SALES (§ 84*)—CONSTRUCTION—TIME OF PERFORMANCE—OPERATION.

Where a contract for the sale of 15,000 bushels of malt was entered into, providing that it should be shipped as ordered during the season ending December 31, 1906, was not completed on such date, and neither party made an offer of completion, there was no breach on either side, as it had expired by its terms.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 234, 235; Dec. Dig. § 84.*]

3. SALES (§ 84*)—CONSTRUCTION—IMPLIED CONTRACT—RENEWAL.

That the seller, after such expiration, shipped more malt at the agreed price, though malt

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had advanced, did not constitute an implied renewal of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 234, 235; Dec. Dig. § 84.*]

4. SALES (§ 84*)—CONSTRUCTION—TERMINATION OF CONTRACT—ESTOPPEL—WAIVER.

Where the seller of malt, which was sold under a contract that provided for its delivery as ordered during the season ending December 31, 1906, filled orders at that price after such date, no estoppel or waiver arose as against the seller, precluding him from asserting a termination of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 234, 235; Dec. Dig. § 84.*]

Certiorari to Appellate Court, First District, on Appeal from Municipal Court of Chicago; McKenzie Oleland, Judge.

Action by the Globe Brewing Company against the American Malting Company. From a judgment of the Appellate Court, reversing a judgment for defendant, plaintiff brings certiorari. Judgment of Appellate Court reversed, and that of trial court affirmed.

Edmund S. Cummings, for plaintiff in error. Frederic E. Von Ammon (Lackner, Butz & Miller, of counsel), for defendant in error.

DUNN, J. On February 19, 1906, the Globe Brewing Company bought of the American Malting Company 15,900 bushels of malt at 51 cents a bushel, to be shipped as ordered during the season ending December 31, 1906. This suit was brought by the Globe Brewing Company, the defendant in error, in the municipal court of Chicago, to recover damages for a failure to deliver 3,974 bushels of malt under the contract. The defendant, which is here the plaintiff in error, pleaded the general issue, and gave notice of a set-off of \$1,330.95 for malt delivered under the contract. A trial by the court without a jury resulted in a judgment in favor of the plaintiff in error for the amount of its set-off, which was not disputed. The Appellate Court reversed the judgment, and rendered judgment in favor of the defendant in error for \$20.21, being the amount claimed by it, less the set-off of the plaintiff in error, and a writ of certiorari has been awarded to bring the record before us for review.

The facts are undisputed; the evidence being wholly documentary, except the testimony of one witness, the manager of the defendant in error, who testified in its behalf. No propositions of law were submitted to the court, and no objections were made to any evidence; but at the close of the evidence the plaintiff in error moved to strike out all the evidence and find the issues in its favor. Upon the hearing of such motion the court found the issues for the plaintiff in error. The defendant in error excepted, and thus the question was presented to the Appellate Court, and is presented here, as to whether there was any evidence tending to

sustain the original cause of action declared on by the defendant in error.

In March, 1905, the Globe Brewing Company had purchased of the American Malting Company 40,000 bushels of malt at 49 cents a bushel, to be shipped as ordered by March 15, 1906. After the contract of February 19, 1906, the defendant in error continued to order and the plaintiff in error to deliver malt under the previous contract until August, 1906, when the delivery of the entire 40,000 bushels was completed, and no malt was ordered or delivered under the new contract until September, 1906. After that time deliveries were made under the new contract upon the orders of the defendant in error; but on December 31, 1906 (the date of the expiration of the contract), there remained undelivered 8,900 bushels of the 15,000 bushels sold, and the price of malt had advanced to 75 cents or 80 cents a bushel. The defendant in error continued to order malt after the expiration of the contract, and during the months of January, February, and March, 1907, the plaintiff in error delivered the malt at the price of 51 cents until March 14, 1907, when it notified defendant in error that, the contract having expired, the balance remaining undelivered had been canceled. The market price of malt was then between 85 and 90 cents a bushel, and the quantity of malt remaining undelivered was 3,974 bushels.

It is suggested on behalf of the defendant in error that the proviso in section 121 of the practice act (Hurd's Rev. St. 1909, c. 110) limits the right to issue a writ of certiorari in actions ex contractu and cases sounding in damages to cases in which the judgment, exclusive of costs, exceeds \$1,000. The judgment of the Appellate Court is usually for costs, only, and the proviso in section 121 refers, not to the judgment of that court, but to the judgment of the trial court.

After December 31, 1906, the plaintiff in error, not having tendered the undelivered portion of the malt and the defendant in error not having demanded its delivery, the contract between them was by its terms at an end, and neither party had any claim against the other for its breach. No contract existed between them, and their relation to one another was the same as if none ever had existed. If any liability afterward arose from one to the other, it must have arisen out of an express or implied contract afterward made. It is the position of counsel for the defendant in error that upon the expiration of the 31st day of December without the delivery of the malt the plaintiff in error had an election to treat the contract as broken and sue for damages, or to waive the time limit fixed for delivery and continue to regard the contract in force. No such right of election existed. There had been no breach of the contract for which the plain-

tiff in error could sue, and it could not, at its option, continue in force a contract which had expired by its terms. The time of delivery was not a provision inserted for the benefit of either party, but was an essential part of the contract, equally binding upon and for the benefit of either party. Neither party can be regarded as in default, because neither party had tendered performance. The fact that the plaintiff in error, after the expiration of the contract, filled an order of the defendant in error for malt at the price fixed in the contract, has no tendency to prove a new contract to deliver the remainder of the malt. Such new contract must have a consideration. The time for the performance of the original contract having passed, the plaintiff in error was at liberty to refuse to deliver any more malt, or to deliver all that remained of the 15,000 bushels, or such part as it saw fit. The plaintiff in error was not bound by the filling of any order, or the defendant in error by the giving of any order, beyond the amount of such order.

The doctrine of waiver has little or no application to the facts of this case, and the doctrine of estoppel none at all. In the case of executory contracts, if, after the time limited for performance, one party induces the other to go on and perform or accepts performance, the party so inducing or accepting performance will be held to performance on his part. Such is the character of the cases cited on behalf of the defendant in error, but such is not this case. The plaintiff in error did not induce the defendant in error to continue in the performance of its contract, and was under no obligation to continue performance on its part, at the request of the defendant in error, longer than it saw fit.

The set-off of the plaintiff in error having been admitted in the trial court, and there being no evidence to sustain the cause of action of the defendant in error, the judgment of the municipal court was rightly rendered in favor of the plaintiff in error, and the Appellate Court erred in reversing it. The judgment of the Appellate Court will therefore be reversed, and that of the municipal court affirmed.

Judgment reversed.

(247 Ill. 402)

PEOPLE ex rel. CITY OF DANVILLE et al.
v. FOX, Town Collector.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF CONSTITUTIONAL QUESTIONS—NECESSITY OF DETERMINATION.

Where a tax collector pursuant to the first proviso of the Road and Bridge Act (Hurd's Rev. St. 1909, c. 121) § 16, has paid to a city one-half of the tax collected for road and bridge purposes on property lying within the city as authorized by sections 13 and 14, and the city

seeks to enforce payment to it of the balance of the tax, as authorized by the third proviso of section 16, requiring the whole tax on property within the limit of cities of 20,000 inhabitants or over to be paid to the treasurer of the city for city purposes, the validity of the first proviso of section 16 is not involved.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

2. CONSTITUTIONAL LAW (§ 208*)—CLASS LEGISLATION—DISPOSITION OF TAXES.

The third proviso of Road and Bridge Act (Hurd's Rev. St. 1909, c. 121) § 16, requiring all taxes levied and collected for road and bridge purposes under sections 13 and 14, on property within cities of 20,000 inhabitants or upwards to be paid to the treasurer of the city for city purposes while the first proviso of section 16 requires a half of the tax to be paid to the city for road and bridge purposes, is unconstitutional as class legislation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.*]

3. STATUTES (§ 79*)—SPECIAL OR LOCAL LAWS—GRANT OF SPECIAL PRIVILEGES AND IMMUNITIES.

The third proviso of Road and Bridge Act (Hurd's Rev. St. 1909, c. 121) § 16, requiring all taxes levied and collected for road and bridge purposes under sections 13 and 14 on property within the limits of cities of 20,000 inhabitants or upwards to be paid to the city treasurer for city purposes, while the first proviso of section 16 requires one-half of such tax to be paid to the treasurer of the city for the improvement of roads, streets, and bridges, is violative of Const. art. 4, § 22, prohibiting the passage of local or special laws granting to any corporation, association, or individual any special or exclusive privilege or immunity, since the classification is arbitrary and discriminates against cities of less than 20,000 inhabitants and against towns or villages of any population.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 84, 85; Dec. Dig. § 79.*]

4. HIGHWAYS (§ 149*)—HIGHWAY TAXES—DISPOSITION OF PROCEEDS—STATUTORY PROVISIONS.

As applied to a tax levy under Road and Bridge Act (Hurd's Rev. St. 1909, c. 121) § 14, on account of contingencies outside the limits of a city included in part in the town, the third proviso of section 16, requiring the payment of the entire tax on property within the limits of cities of twenty thousand inhabitants or over, to be paid to the city treasurer for city purposes, is invalid as a diversion of the tax from the purposes for which it was levied.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 149.*]

Appeal from Circuit Court, Vermilion County; W. B. Scholfield, Judge.

Petition by the People, on the relation of the City of Danville and another, for mandamus to William H. Fox, Town Collector. From a judgment for petitioners on demurrer, the defendant appeals. Reversed and remanded, with directions.

Rearick & Meeks, for appellant. J. B. Mann, for appellees.

FARMER, J. The people, on the relation of the city of Danville and John F. Ridge, treasurer of said city, filed a petition in the circuit court of Vermilion county, at the May term, 1910, for a writ of mandamus di-

rected to William H. Fox, collector for the town of Danville, commanding him to pay over to the said John F. Ridge, for the use of said city, the sum of \$16,402.89, which was collected by him on account of taxes levied in the year 1909 for road and bridge purposes on property situated within the corporate limits of said city of Danville, said sum being the balance in his hands after deducting his commission or fees for collecting the same. The petition alleges that the commissioners of highways of the town of Danville in September, 1909, levied under section 13 of the road and bridge act (Hurd's Rev. St. 1909, c. 121) a tax of 36 cents on the \$100 for road and bridge purposes on all taxable property in said town, and under section 14 of said act a tax of 25 cents on the \$100 to meet certain contingencies specified in the levy which existed in said town outside the limits of the city of Danville. The petition alleges that there has been collected on account of the levy under section 13 of said act the sum of \$19,360.78 and on account of the levy under section 14 the sum of \$13,445, out of which sums collected the said collector has paid to the city \$16,402.89; that there is still in the hands of said collector the sum of \$16,402.89, which he refuses to pay over to said city treasurer. The petition further alleges that pursuant to an ordinance passed by the city council in 1907 a census of the city of Danville was taken which showed the number of inhabitants to be 29,485, and that on July 1, 1909, the city contained more than 20,000 inhabitants. The defendant demurred to the petition. The court overruled the demurrer, and, defendant electing to stand by his demurrer, judgment was rendered and the writ ordered to issue. The case has been brought to this court by appeal.

The question presented by this record is, Is the city of Danville entitled to all of the road and bridge taxes levied and collected upon property within the corporate limits of the city under both sections 13 and 14 of the road and bridge act? The first proviso of section 16 of said act requires one-half of the tax collected for road and bridge purposes under sections 13 and 14 on property lying within an incorporated village, town, or city in which the streets are under the care of the corporation shall be paid to the treasurer of said village, town, or city, to be appropriated to the improvement of roads, streets, and bridges, either within or without the village, town, or city, and within the township, under direction of the corporate authorities of such village, town, or city. The third proviso requires all taxes levied and collected for road and bridge purposes under sections 13 and 14 on property within the limits of cities of 20,000 inhabitants or upwards shall be paid over to the treasurer of said city for city purposes. The tax authorized to be levied under section 13 is a

tax for road and bridge purposes, and for the payment of any outstanding orders, and cannot exceed 36 cents on each \$100. The tax authorized under section 14 is a sum in addition to that authorized under section 13 in view of some contingency, and cannot exceed 25 cents on the \$100. The maximum levy under both sections was made in this case. The levy under section 14 was made on account of contingencies outside the city limits of the city of Danville.

Counsel have in their brief and argument attacked the constitutionality of both the first and third provisos to section 16 referred to, but the only question involved here is the right of the city of Danville to all of the road and bridge tax levied and collected upon property within the city limits because its population exceeds 20,000. Its right to one-half of the tax collected is not involved, for it appears from the averments of the petition that one-half of said tax has already been paid to and received by the city treasurer of said city. That amount it was entitled to if the first proviso of section 16 is valid, and that is all it was entitled to under that proviso. The city, having received all it could claim under said proviso, is not by the petition in this case seeking to enforce any rights thereunder, but it is attempting to compel the payment to it of the other half of said tax under the third proviso to section 16. If the classification therein made cannot be sustained, then the city of Danville has already received all it could be entitled to under the first proviso to section 16. If the third proviso to said section 16 is invalid for any reason, the city was not entitled to the money it was seeking to obtain, and in that event the demurrer should have been sustained.

The constitutionality of said third proviso has never been directly presented to this court for determination. In *Peoria & Pekin Union Railway Co. v. People*, 144 Ill. 458, 33 N. E. 873, the validity of the third proviso to section 16 was not involved. That case arose upon an objection by the railway company to judgment for the road and bridge tax levied under section 13 in the town of Peoria, which includes the city of Peoria, and it was contended that the law authorizing the levy by the commissioners of a road and bridge tax upon property within the limits of an incorporated city was invalid. The tax levied had not been collected, and the validity of the third proviso to section 16 was not directly raised. It was contended by the railway company that the law attempted to confer power upon the highway commissioners to levy a tax for city purposes. The contention was not sustained, and the court, in discussing the question, referred to the provisos of section 16 as to what was to be done with the tax when collected under both sections 13 and 14. The first proviso to section 16 was the same then as it

is now, and the third proviso differed from the present proviso only in that the population of cities to which all the tax was required to be paid was fixed at 85,000, instead of 20,000. The court did not attempt to pass upon the validity of the third proviso, but, answering the contentions of the railway company, said, as the city of Peoria had over 85,000 population, all the road and bridge tax collected in the city "would be controlled by the last proviso of section 16, if valid." That case, therefore, is not, and was not intended to be, an adjudication of the validity of the third proviso to section 16. Objections by the same railway to a tax levied under sections 13 and 14 were considered by this court in *People v. Peoria & Pekin Union Railway Co.*, 232 Ill. 540, 552, 83 N. E. 1054, 1058, and it was there held that the commissioners of highways have no authority to levy a tax for a contingency occurring in an incorporated city or village; that such tax is authorized to be levied upon property within the limits of a city or village, but the commissioners cannot levy a greater amount on account of a contingency than is necessitated by the emergency, and in levying such tax only such contingencies as exist outside the corporate limits of cities and villages can be considered by the commissioners. Section 14 was held valid, but the validity of the proviso to section 16 was not considered or determined. The court said: "The question whether or not the Legislature may properly require the money raised for such purpose within the city, to be paid, in whole or in part, into the treasury of that city, is not presented by this record. Whether the last proviso of section 16, supra, can be enforced with reference to a tax levied to meet a contingency arising outside the city, we do not now determine." As the validity of the third proviso to section 16 has not heretofore been passed upon by this court, it is open for our consideration in this case, and it is here directly raised.

It is insisted that the proviso for the payment of all of said tax only to cities of 20,000 population or upward is unconstitutional as class legislation, and that it violates the constitutional prohibition against the passage of any local or special law granting to any corporation, association, or individual any special or exclusive privilege or immunity. In our opinion the objection is well taken. We are unable to see any reasonable basis for the classification made by said proviso. The Legislature may classify cities and enact laws applicable to such cities according to their classification, but the classification cannot be an arbitrary one. There must be some reason for the classification, based upon differences in circumstances or condition that will justify it. What reason, within the meaning of the rule, can there be for directing that where a city has 20,000 inhabitants or upwards all the tax levied

and collected under sections 13 and 14 shall be paid into its treasury for city purposes, but as to cities having a population of 19,900, or any number less than 20,000, only one-half of said tax shall be paid to the city treasurer, and that to be appropriated to the improvement of roads, streets, and bridges either within or without the city, village, or town and within the township, under the direction of the corporate authorities of the village, town, or city? It seems plain the classification is arbitrary, and is based upon no reasonable difference between cities sought to be favored and cities denied the benefits of the provision. Again, it is an unauthorized discrimination in favor of cities against villages and towns having an equal or greater population. An incorporated village or town which has attained a population of 20,000 or upwards is charged with the burden of maintaining its streets, alleys, and bridges just the same as a city that has attained that population, and, if the Legislature has authority to grant a city the right to receive and control the expenditure of all the tax levied and collected under sections 13 and 14 on property within its limits, we see no reason why the same privilege should not be granted a village or town under like circumstances and similarly situated.

While, as we have said, it is competent for the legislature to classify cities for governmental purposes and to enact laws applicable to such class, this authority is not absolute, but is subject to constitutional restrictions. "There must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained. There must be something, in the nature of things, which in some reasonable degree accounts for the division into classes." *People v. Knopf*, 183 Ill. 410, 56 N. E. 155. Unless there be some substantial reason, based upon differences in circumstances or conditions, which will justify the classification, the exclusion of villages and towns from the benefits to be derived from the control of the expenditure of all the tax collected under sections 13 and 14 is a grant of a special privilege to the cities included within the class and is in violation of section 22 of article 4 of the Constitution, which prohibits the passage of local or special laws granting to any corporation, association, or individual any special or exclusive privilege or immunity. That villages and towns may avail themselves of the benefits of said third proviso by becoming cities is no answer to the objection that it confers special privileges upon cities which are denied to other municipal corporations similarly situated. The fact that a municipality has adopted the form of government provided for cities affords no reasonable basis for conferring upon it benefits and privileges withheld from villages of equal population, and differing from cities only in that they have not thought proper or desirable to incorporate as

cities. This is not in conflict with the rule announced in cases sustaining acts of the Legislature which are to apply only to municipalities adopting them.

There is another reason in this case which will not arise in all cases, but will in many, that we think requires the proviso to be held invalid. The city of Danville is situated partly in Danville township and partly in Newell township. The tax the city is attempting to obtain was levied by the commissioners of highways of Danville township and for the purpose of meeting expenses required by contingencies that had occurred in said township outside the city limits. No authority exists for the commissioners levying a greater sum under section 14 than is necessitated by the contingency. *People v. Peoria & Pekin Union Railway Co.*, supra. Upon what principle, then, may the Legislature, after authorizing the levy and limiting it to the amount necessitated by the emergency, direct a diversion of a part of it from the purposes for which it was levied by authorizing its expenditure for some other purpose? If that may be done, then in this case a large sum of money levied to meet contingencies may be appropriated to and expended for entirely different purposes, and part or all of it may be expended on roads, streets, and bridges in that part of the city of Danville lying in Newell township. It needs no argument to show that the Legislature never intended such results, but, if it did, it had no constitutional power to enact laws to produce such results.

In our opinion proviso 3 of section 18 is unconstitutional and void, and the court erred in not sustaining the demurrer to the petition. The judgment is therefore reversed and the cause remanded to the circuit court, with directions to sustain the demurrer and dismiss the petition.

Reversed and remanded, with directions.

(247 Ill. 410)

PEOPLE ex rel. OWEN v. DUNN.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. DRAINS (§ 83*)—ADDITIONAL ASSESSMENTS—JURISDICTION OF COURT—NONRESIDENT.

Where the name of a nonresident owner of land within a drainage district was not contained in the affidavit of nonresident landowners filed by the commissioners with the petition for an additional assessment for work and repairs, nor in the affidavit of nonresident landowners filed when the time for hearing on the report of the assessment roll was fixed, nor in the assessment roll, the land belonging to such owner being described in such affidavits and in the assessment roll as the property of the owner's father, who died in 1878, the court had no jurisdiction of him, and could not confirm the assessment against his land, nor render judgment against it and order the land sold for non-payment of the assessment.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-83; Dec. Dig. § 83.*]

2. NAMES (§ 8*)—MIDDLE NAME—INITIALS.

The law recognizes only one Christian name, and a middle name or initial is not material in any legal proceeding.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. § 2; Dec. Dig. § 3.*]

3. COURTS (§ 39*)—JURISDICTION—RECITALS IN RECORD.

Where it appears from the record of a proceeding that a nonresident was not a party to it, so that the court had no jurisdiction over him, a finding of the court that it has jurisdiction is overcome.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 152-156; Dec. Dig. § 39.*]

Appeal from Iroquois County Court; John H. Gillan, Judge.

Action by the People, on relation of James E. Owen, against Wilmer H. Dunn. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

J. W. Kern and C. G. Hirsch, for appellant. John P. Pallissard, State's Atty., and A. F. Goodyear, for appellee.

FARMER, J. At the June term, 1910, of the county court of Iroquois county, the county collector made application for judgment and order of sale against the lands of Wilmer H. Dunn, appellant, for delinquent drainage tax due Crescent Drainage District No. 1. Said drainage district was organized several years ago under the levee act, and the taxes for which judgment was sought were assessed against the lands under an order of the county court for an additional assessment of the lands of the district for additional work and repairs. The commissioners of the district presented a petition to the county court July 22, 1907, representing that it was necessary to do certain additional work in said Crescent Drainage District No. 1 and to make certain repairs therein, and that there were no funds on hand with which to do the work and make the repairs. The petition averred that \$26,000 would be required for the additional work, and prayed an order directing said sum to be levied on the lands of the district benefited thereby for that purpose. August 8, 1907, was fixed by the court as the date for the hearing upon said petition. At the time the petition was presented to the court and filed therein the commissioners presented an affidavit, sworn to by all three of them, setting out the names of all persons said to be nonresident owners of lands in said district, with the places of their residence and addresses. This affidavit was sworn to by the commissioners on the 29th day of June, but was not filed until the 22d day of July following, which, as we have said, was the date the petition was presented to and filed in the court. The clerk's certificate states that within three days after the first publication of notice to nonresident owners, a copy of which publication was appended to the certificate, he mailed a copy thereof to each of the per-

sons named in the affidavit, directed to their respective places of residence as stated therein. On the day of the hearing under the petition the court entered an order finding that it had jurisdiction of the nonresident owners by due publication and mailing copies in the manner required by law, and entered an order granting the prayer of the petition. Subsequently the commissioners reported to the court they had procured the right of way for the work proposed to be done, and on April 14, 1909, the court ordered the assessment made by a jury, for the reason that all the commissioners were landowners in the district. The jury impaneled under the order returned an assessment roll May 19, 1909, and May 31, 1909, was fixed as the time for hearing objections thereto and notice ordered given of said hearing. On the day the assessment roll was returned by the jury, May 19, 1909, the commissioners filed an affidavit setting out the names of all persons stated therein to be nonresident owners of land in said district, giving their places of residence and addresses, and publication was made as to them. The hearing of objections to the assessment roll was continued from time to time until June 16, 1909, when it was approved and confirmed by the court. Appellant refused to pay the assessment against his lands, and objected to judgment and order of sale being entered, on the ground that the court had no jurisdiction to order the assessment made, and to confirm the same after it was made. The objections were overruled, and judgment was rendered as prayed by the collector, from which this appeal is prosecuted.

The claim of want of jurisdiction of the county court is based upon two grounds: First, that the affidavit as to nonresident landowners, filed when the petition for the additional assessment was filed, July 22, 1907, was sworn to by the commissioners on the 29th day of June preceding, and publication thereunder was unauthorized; second, that in neither of the affidavits as to nonresident landowners was the name of appellant given as a landowner in the district, and that no notice of the proceeding at any stage was mailed to him by the clerk.

We do not find it necessary to consider the first contention. Appellant was never at any time made a party to the proceeding or notified of the filing of the petition, the hearing thereon, or of any subsequent action of the court, including the hearing upon the report of the assessment roll by the jury and its confirmation by the court. The only place in the record and files of the proceedings under the petition for the additional assessment where the names of nonresident landowners purport to be given is in the affidavit of nonresident landowners filed by the com-

missioners with the petition and the affidavit of nonresident landowners filed when the time for hearing on the report of the assessment roll was fixed. In none of these, nor in the assessment roll, does the name of Wilmer H. Dunn appear. The lands assessed had formerly belonged to the father of appellant, Hiram Dunn, who died in 1876. Both affidavits as to nonresident landowners stated Hiram Dunn was a nonresident owner of lands in the district, and in the assessment roll the lands were described as the property of Hiram Dunn. Appellant's full name is Wilmer Hiram Dunn, but he testifies he had never been called or known by the name of Hiram. Appellee contends that appellant was a party to the proceeding under the name of Hiram Dunn, and that, Hiram being a part of his name, the court acquired jurisdiction of his person by publication. The law recognizes only one Christian name, and a middle name or initial is not material in any legal proceeding. *Thompson v. Lee*, 21 Ill. 242; *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339; *Illinois Central Railroad Co. v. Hasenwinkle*, 232 Ill. 224, 83 N. E. 815, 15 L. R. A. (N. S.) 129; *Beattie v. National Bank of Illinois*, 174 Ill. 571, 51 N. E. 602, 43 L. R. A. 654, 66 Am. St. Rep. 318; *Erskine v. Davis*, 25 Ill. 251; *Miller v. People*, 39 Ill. 457; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809.

It appears from the record of the additional assessment proceeding that Wilmer Dunn was not a party to it. The affidavits of non-residence of Hiram Dunn, publication notices as to him, and mailing to him copies thereof could not give the court jurisdiction of appellant. Where want of jurisdiction thus appears, the finding of the court that it had jurisdiction is overcome. This is unlike a case where one who was a party to the proceeding seeks in a collateral proceeding to contradict the finding of the judgment that the court had jurisdiction of all the parties. The county court could not acquire jurisdiction, by publication or otherwise, of one who was never made a party to the proceeding, and whose name did not appear in the record or files in the proceeding. The court was therefore powerless to confirm the assessment against appellant's lands, and had no authority to render judgment against it and order the lands sold for nonpayment of the void assessment. *Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Frank v. Rogers*, 220 Ill. 206, 77 N. E. 221.

The county court erred in overruling the objections and rendering judgment against the lands of appellant and ordering their sale. The judgment is therefore reversed, and the cause remanded, with directions to the county court to sustain the objections.

Reversed and remanded, with directions.

(247 Ill. 319)

**CITY OF CHICAGO v. PITTSBURGH,
FT. W. & C. RY. CO.**

(Supreme Court of Illinois. Dec. 21, 1910.)

1. BRIDGES (§ 2*)—VIADUCT—"APPROACH."

Under the common law, and generally under the statutes in this country, a "bridge" includes the abutments and such approaches as will make it accessible and convenient to public travel. Ordinarily an "approach," as the term is used, is considered a part of a viaduct or bridge. The question what is a viaduct proper and what is an approach, where one begins and the other ends, and what is street or highway, as distinguished from an approach to a viaduct or bridge, are more questions of fact than law.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 2; Dec. Dig. § 2*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 465, 466; vol. 1, pp. 869-874.]

2. RAILROADS (§ 95*)—STREETS—APPROACH TO VIADUCT—WHAT CONSTITUTES—PAVING—LABILITY OF RAILROAD COMPANY.

For a block west of a viaduct over the tracks of defendant railroad company the approach was constructed of planking, with a substructure of woodwork and iron, and for another short block west of this the street was filled to its full width, according to the grade established for the approach, and the surface of the fill was paved, manholes provided, curbing set, and sidewalks built; the street, except for the slope or grade of six or seven feet for such blocks, having all the appearances of a city street. *Held*, that that part of the grade so filled and improved did not constitute a part of the "approach" to the viaduct, and that the city had no power to require that the same be repaved and improved at the expense of the railroad company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 274-283; Dec. Dig. § 95*]

3. RAILROADS (§ 113*) — STREET GRADE — CHANGE—RIGHTS OF PROPERTY OWNERS.

Where property owners are damaged by the elevation of the grade of a street, in order to provide for viaducts over the tracks of a railroad company, they may recover damages therefor.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 354; Dec. Dig. § 113*]

Appeal from Municipal Court of Chicago; John H. Hume, Judge.

Action by the City of Chicago against the Pittsburgh, Fort Wayne & Chicago Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Loesch, Scofield & Loesch, for appellant. Edward J. Brundage, Corp. Counsel, and Charles M. Haft, for appellee.

CARTER, J. This is an appeal from a judgment for \$6,377.02 entered against appellant in the municipal court of Chicago May 20, 1910. The judge by whom the case was heard certified that the rights of the respective parties depended upon the validity of a municipal ordinance, and the public interests required that the appeal should be taken directly to this court.

The city of Chicago, October 21, 1907, passed an ordinance directing appellant to repave Eighteenth street, between the center line of Canal street and the east line of Me-

chanic street, either with granite block or standard pavement, put in new curbing, manholes, and such accessories as are incident to the repavement of streets, and to lay new sidewalks. The ordinance further provided that if appellant failed to enter upon the performance of the work within seven days the commissioner of public works should perform the work therein specified and charge the same to appellant, to be recovered by a suit in a proper form of action. Appellant refused to do the work required by the ordinance, which was thereafter performed by the city, and this suit is brought to recover from appellant a portion of the cost.

Eighteenth street runs east and west. The appellant's tracks extend north and south. When said railroad entered the city of Chicago, it crossed Eighteenth street at grade, and so continued for years thereafter. The Chicago & Alton Railway Company parallels the tracks of the appellant company on the east side at this point. March 22, 1876, the city council of said city made an appropriation towards the erection of a viaduct over the tracks of appellant and the Chicago & Alton Railway at Eighteenth street. On April 15, 1878, the city council passed an ordinance directing the commissioner of public works to erect a viaduct over said tracks, with stone abutments and iron framework, requesting the appellant to contribute \$14,000 towards said construction, and that said viaduct be constructed under the general superintendence of the department of public works and the chief engineer of appellant. The ordinance provided that the city should maintain the approaches and the floor of said viaduct at its own expense and do all ordinary repairs. The viaduct was constructed in accordance with the terms of such ordinance. After this work was completed the grade of Eighteenth street, from the center line of Canal street to the west line of Mechanic street, was established.

Canal street extends north and south across Eighteenth street, and Mechanic street, also extending north and south, is a short block east of Canal. The grade of Eighteenth street, between the center line of Canal street and the west line of Mechanic street, was obtained by depositing earth in the street from building line to building line, to the necessary height. The surface of this fill was paved, manholes were provided, curbing set, and sidewalks built, and the street, except for the slope or grade of six or seven feet between Canal and Mechanic streets, is to all appearances a city street. East of Mechanic street the approach to the viaduct is constructed of planking and a substructure of woodwork or iron. On the south side of Eighteenth street, between Canal and Mechanic streets, stands a large business building, occupying the entire dis-

tance between said streets, and abutting on the sidewalk on Eighteenth street. At the northwest corner of Mechanic and Eighteenth streets stands a business house, built to the street line, and abutting on the sidewalk on said streets. Both of these buildings conform to the grade of the street as now established. Appellant does not own any property on Eighteenth street, between Canal and Mechanic streets, and has no interest therein, either directly or indirectly; all such property being owned by private interests for business purposes. No question is raised on this record as to paving the street or keeping up the approach east of Mechanic street.

It is insisted by the city that all of Eighteenth street, from Canal street to the viaduct proper over the railways, including pavement, manholes, catch-basins, curbing, and sidewalks, is a part of the approach to said viaduct, and therefore a part of the viaduct, and for that reason the city can compel appellant to keep and maintain all of said approach in such condition of repair as the convenience of the public or the safety of lives and property may require; that, notwithstanding the ordinance under which the viaduct was constructed provided that the city should maintain and repair these approaches, the city authorities by said ordinance could not waive the authority of the city, under its police power, to require appellant to maintain and repair said viaduct, including its approaches. The conclusion that we have reached in this matter renders it unnecessary for us to consider that question. There can be no doubt that under the provisions of the ordinance granting the appellant the right to construct its railway in the city of Chicago, as well as under the statutes of the state concerning the control of railways, the public authorities can compel appellant to construct and maintain proper crossings at streets, alleys, and highways, or, if the safety and security of the public require, to erect and maintain viaducts, with proper approaches thereto.

Under the common law, and generally under the statutes in this country, a bridge includes the abutments and such approaches as will make it accessible and convenient for public travel. It has been held in some cases that whether a particular bridge includes approaches depends on the circumstances in which the word "bridge" is used. *State v. Illinois Central Railroad Co.*, 246 Ill. 188, 288, 92 N. E. 814. What is true as to a bridge and its approaches is equally true of a viaduct and its approaches. Ordinarily an "approach," as that term is used, is considered a part of the viaduct. What would be regarded as approaches would depend largely upon the demands of the traveling public, and "upon what would be reasonable under the circumstances and local situation in each case. It is manifest that they do not, and should not, in all cases, include all

that part of the right of way that is covered by the street or highway and is not immediately at the crossing." *City of Bloomington v. Illinois Central Railroad Co.*, 154 Ill. 539, 39 N. E. 478.

What is a viaduct proper, and what is an approach, where one begins and the other ends, and what is a street or highway, as distinguished from the approach, are more questions of fact than of law, and are more sometimes not easy to decide. *Tolland v. Willington*, 28 Conn. 578. The material of which the approach was constructed might or might not have weight in deciding whether said approach was a part of the viaduct or of the street. If the driveway or approach to a viaduct was only of sufficient width for the use of teams in going over the viaduct, occupying a comparatively small part of the street or highway, and not of a character to be used for any other street purposes, the question whether it was constructed of permanent and lasting material, or of material that would have to be replaced within a few years, could have little weight in deciding the matter here under consideration. Such a structure, whether permanent or temporary, would ordinarily be held to be an approach, and a part of the viaduct. If a viaduct were to be constructed in a depression some two or three blocks distant from the higher ground, and the public authorities and owners of adjacent property thought it wise to construct the connection with such viaduct for the entire distance from the viaduct to the ridge, so as to make such connection all on the same level, whether such structure from the viaduct to the ridge would be considered a part of the approach or a part of the street would depend upon the character of the structure and the situation with reference to surrounding property.

No one would contend that if the whole distance, for the full street width, from the viaduct to the ridge, was filled in and made a solid street, and the buildings on either side constructed along such street on that grade, the connection in question would be considered an "approach" to the viaduct, as that term is usually understood. On the other hand, if such structure were built up in the air, and below it was a street bordered by buildings built at the street grade, such a structure might be held to be an approach to the viaduct. If the rise to a viaduct from the ordinary surface of the ground is not more than six or eight feet, it is not generally thought necessary to commence the ascent or approach more than a block away from the viaduct proper. If, however, the public authorities and the property owners along a street for three or four blocks all agree to distribute this grade of six or eight feet over said three or four blocks and have the pavement, curbs, sidewalks, and buildings for that distance conform thereto, it could hardly be argued that the whole of

such three or four blocks was a part of the approach, which the railway company constructing the viaduct would be compelled to maintain and keep in repair. As was said by this court in *City of Bloomington v. Illinois Central Railroad Co.*, 154 Ill., on page 547, 39 N. E. 481: "What is to be considered as the extent of the approaches to the railroad crossing must be determined by what is reasonable in the particular case."

The railroad must keep and maintain its crossings so that they will continue to meet the needs and requirements of an increasing population in respect to the safety of persons and property. *Northern Pacific Railway Co. v. Duluth*, 208 U. S. 568, 28 Sup. Ct. 341, 52 L. Ed. 639. But this does not necessarily require the railroad to keep and maintain that which is for every practical purpose a street or highway, even though incidentally it is used as a part of the ascent or approach to reach the viaduct. The railroad company, in *State v. St. Paul, Minneapolis & Manitoba Railway Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. Rep. 581, was compelled, under the police power of the state, to erect and maintain a viaduct and long approaches over its railroad. But the same court held, in *State v. Northern Pacific Railway Co.*, 99 Minn. 280, 109 N. W. 238, 110 N. W. 975, that there were reasonable limitations upon the liability of the railway company to maintain and repair the so-called viaduct approaches; that where a part of these approaches was filled in permanently the full width of the street, resulting in a mere raising of the street grade, such permanently filled portions of the improvement constituted no part of the viaduct or "approaches"; and that the curbing, paving, and sidewalk upon those portions could not be charged to the railroad company.

This court decided, in *People v. Illinois Central Railroad Co.*, 235 Ill. 374, 85 N. E. 606, 18 L. R. A. (N. S.) 915, where the railroad company had elevated its tracks and constructed a subway at a certain point for a street, that under the provisions of its charter (similar to the provisions of appellant's charter) and the general police power resting in the state, under the principles of law here invoked, the city could not require the railroad to maintain the pavement of the subway or its approaches. The situation of Eighteenth street, between Canal and Mechanic streets, is very similar to that of the approaches to the subway in the case last referred to. The reasoning of this court in that case as to the authority of the city, under its police power, to compel the railroad company to pave the subway and approaches, applies with equal force to the authority of the city in this case to compel appellant, under the police power, to pave Eighteenth street, between Canal and Mechanic streets.

It is insisted by counsel for the city that *McFarlane v. City of Chicago*, 185 Ill. 242,

57 N. E. 12, and *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39, are controlling in favor of the city on the questions here involved. We cannot so hold. The basis of those decisions was that there was a contract between the railroad company and the city that, in consideration of certain privileges granted to said company, it should construct, maintain, and keep in repair approaches to certain viaducts, and that because of such contract the property owners abutting on the said approaches could not be compelled to pay for the paving of said approaches; that to compel the property owners to pay for the work which the railroad company had agreed to construct would be unjust. This is also the reasoning in *City of Chicago v. Newberry Library*, 224 Ill. 330, 79 N. E. 666, and the ordinance in each of these three cases, requiring the property owners to pave the portions of the street there in question, was held unreasonable and void. These decisions do not support the contention of the city.

Whether Eighteenth street, between Canal and Mechanic streets, should be repaved and kept in repair by special assessment or by general taxation, is not before us for decision. The argument of counsel for the city that it would be unjust to the abutting property owners to compel them to repave this street, because they have been damaged by the elevation of the street above its former grade, is without force. If the property owners have been damaged by such elevation, according to the long-settled law of this state they have a remedy for such damages. *Chapman v. City of Staunton*, 246 Ill. 394, 92 N. E. 905.

On the facts in this record the city of Chicago was without authority to pass or enforce the ordinance in question requiring appellant to repave and keep in repair West Eighteenth street, from Canal to Mechanic streets. The judgment of the municipal court must therefore be reversed.

Judgment reversed.

(246 Ill. 100)

CITY OF CHICAGO v. PITTSBURGH, FT. W. & C. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

Appeal from Municipal Court of Chicago; John H. Hume, Judge.

Action by the City of Chicago against the Pittsburgh, Ft. Wayne & Chicago Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Loesch, Scofield & Loesch, for appellant. Edward J. Brundage, Corp. Counsel, and Charles M. Haft, for appellee.

PER CURIAM. This is an appeal from a judgment rendered in the municipal court of Chicago against appellant for \$14,130.78. The trial judge certified that the rights of the respective parties depended upon the validity of a municipal ordinance, and the public interests required that the appeal should be taken directly to this court.

The city of Chicago, September 23, 1907, passed an ordinance requiring the appellant and the Chicago & Alton Railway Company to repave the roadway leading to the Harrison street viaduct, between Clinton and Canal streets, with granite blocks, and providing that on their refusal to do so the commissioner of public works should make the repairs needed and charge the same to said companies. Appellant refused to do its part of the work in question, and the city repaved the viaduct, and by this action seeks to collect the part of the cost the ordinance required should be paid by appellant.

Harrison street runs east and west. The record shows that from South Clinton street to South Canal street, on West Harrison street, the surface of the latter street ascends slightly to the viaduct over said railways, and that said ascent is a solid embankment, on which is constructed the pavement of the roadway, which is curbed, graded, and paved, and has sidewalks, and the adjacent property abuts thereon the same as it does on an ordinary street; the only difference between the portion of Harrison street between Clinton and Canal streets and the rest of Harrison street being the slight grade or ascent.

The questions of law in this case are identical with those in *City of Chicago v. Pittsburgh, Ft. Wayne & Chicago Railway Co.*, 93 N. E. 307. The conclusions there reached must control here. For the reasons stated in that opinion, the judgment of the municipal court must be reversed.

Judgment reversed.

(247 Ill. 451)

PEOPLE v. AMBACH.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—APPLICABILITY TO CASE.

In a prosecution for rape of a female under the age of consent, where the only evidence offered by the prosecution was that of the prosecutrix, an instruction on circumstantial evidence was improper, as not based on the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1883; Dec. Dig. § 814.*]

2. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

An instruction that accused was presumed to be innocent, "and that presumption remained until such time as the minds of the jury are convinced from the evidence that he is guilty. You are to just start out, and just say, without regard to the indictment: 'Now, we have got to start out on the proposition that this man is innocent. Now, has the state proved his guilt, and proved it beyond a reasonable doubt?'"—was erroneous, as permitting the jury to discard the presumption before they had agreed upon a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1857; Dec. Dig. § 778.*]

3. CRIMINAL LAW (§ 799*)—INSTRUCTIONS—INFLUENCE OF ARGUMENT OF COUNSEL.

An instruction that: "It is not what counsel say on either side. It is what you have heard from the witnesses. You will have to rely on your own recollection about that. You are to decide it upon that. Counsel are here for a very high and important purpose, to assist the court and assist the jury; but you are not to make the mistake at any time in saying: 'Well, the lawyer said so and so. He believed that was so and so.' That is not to influence you. You are to be influenced alone by the law as the court has told you it is, and by the

evidence in the case as you believe it to be. The court cannot interfere with you in that respect, and don't want to. Counsel have no right to interfere with you in your deciding what are the facts, or what is the truth of this matter. That is for you"—was erroneous, as practically telling the jury to disregard the argument of counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1844-1846; Dec. Dig. § 799.*]

Hand and Carter, JJ., dissenting.

Error to Criminal Court, Cook County, Richard S. Tuthill, Judge.

Edward Ambach was convicted of rape, and brings error. Reversed and remanded.

Charles E. Erbstein and Louis Greenberg, for plaintiff in error. W. H. Stead, Atty. Gen., and John E. W. Wayman, State's Atty. (Robert E. Crow, of counsel), for the People.

FARMER, J. Plaintiff in error was convicted in the criminal court of Cook county of the crime of rape and his punishment fixed at imprisonment in the penitentiary for one year. The indictment charged him with having committed rape by having carnal knowledge of Annie Lawrence, a female under 16 years of age. The prosecuting witness, Annie Lawrence, was the only witness who testified for the prosecution, and plaintiff in error was the only witness who testified in his behalf. At the conclusion of the evidence, by agreement between the state's attorney and counsel for plaintiff in error, the court instructed the jury orally. The grounds relied upon by plaintiff in error for reversal of the judgment are that the evidence is not sufficient to sustain the verdict and judgment and that the court erred in giving instructions.

Annie Lawrence testified she was born in 1893, and was at the time of the commission of the alleged offense residing with her mother in the city of Chicago. Plaintiff in error was rooming at her mother's house. She testified that on the evening of April 15, 1908, her mother was absent from the house; that she (the witness) had a headache, and was lying on a couch in the front room of the house, with her clothes on; that plaintiff in error came in the room, stayed a few minutes, "lifted up my clothes, and then he got the best of me; he opened his clothes; he put his private person into my private person." The witness did not tell her mother for two or three days—said she was afraid. She also testified plaintiff in error had done the same thing about two weeks before. This is the substance of the material testimony of the prosecuting witness on direct examination. On cross-examination she was shown by counsel for plaintiff in error, Charles E. Erbstein, a paper bearing her signature, and purporting to have been sworn to by her before said Erbstein; which she admitted she signed in Erbstein's office. The paper is as follows:

"State of Illinois, Cook County—ss. In the Criminal Court of Cook County. The People of the State of Illinois v. Edward Ambach. Anna Lawrence, being first duly sworn, upon her oath deposes and says that she is the complaining witness in the above entitled cause; that the statements made by this affiant before the grand jury of Cook county, Illinois, which resulted in the indictment of the said Edward Ambach, were false and untrue, and that the said Edward Ambach is not guilty of the charge of rape preferred against him by this affiant; that this affiant is making this statement of her own free will, without any promise of reward; and that no threats have been made to induce her to make this affidavit, and that the same is true in substance and matter of fact.

"Anna Lawrence.

"Subscribed and sworn to before me this 23d day of November, A. D. 1909.

"Charles E. Erbstein."

At the time the paper was signed the witness had gone to Mr. Erbstein's office with her mother. Mr. Erbstein had shortly before that defended her mother upon a criminal charge, and the mother, subsequent to the time of the alleged rape, married the brother of plaintiff in error. The witness testified that Mr. Erbstein asked her if she knew why she had been brought to his office, and that she replied she came to tell the truth; that Erbstein told her, if she was in fear of her mother or any one else, he did not want her to stay in his office; that Erbstein then asked her whether she had ever had intercourse with plaintiff in error, and that she replied that she had not; that Erbstein asked her whether she was telling the truth, and she replied she was. The witness testified she understood she was asked whether plaintiff in error was the first man who had had intercourse with her, and that she said, "No, he was not; that another man by the name of Prudam was the first man who had intercourse with her." The witness testified that she was in no fear when she signed the paper, and she was not compelled to sign it by anybody. She further testified she did not know the meaning of the term "rape," and she had never been told that if a man had intercourse with a girl under 16 years of age it was rape.

Plaintiff in error testified he was at the time of the trial 26 years of age, and was on the day of the alleged crime rooming in the house of the mother of the prosecuting witness, but denied that he had intercourse with the prosecuting witness at the time alleged, or at any other time.

The circumstances and surroundings under which the statement above set out was obtained, together with the witness' explanation of what she understood she was signing, tend to affect its value as impeachment or as discrediting the witness. But, aside from the paper, the truth of the charge rests upon the unsupported testimony of the prosecuting wit-

ness, contradicted by the testimony of the plaintiff in error. This would not alone justify a reversal of the judgment; but it is apparent that there is that in the testimony of the prosecuting witness, leaving out of consideration the statement signed by her, which must naturally excite some suspicion and distrust. The case made by the evidence was such that the instructions as to the law governing the case and the rights of defendant should have been accurate and free from prejudicial error.

The court instructed the jury that circumstantial evidence is competent legal evidence, and if they were convinced of the truth of the charge, beyond a reasonable doubt, from facts and circumstances in proof, they would be authorized to convict the defendant; also that "circumstantial evidence in a criminal case is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tends to show the guilt or innocence of the charge, and if facts and circumstances shown by the evidence in this case are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding the defendant guilty. The law demands a conviction wherever there is sufficient legal evidence to establish the defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence." Conceding that this instruction states the law correctly, we are unable to perceive why it should have been given in this case, as the plaintiff in error's guilt was not dependent upon any circumstances proven; but, if found guilty at all, it could only have been upon facts testified to by the prosecuting witness. The giving of such an instruction, where there is no evidence to base it upon, was held erroneous in *Kevern v. People*, 224 Ill. 170, 79 N. E. 574.

The court also instructed the jury that plaintiff in error was presumed to be innocent, "and that presumption remains until such time as the minds of the jury are convinced, from the evidence, that he is guilty. * * * You are to just start out, and just say, without regard to the indictment: 'Now, we have got to start out on the proposition that this man is innocent. Now, has the state proved his guilt and proved it beyond a reasonable doubt?' " An instruction not similar in language, but similar in principle, to this one, was held to be prejudicial error in *Flynn v. People*, 222 Ill. 303, 78 N. E. 617. It was there held that the jury were authorized, under the instruction, if they deemed the evidence for the prosecution sufficient to establish the guilt of the defendant beyond a reasonable doubt, to take from him the benefit of the presumption of innocence that continues throughout the trial and during the consideration of all the evidence, and find him guilty from a consideration of the evidence for the prosecution. The court said: "The defendant is entitled to the benefit of the

presumption of innocence through all the steps of the trial and during the consideration of all the evidence by the jury after they have been instructed by the court, and until they determine from a consideration of all the evidence that the guilt of the defendant has been established beyond a reasonable doubt. The presumption of innocence attends the accused at every stage of the proceedings until the jury agree upon a verdict."

The court further instructed the jury as follows: "It is not what counsel say on either side. It is what you have heard from the witnesses. You will have to rely on your own recollection about that. You are to decide it upon that. Counsel are here for a very high and important purpose, to assist the court and assist the jury; but you are not to make the mistake at any time in saying: 'Well, the lawyer said so and so. He believed that was so and so.' That is not to influence you. You are to be influenced alone by the law as the court has told you it is, and by the evidence in the case as you believe it to be. The court cannot interfere with you in that respect, and don't want to. Counsel have no right to interfere with you in your deciding what are the facts, or what is the truth of this matter. That is for you."

In *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341, an instruction was given telling the jury that denunciation of witnesses by counsel should not influence the jury to disregard or disbelieve the testimony of any unimpeached witness. This was held erroneous, and the court said, on page 307 of 219 Ill., and page 342 of 76 N. E.: "The instruction, in effect, advised the jury that there was a rule of law that they must not be influenced by the argument of counsel to disregard or disbelieve the testimony of any witness unless such witness had been impeached. The jury are to decide questions of fact, and the purpose of argument by counsel is to induce them to decide such questions in accordance with the claims and theories of counsel. Where witnesses contradict each other, the object of argument is to influence the jury to believe the testimony of one and to disregard or disbelieve the testimony of the other. To that end counsel have a right to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, their appearance upon the stand, the improbability of their statements, and anything else which will show that they are mistaken or unworthy of belief, and to denounce a witness as unreliable or untruthful when subjected to any of the tests for determining his credibility. It is the right of counsel to draw any and all proper inferences arising from the evidence in the case, tending to show that the testimony of witnesses is untrue. *East St. Louis Connecting Railway Co. v. O'Hara*, 160 Ill. 580, 37 N. E. 917. The instruction

was erroneous in telling the jury that the credibility of a witness cannot be affected by the argument of counsel unless the witness is impeached, and in practically destroying the effect of argument on the credibility of witnesses or the weight to be given to their testimony."

The instruction in the case at bar, we think, was more prejudicial than the one condemned in the *O'Brien* Case. It practically told the jury that they were to disregard the arguments of counsel entirely. It would have been entirely proper to have instructed the jury to give no weight or credit to any statement of fact made by counsel not supported by evidence; and this is perhaps what the court had in mind in delivering the oral charge, but it is not what was stated in the charge. In our jurisprudence it has always been considered that the argument of counsel in jury trials is an important element of the trial. If the arguments of counsel are to be disregarded by juries, it would in a large measure deprive parties of the benefit of counsel. While the privilege of legitimate argument is sometimes abused, it would be a dangerous precedent to deny the benefit of it to parties litigant, to the court, and to the jury. The object and purpose of argument is to aid in arriving at the truth and correct and just verdicts and judgments, and that it serves a useful purpose in the accomplishment of that end cannot be denied. In *Meredeth v. People*, 84 Ill. 479, this court said: "The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense secured by the law of the land, of which a citizen cannot be deprived."

Considering the state of the evidence, the errors in the instructions are of too grave a character for us to say that plaintiff in error was not prejudiced thereby. The judgment of the criminal court is therefore reversed and the cause remanded.

Reversed and remanded.

HAND and CARTER, JJ., dissent.

(247 Ill. 346)

SPARTA GAS & ELECTRIC CO. v. ILLINOIS SOUTHERN RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 1095*)—DECISION—FINDINGS—APPELLATE COURT.

When the Appellate Court reverses without remanding as the result wholly or partly of finding the facts different from the trial court's findings, it must find and recite in its final order the ultimate facts upon which the case depends, as its conclusion from all the evidentiary facts on the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4263; Dec. Dig. § 1095.*]

2. APPEAL AND ERROR (§ 1095*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—FINDINGS—ULTIMATE FACTS.

Where the Appellate Court, upon reversing without remanding as a result of a finding of

facts different from the trial court's findings, recites in its final order evidentiary facts in connection with its finding of ultimate facts, the Supreme Court will not consider the evidentiary facts, to determine whether the ultimate facts found are sustained by the evidentiary facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4208; Dec. Dig. § 1095.*]

3. APPEAL AND ERROR (§ 1095*)—REVIEW—DECISIONS OF INTERMEDIATE COURTS—FINDINGS—ULTIMATE FACTS.

In an action against a railroad company for the statutory penalty for extortionate charges for transporting coal for a distance of less than two miles, the Appellate Court found as "ultimate facts," upon reversing without remanding a judgment for plaintiff, that the services rendered by defendant were not switching or transfer services, within the meaning of Railroad and Warehouse Commission rule No. 23, and that it was not guilty of charging extortionate freight or switching rates, as alleged in the declaration. *Held*, that the finding that the services were not switching or transfer services, within the meaning of the rule, was evidentiary only, and would be rejected as surplusage by the Supreme Court, but the finding that defendant did not charge extortionate rates was a finding of ultimate fact, which was binding upon the Supreme Court; not being a legal conclusion, since it did not necessarily depend upon the construction or application of any rule of the Railroad and Warehouse Commission, but might have been reached upon the ground that the rule did not apply to the facts proven, or that the rates charged were not in fact extortionate.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1095.*]

4. APPEAL AND ERROR (§ 1175*)—DISPOSITION—REVERSAL WITHOUT REMAND.

Upon finding the ultimate and controlling facts against plaintiff's contention, the Appellate Court properly reversed a judgment for plaintiff without remanding the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4580; Dec. Dig. § 1175.*]

5. APPEAL AND ERROR (§ 43*)—CERTIFICATE OF IMPORTANCE—PROPRIETY OF ALLOWING.

Where the Appellate Court makes a finding of ultimate facts different from that of the trial court upon reversing its judgment, so that its findings would bind the Supreme Court on appeal, the Appellate Court should not grant a certificate of importance and allow an appeal to the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 43.*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Randolph County; Charles T. Moore, Judge.

Action by the Sparta Gas & Electric Company against the Illinois Southern Railway Company. From a judgment of the Appellate Court, reversing a judgment for plaintiff, plaintiff appeals, upon the allowance of a certificate of importance. Affirmed.

H. Clay Horner, for appellant. John B. Montgomery and William T. Abbott. (John G. Drennan, of counsel), for appellee.

COOKE, J. The appellant, the Sparta Gas & Electric Company, brought an action of debt in the circuit court of Randolph county against the appellee, the Illinois Southern Railway Company, and upon a trial before a jury obtained a verdict for \$1,248.51, upon

which judgment was rendered. The railway company appealed to the Appellate Court for the Fourth District, where the judgment was reversed, a finding of facts made, and a certificate of importance granted, whereupon appellant appealed to this court.

The action was brought under section 6 of the act to prevent extortion and unjust discrimination by railroads, approved May 2, 1873 (Laws 1873, p. 138), which provides that if any railroad corporation shall ask, demand, charge, or receive of any person or corporation any extortionate charge or charges for the transportation of any passengers, goods, merchandise, or property, or for receiving, handling, or delivering freights, the person or corporation so offended against may, for each offense, recover of such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with cost of suit, etc. The declaration consists of 133 counts, each count charging a separate offense.

The Appellate Court made and incorporated in its judgment the following finding: "We find as ultimate facts in this case that the services in question rendered by appellant for the appellee were not switching or transfer services, within the meaning of said rule 23, and that the defendant is not guilty of charging extortionate freight or switching rates, as charged in the declaration"; the appellant there being the appellee here. The appellant insists that this is not a finding of the ultimate facts but is simply a finding of law, based upon the construction the Appellate Court has placed on rule 23 of the Railroad and Warehouse Commission.

When the Appellate Court reverses, without remanding, a cause, as the result, wholly, or in part, of the finding of the facts different from the finding of the trial court, it is required to recite in its final order the facts as it finds them. This implies the drawing of a conclusion from all the evidentiary facts bearing on the issue, and the conclusion so drawn is the ultimate fact or facts upon which the case depends, and which it is the duty of the Appellate Court to find. *Brown v. City of Aurora*, 109 Ill. 165; *Stone & Co. v. Ferry*, 239 Ill. 606, 88 N. E. 186. When the Appellate Court, in its finding of facts, states all or some portion of the evidentiary facts, and in connection with the same also finds the ultimate facts, we will not consider the evidentiary facts for the purpose of determining whether the ultimate conclusion of fact is sustained by the evidentiary facts recited. *Stone & Co. v. Ferry*, supra. The first portion of the finding, "that the services in question rendered by appellant for the appellee were not switching or transfer services, within the meaning of said rule 23," is a mixed ques-

tion of law and fact, and is evidentiary only. It might tend to prove that appellant had no right of recovery, but it is not properly a part of the finding of the ultimate facts. That part of the finding which immediately follows, "and that the defendant is not guilty of charging extortionate freight or switching rates, as charged in the declaration," is the conclusion of the Appellate Court upon all the evidentiary facts.

The first clause of the finding, which is evidentiary only in its nature, may be properly rejected as surplusage. Being so rejected, we find then remaining a finding of the controlling or ultimate facts in issue between the parties, which is binding upon us. When thus viewed, the finding is purely one of fact, and it does not necessarily depend upon the construction or application of any rule of the Railroad and Warehouse Commission. This conclusion may have been reached from a belief that the evidentiary facts proven were such that said rule 23, even as construed by appellant, did not apply, or from a belief that, notwithstanding the rule of the Railroad and Warehouse Commission, the rates charged were not extortionate. The action is based on alleged extortionate charges for the transportation of coal from Moffat's mine, located on the line of appellee's railway, to Sparta, a distance of less than two miles, and whether the conditions were such that said rule 23 would apply under any construction to be given it, and whether, without respect to the rules of the Railroad and Warehouse Commission, the rate charged was extortionate, were controverted questions of fact, shown by the record to have been submitted to the jury, and were all presented to the Appellate Court for review upon appeal from the judgment of the trial court. Finding the ultimate and controlling facts as it did, the Appellate Court properly reversed the cause without remanding.

Appellant suggests that, if its view that this is merely a finding of law and not of the ultimate facts is not correct, then the certificate of importance in this case should have been denied. There is force in this suggestion. Having thus concluded appellant by its finding of the ultimate facts, the Appellate Court should not have granted a certificate of importance in this case and allowed this appeal.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 629)

GEIGER v. GEIGER et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. WILLS (§ 327*)—ESTABLISHMENT—TRIAL—PEREMPTORY INSTRUCTION—STATUTES.

Under Wills Act (Hurd's Rev. St. 1909, c. 148) § 7, which provides that in the trial of

contested wills an issue of law shall be made and the question decided by a jury, the rules governing peremptory instructions are the same as those in actions at law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 773; Dec. Dig. § 327.*]

2. TRIAL (§ 139*)—TAKING CASE FROM JURY—DIRECTION OF VERDICT—GROUND.

A case should not be taken from the jury when there is any evidence tending to prove the cause of action or fact affirmed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. § 139.*]

3. WILLS (§ 324*)—ESTABLISHMENT—TRIAL—EVIDENCE—SUFFICIENT TO GO TO JURY.

In an action to set aside a will for lack of testamentary capacity, evidence offered by the contestant to that effect held sufficient to go to the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 768; Dec. Dig. § 324.*]

Appeal from Circuit Court, Lee County; R. S. Farrand, Judge.

Suit by Thomas L. Geiger against Walter W. Geiger and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

John E. Erwin, for appellant. Wingert & Wingert, for appellee Bardwell.

VICKERS, C. J. Thomas Geiger filed a bill in the circuit court of Lee county against the executor, trustee, and devisees under the will of John L. Geiger to set aside said will and the probate thereof on the ground that the testator was of unsound mind and memory at the time the will was executed. The widow and children, who were made defendants, answered the bill, admitting that the testator was of unsound mind at the time said will was executed. The executor answered, denying such unsoundness of mind, and averred that the testator had capacity to make the will. The trustee answered, not admitting or denying the allegations of the bill. An issue at law was made up as to whether the writing in question was the last will and testament of John L. Geiger, and submitted to a jury. At the close of all of the evidence the executor made a motion to exclude the evidence of contestant, and for a directed verdict finding the instrument read in evidence to be the last will and testament of John L. Geiger, deceased. This motion was sustained, and the jury, in accordance with the direction of the court, returned a verdict finding that the instrument was the last will and testament of John L. Geiger, and that he was of sound mind and memory at the time he executed the same. Contestant excepted to this ruling of the court, and also to the order overruling his motion for new trial.

The only question involved is whether the court below erred in instructing the jury to find a verdict in favor of appellees upon the issue submitted to the jury. The same rule applies in reference to giving a peremptory

instruction to the jury in a suit to contest a will, under section 7 of the wills statute (Hurd's Rev. St. 1909, c. 148), as obtains in trials of actions at law. This court has so decided several times. *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645; *Thompson v. Bennett*, 194 Ill. 57, 62 N. E. 321; *Woodman v. Illinois Trust & Savings Bank*, 211 Ill. 578, 71 N. E. 1099. The rule established, applicable to a motion for a directed verdict in law cases, has been announced so often that it is only necessary to briefly refer to it at this time. The question presented by such a motion is whether there is any evidence fairly tending to prove the cause of action or fact affirmed. It is not the province of the trial judge, on such motion, to weigh the evidence and determine where the preponderance is. Neither the trial court in the first instance, nor the court of review, has anything to do with the question of the preponderance of the evidence or the credibility of the witnesses when considering this question. *Rack v. Chicago City Railway Co.*, 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127. Under this rule a brief reference to the testimony will show that the court below improperly directed the verdict.

James Lonergan, a witness on behalf of appellant, testified that he had been acquainted with the testator a great number of years, and had many conversations with him during the year 1906; that the will was executed in August, 1906; that the testator was then about 80 years of age; that in the winter of 1906 the testator went to Hot Springs, and remained there several weeks; that the witness saw him frequently while in Hot Springs; that he was being wheeled about in an invalid chair; that his mind was unsound and his memory very poor; that he was weak in body and mind, old and childish, and incapable of transacting the ordinary business affairs of life; that he talked with him at Hot Springs about people whom he had known well in Dixon, and the testator was unable to remember such persons. This witness testified that it was difficult to make the testator understand what you were talking about.

James Geer testified that he had been acquainted with the testator since 1860 up to the time of his death, and that he saw him once or twice every week during the last year of his life; that he was suffering from erysipelas in one of his legs, and that he had suffered an injury by being thrown from a buggy in a runaway. He testified that the testator was very thin and emaciated when he went to Hot Springs, and worse when he returned; that he was bad off both in body and mind; and that in his opinion the testator was insane, or "very close to it," in 1906.

The witnesses for appellant, Gregory, Godfrey, Buzzard, and others, who knew the

testator more or less intimately, and had an opportunity to observe his physical and mental condition, expressed the opinion that he was so feeble in body and mind that he was wholly unable to understand ordinary business transactions. None of the witnesses for appellant were present on the day the will was executed, and none of them could swear, from personal observation, what the condition of the testator's mind was at that particular time. The testator died in 1908, and the evidence shows that he never recovered from the diseases from which he was suffering in 1906, but gradually grew worse until he died. In addition to the evidence for appellant, some of the witnesses for appellees made admissions, on cross-examination, that tended to show that the mind of the testator was to some extent impaired. Nelson A. Ankeny, a witness for appellees, testified, among other things, that the latter part of 1906 he noticed that the testator was getting more feeble and weaker, both physically and mentally. When asked whether the testator was of sound mind and memory, he said that he could not say as to that; that part of the time he would act queer after he got back from Hot Springs.

In referring to this evidence, we do so merely for the purpose of showing that this case should have been submitted to a jury, and not for the purpose of intimating any opinion as to how this question should be determined. It is not our purpose to embarrass another trial of this case by anything that has been said with reference to the evidence.

For the error in directing a verdict and dismissing the bill, the decree of the circuit court is reversed, and the cause remanded for a trial de novo upon the issue involved.

Reversed and remanded.

(248 Ill. 50)

GRAHAM v. PETERS.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. ELECTIONS (§§ 241, 247*)—"CANVASS"—"RETURN."

The "canvass" by the judges of election is merely their count, and the "return" is the evidence of the result.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 213, 223; Dec. Dig. §§ 241, 247.*]

For other definitions, see Words and Phrases, vol. 1, pp. 951, 952; vol. 7, pp. 6202-6205.]

2. ELECTIONS (§ 295*)—CONTEST—EVIDENCE—PRESUMPTIONS AS TO RETURNS.

The return is presumptively correct; but the ballots themselves, if kept in accordance with the election law, are the best evidence of the result, and whether or not they shall prevail over the return depends upon whether there has been such a compliance with the election law for preserving them that their integrity cannot be doubted.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 297-299; Dec. Dig. § 295.*]

3. ELECTIONS (§ 295*)—CONTEST—EVIDENCE—IMPEACHMENT OF BOTH BALLOTS AND RETURN.

Where it appears that neither the judges of election nor the custodian of the ballots have properly performed their duties, both the return and the ballots are to be weighed in determining the result.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 297-299; Dec. Dig. § 295.*]

4. ELECTIONS (§ 255*)—CONTEST—BALLOTS—STATUTE.

The provision of the election law that, for the purpose of preserving the integrity of the ballots, they shall be strung upon a piece of flexible wire and the ends united in a firm knot, sealed, etc., is directory, and not mandatory.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 231; Dec. Dig. § 255.*]

5. ELECTIONS (§ 291*)—CONTEST—EVIDENCE—BURDEN OF PROOF.

Where a contestant wishes to recount the ballots, the burden of proof is upon him to show a substantial compliance with the election law relative to preservation of the ballots.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 286; Dec. Dig. § 291.*]

6. ELECTIONS (§ 295*)—CONTEST—EVIDENCE—WEIGHT AND SUFFICIENCY.

In an election contest, where it was sought to determine the result by a recount of the ballots, evidence held to show that there was not a substantial compliance with the provisions of the election law in reference to the preservation of the ballots.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 297, 299; Dec. Dig. § 295.*]

7. ELECTIONS (§ 307*)—CONTEST—COSTS—FEES.

In a suit to contest an election, the county court has no power to allow fees to the tellers who recounted the ballots, and tax them as costs.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 333; Dec. Dig. § 307.*]

Appeal from Sangamon County Court; George W. Murray, Judge.

Suit by James E. Graham against Frank Peters. From a judgment for plaintiff, defendant appeals. Reversed.

Andrus & Trutter (Sidney S. Breese, of counsel), for appellant. Graham & Graham, for appellee.

CARTWRIGHT, J. At an election held on April 5, 1910, in the town of Illiopolis, in Sangamon county, the appellant, Frank Peters, and the appellee, James E. Graham, were rival candidates for the office of collector. The ballots were canvassed, and the result determined was that the appellant had received 163 votes and appellee 162 votes, and a return was made accordingly. The appellant received a certificate of election and qualified as collector. Appellee filed in the county court his petition for a contest, alleging that ballots were counted for the appellant which should not have been counted, and others were not counted for appellee which should have been counted for him. The petition was answered, with a denial of any errors in the canvass; and, the issue coming on for hearing, the court, against the objection of appel-

lant, ordered a recount of the ballots, and, after deciding disputes between the parties based on the appearance of certain ballots and the manner in which they were marked, found that 161 legal votes were cast for the appellee and 159 for the appellant. It was thereupon adjudged that the appellee was duly elected collector, and the court ordered that a proper certificate of election be issued to him, and the certificate of election issued to the appellant be canceled and annulled.

The appellant questions the ruling of the court in refusing to count for him certain ballots which the court concluded were defectively marked, and counting for appellee a ballot which was alleged to have a distinguishing mark, and the appellee questions rulings in counting a ballot for the appellant which it is claimed had a distinguishing mark, and another in which a judge of the election wrote his initials, and by mistake one of the three initials was a different letter; but the principal controversy is whether the ballots ought to prevail over the return of the judges.

The rules of court by which courts hearing election contests are to be governed have been stated in various cases. The canvass by the judges of election is merely a count of the ballots, in which the judges credit to the several candidates the ballots which in their judgment ought to be counted for them, and the return is a statement of such count. The return is prima facie evidence of the result; but the ballots are the original evidence of the votes cast, and are better evidence of the result, if they have been preserved in the manner required by the election law, for the purpose of securing the integrity of the ballots in case there should be a contest. The statute provides that they shall be strung upon a piece of flexible wire, and the ends united in a firm knot, sealed in such a manner that it cannot come untied without breaking the seal. The ballots so strung are to be inclosed in a secure canvas covering, securely tied and sealed with official wax impression seals in such manner that it cannot be opened without breaking the seals. The ballots in the canvas covering are then to be returned to the proper clerk, who is required to preserve them carefully. The question whether they shall prevail in a contest over the return is to be determined by considering whether they have been preserved in substantial compliance with these requirements, or have been so exposed to the reach of unauthorized persons that they may have been changed or tampered with. If there is no evidence which would cast discredit upon the return, and the ballots have not been properly preserved, but have been so kept that they might have been reached by unauthorized persons, they will not be regarded as better evidence than the return. *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *Murphy v. Battle*, 155 Ill. 182, 40 N. E. 470; *Beall v. Albert*, 159 Ill. 127, 42 N. E.

186; *Bonney v. Finch*, 180 Ill. 133, 54 N. E. 318; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. Where the evidence shows that both the judges of election and the custodian of the ballots have failed properly to perform their duties, neither the return of the judges nor the ballots will prevail over the other; but the result must be determined from a consideration of the return and the ballots, with all the facts and circumstances surrounding the case. *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Jeter v. Headley*, 186 Ill. 34, 57 N. E. 784; *Caldwell v. McElvain*, *supra*.

The provisions of the statute for preserving the ballots are directory, in the sense that the precise method prescribed is not essential, if there is a substantial compliance, and it is clearly proved that the ballots have been kept intact in the same condition as when counted and protected from any opportunity for interference with them. The contestant is the moving party, and the burden is upon him to show that the ballots have been kept intact, substantially as required by the statute, and preserved from any opportunity to tamper with them. It is not incumbent on the defendant to show that they have been changed, and unless the contestant shows that they have been kept in such a way that there was no reasonable opportunity for tampering with them, they cannot overcome the return. *Kingery v. Berry*, 94 Ill. 515; *West v. Sloan*, 238 Ill. 330, 87 N. E. 823; *Jeter v. Headley*, *supra*. In this case there was no evidence tending to show any fraud or improper conduct on the part of the judges of the election, or any negligence in the manner in which the ballots were canvassed and the return made, so that the return was unimpeached, and there was no ground for the application of the rule that the result was to be determined from a consideration of both a discredited return and discredited ballots.

The facts concerning the preservation of the ballots are as follows: After they had been counted by the judges they were strung on a wire, and the ends of the wire were twisted and sealing wax was placed thereon as required by the statute. The ballots were then put in a canvas sack, and the wire was run through the cloth and wrapped around the neck of the sack, and sealing wax was placed on the wrapping. There was no official wax impression seal, as required by law, applied in such a manner that the sack could not be opened without breaking such seal; but the wax was applied without any seal, in such a manner that it would have to be broken to open the sack, but could be replaced without any certain means of showing the fact. The judges took the sack containing the ballots with the intention of delivering them to the town clerk; but he was playing in a band in the street, and they delivered the ballots to the supervisor, who kept a store in the village, and he locked them in his desk in the store. The next morning the supervisor delivered the sack to the town

clerk, who kept a bakery, and called the attention of the clerk to the fact that the seal was in the same condition as when he received the sack. When the sack was delivered to the clerk, he placed it in a wooden box, which had a lid, but was not fastened in any way, and put the box on a shelf back of the counter in his store and bakery. There were two keys to the bakery—one carried by the owner and the other by his baker, who usually came down to the bakery before the owner. The ballots remained in that condition and place about two weeks, when they were delivered to the newly elected town clerk, and he took them to a grain office, where he was employed, and put them in a safe. They remained in the safe in the sack three days, when the sack was taken out and put in a ballot box in the grain office, under a desk. Four persons had keys to the office, and business was transacted there and meetings of the school board held. The sack remained there about a week, when it was taken to a bank and placed in a vault to which three persons had access. When the sack was produced in court the seal was cracked, and the second town clerk testified that he accidentally cracked it while the ballots were in his possession. Both the town clerks, the supervisor, and a night watchman, who had a key to the bank, each testified that he did not tamper with the ballots, nor know of any one else doing it; but no one else who had access to the various places where the ballots were kept testified in the case.

There was a disregard of the provision of the statute requiring wax impression seals, which would have prevented opening the sack without breaking the seals, which could not be restored, and although that fact was not conclusive against the ballots as evidence, it was incumbent upon the appellee, in the absence of the seals, to prove that the ballots had been so kept that no reasonable opportunity was afforded for tampering with them or changing them. He attempted to do that with the testimony of the various officials who had the custody of the ballots and who felt sure that they had not been interfered with in any manner, but whose testimony showed that the ballots were sealed and kept in such manner that they might have been tampered with or changed, and the wax restored in such a way as to present no appearance of the fact. If the method pointed out by the statute for keeping the ballots inviolate is not pursued, the evidence must be clear and satisfactory that the method actually adopted was such that there was no reasonable opportunity for unauthorized persons to interfere with them. We are of the opinion that the ballots were not kept in such a way as to authorize the court to order a recount, and to base a decision upon the result of such a recount contrary to the return of the judges of election.

The county court appointed tellers for the recount of the ballots, and taxed charges for

their services as costs. There is no authority in the statute for the taxation of costs for such services, and, inasmuch as costs can only be allowed as provided by statute, the court erred in taxing costs for the services of the tellers.

The judgment of the county court is reversed.

Judgment reversed.

(247 Ill. 475)

RIEHL et al. v. RIEHL.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—RULINGS ON EVIDENCE—EQUITY CASES.

Error in the admission or exclusion of evidence in an equity case will not affect the decree if there is other evidence sufficient to sustain it, and if the evidence erroneously acted on by the court would not change the result if considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

2. EQUITY (§ 381*)—SUBMISSION OF ISSUES TO JURY—EFFECT ON DECREE.

The trial of a feigned issue by a jury in an equity case is merely advisory to the chancellor, who may render his decree in accordance with it or not, at his option.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 813-817; Dec. Dig. § 381.*]

3. APPEAL AND ERROR (§ 847*)—EQUITY—SCOPE OF REVIEW.

In an equity suit by heirs to partition property alleged to have been conveyed by deceased while mentally incapable, where the chancellor's finding that deceased was mentally incapable to make the conveyance and that therefore the property should be partitioned was not wholly based upon the findings of a jury on the submission of issues to it, the Appellate Court would consider the validity of the decree in the light of the entire record, and not merely as to errors in the jury proceeding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3367-3371; Dec. Dig. § 847.*]

4. DEEDS (§ 211*)—MENTAL CAPACITY OF GRANTOR—EVIDENCE.

In a suit to have a deed set aside because of the grantor's mental incapacity and for partition, though the witnesses were unable to testify as to the mental condition of the grantor on the morning he made the deed, yet the testimony of his being a victim of melancholia, and being committed to an insane asylum, was sufficient to sustain a finding of his mental derangement at the time of making the deed, as such may have been reasonably inferred from the progressive character of his disease.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-642; Dec. Dig. § 211.*]

Appeal from Circuit Court, Monroe County; Louis Bernreuter, Judge.

Suit to set aside a deed, and for partition by Robert Riehl and others against Charles Riehl. Judgment for plaintiffs, and defendant appeals. Affirmed.

Joseph W. Rickert, for appellant. Charles Morrison and A. C. Bollinger, for appellees.

VICKERS, C. J. This is an appeal from a decree of the circuit court of Monroe county finding the interests of the parties in the real estate involved and granting a partition thereof among the respective owners. The real estate involved, consisting of about 52.75 acres, originally belonged to Mrs. Fendrich, the mother of the appellant and appellees. The mother died October 26, 1893. At the time of her death she left surviving her as her only heirs four children, Charles, Robert, and Joseph Riehl, her sons, and Mrs. Amalie Kroman, a daughter. Charles Riehl purchased the undivided interests of Robert Riehl and Mrs. Kroman. On January 27, 1894, Joseph Riehl executed a deed of his one-fourth interest to his brother Charles for the express consideration of \$365. After the death of Joseph Riehl, which occurred in September, 1907, appellees, Robert Riehl and Mrs. Kroman, filed the bill in this case, alleging that they were each the owner of a one-twelfth undivided interest in the real estate in question as heirs of their brother, Joseph Riehl, and alleging that at the time of the execution of the deed of January 27, 1894, the said Joseph Riehl was of unsound mind and incapable of executing the deed, and that the execution thereof was procured through fraud and undue influence practiced upon said Joseph Riehl by Charles Riehl, the grantee, and that the consideration for said conveyance was wholly inadequate. Charles Riehl answered the bill, denying that Joseph Riehl was of unsound mind at the time of the execution of the deed in question, or that the same was procured through undue influence or other improper means. The circuit court caused an issue at law to be made up as to the mental capacity of Joseph Riehl, which was by direction of the court submitted to a jury. The jury, after hearing the evidence and being instructed by the court, returned a verdict finding that the deed in question was not the deed of Joseph Riehl. A motion for a new trial was made and overruled, to which exceptions were preserved. Thereupon the court rendered the decree from which this appeal is prosecuted, which recites that it is based upon the pleadings, the verdict of the jury, and the exhibits, files, and proofs submitted in evidence. The decree shows upon its face that the court specifically found all of the material facts necessary to sustain the decree rendered. It is the reversal of this decree which Charles Riehl seeks by his appeal to this court.

Most of appellant's assignments of error relate to the rulings of the court upon the admission and exclusion of evidence during the trial of the feigned issue by the jury, and the instructions of the court given and refused. The rule which is applicable to the trial of chancery proceedings is that any error which may have been committed in rulings upon the admission or exclusion of evi-

dence is unimportant if there is competent evidence in the record sufficient to support the decree, and that the evidence which ought to have been considered would not, if considered, change the result. The question in such case is whether or not upon the whole record substantial justice appears to have been done to the parties. *Treleven v. Dixon*, 119 Ill. 548, 9 N. E. 189. *Shedd v. Seefeld*, 230 Ill. 118, 82 N. E. 580, 13 L. R. A. (N. S.) 709, 120 Am. St. Rep. 269. Under the chancery practice which prevails in the English courts of chancery and in this state, the formation and trial of a feigned issue by a jury is merely advisory to the chancellor, and the verdict upon such issue is not binding upon the court. *Fanning v. Russell*, 94 Ill. 386. In such case the parties are entitled to the judgment of the chancellor upon the issues of fact in the case. If the court is satisfied with the verdict, he may adopt it and render a decree in accordance therewith, or he may, without setting aside the verdict, render a decree contrary thereto. In 2 *Daniell's Chancery*, p. 1306, it is said: "Upon the trial of an issue a bill of exceptions for an alleged misdirection of the judge will not lie, but the regular course is to apply to the court which directed the issue, for a new trial. Under the English chancery practice the feigned issue was sent to a law court for trial, from which the evidence and the verdict were certified back to the court of chancery. If a motion for a new trial was made, it was made in the chancery court and not in the law court. If a new trial was applied for in the chancery court and denied upon an appeal from the decree, the question was not whether there had been errors in the trial of the feigned issue, but the question was, upon the whole record, whether the decree of the chancellor was right."

This rule is applied by the Supreme Court of the United States. *Johnson v. Harmon*, 94 U. S. 371, 372, 24 L. Ed. 271. In disposing of that question in the case above cited, Mr. Justice Bradley said: "The issue is directed to be tried for the purpose of informing the conscience of the chancellor and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the cause though dissatisfied with the verdict, and make a decree contrary thereto, if in his judgment the law and the evidence so require. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause, for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide (as was done here) upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon

the whole case, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue."

Appellant relies on the case of *Guild v. Hull*, 127 Ill. 523, 530, 20 N. E. 665, 667, as establishing a different rule. In that case the decree was based exclusively upon the verdict, as the following recital will show: "And being fully advised in the premises, and having overruled the motion to set aside said verdict and for a new trial, as aforesaid, doth order and decree that a pro forma decree, and pro forma only, be entered in said cause in pursuance of said findings of the said jury, and not otherwise," etc. In disposing of that case this court did consider errors assigned upon the rulings of the court during the trial of the feigned issue, but that was only because the language of the decree showed affirmatively that the court did not act upon its own independent judgment. This court in that case used the following language: "As the decree is based on the verdict of the jury alone, and not upon any independent judgment of the circuit court, it must follow that if the finding of the jury was the result of or was influenced by the admission of improper evidence or by improper instructions given by the court, the decree should be reversed."

The decree in the case at bar is not based upon the verdict of the jury alone. It appears from the recitals of the decree already set out that it was the result of an independent consideration of the evidence by the court in connection with the verdict of the jury. That being true, the practice sanctioned in the *Hull Case* cannot be followed here. The question, therefore, to be determined upon this appeal, is whether the decree finding that Joseph Riehl was of unsound mind at the time the deed was executed to appellant, and setting the same aside, properly disposes of the cause when the entire record is considered.

The evidence submitted to the jury, and upon which its verdict as well as the decree of the court is based, tends to establish the following facts: Joseph Riehl, the grantor in the deed in question, resided on the farm in question with his mother and step father until his mother's death. He was about 26 years of age at that time. He had never been married. After his mother's death the farm was rented. The evidence shows that the grantor, Joseph Riehl, was able to do some farm work prior to his mother's death. He was a man of good physical health and able to do any kind of labor so far as mere physical strength was concerned. About the year 1891 the evidence shows that he began to show signs of melancholia, and that these manifestations continued to become more marked—so much so that at the time his mother died, in 1893, he had practically ceased trying to do anything in the way of labor upon the farm. He had been under treat-

ment of various physicians, but his condition had not improved. In November, 1893, he went to St. Louis and consulted Dr. Charles Richter. Dr. Richter saw him three times during the month of November. The doctor testifies that he found it very difficult to get any clear view of his case because of his unwillingness to answer questions. Riehl at that time complained of headaches and pains, and said that he felt restless, but his description of his condition was indefinite and unsatisfactory. The physician testifies that he concluded that he was suffering from some mental disturbance. On the occasion of the third visit to Dr. Richter he was able to get a clear statement from Riehl and made a careful examination, and found him suffering from melancholia. Dr. Richter did not see Riehl again until in September, 1894, when he visited him in an insane asylum in St. Louis where Riehl was confined. Dr. Richter says from the condition which he found in November, 1893, it was his opinion that the disease had been of long standing. When the doctor examined him in 1894, in the asylum, he was entirely irrational. Basing his opinion upon the condition he found in the fall of 1893 and his subsequent condition in 1894, Dr. Richter testifies that Riehl was suffering from a true case of melancholia, from which he had not in any degree recovered.

Joseph Scharfenberger testified that he was well acquainted with Joseph Riehl for a number of years prior to the time when the deed in question was executed. He worked on the same farm with Riehl during the early 90's. The witness testifies that Riehl would walk around in the fields during harvest time, when the weather was very hot, wearing boots and heavy clothes and a big fur cap; and during these times Riehl would complain of not feeling well, and would go to the house and go to bed with his clothes on, and cover up with a feather bed. He testifies that Riehl wore an overcoat during the hot weather. From his conversations and actions this witness says that Joseph Riehl was not mentally competent to transact ordinary business; that in his opinion he would not be able to understand a transaction involving the execution of a deed.

Frank Noelke, who lived near Riehl, testified that he saw Riehl frequently in the summer time wearing a fur cap and a heavy overcoat; that he saw him in bed with his clothes on; that he would walk aimlessly about over the place, more frequently at night. This witness also gives it as his opinion that he was totally unable to transact any ordinary business.

Mrs. Kroman, a sister of Joseph Riehl, testifies that her brother Joseph was suffering from some mental trouble before the death of their mother, and that he gradually grew worse; that he would wear his winter clothing, including an overcoat, during the summer time, and that he would never

take off his clothing when going to bed; that he did not shave or have his hair cut; that his hair was 18 inches long, and he wore a long beard. This witness resided in St. Louis. She testifies that her brother would spend a part of his time at her house and a part of the time at his home in Waterloo. She testifies that she was at her mother's home when she died and remained there after the funeral three or four weeks, during which time she was frequently with her brother; that he was then mentally incompetent to attend to any business; that he gradually grew worse until the fall of 1894, when he was placed in an insane asylum in St. Louis. She testifies that he would sit up at night and write letters, but instead of mailing them he would hide them behind the washstand, tables, etc. This witness testifies that she sold her one-fourth interest in the farm to her brother Charles (the appellant herein) 10 or 12 years before for \$1,000, and that her brother Joe's interest was worth the same as hers.

Robert Riehl, a brother of Joseph and one of the appellees herein, testified to substantially the same state of facts. He testified that his brother would wear the same clothing for five months, and that they were unable to get him to change his clothing; that he did not take off his clothing at night, but slept with the same clothing on that he wore during the day.

These and other witnesses testify to the unusual conduct of Joseph Riehl. It is shown by the evidence that he would go out in the field and walk in a circle; that he would stand for hours in the same place, looking at the sun, and claim that he saw circles around the sun which would bring him good luck. He would attempt to point out to others the circles which he saw around the sun, but no one else could see them.

Charles Riehl, the appellant, resided in St. Louis. On the morning of January 27, 1894, at about 3 or 4 o'clock in the morning, Joseph Riehl came to appellant's house. It was dark, and the family were not yet up. He was admitted. The evidence is not very clear as to the occurrences that took place on the morning the deed was executed. The appellant was incompetent to testify, and the only persons who do testify as to the occurrences attending the execution of the deed are appellee Robert Riehl, a son of Charles Riehl, and the notary public who took the acknowledgment. The notary testifies that the deed was read to the grantor and that he thought he understood it; that he took his acknowledgment in the usual manner, and saw nothing to excite his suspicions as to the mental condition of the grantor. From the evidence of the notary it is apparent that he only has a very general recollection of the transaction. On behalf of appellant no expert witness testifies. A number of lay witnesses testify to their acquaintance with Joseph Riehl and to his

ability to transact the ordinary business affairs of life during the two or three years preceding the execution of this deed. It is shown that on one occasion he paid men who helped to thrash wheat on the farm; that he himself assisted in the thrashing; and that he returned the labor of some of the hands by helping them to thrash their wheat. It appears from the evidence that he was brought before the county judge of Monroe county upon a complaint that he was insane and an examination was had before Judge Erd and a jury, which resulted in a verdict finding that he was not insane. The date of this inquest is not definitely stated in the record. It is proven on behalf of appellant that Joseph Riehl was able to travel from one place to another unattended; that it was not thought necessary for any one to look after him in going from his home to St. Louis or other places where he might desire to go.

The foregoing is the substance of all the evidence heard. There is no controversy over the value of the interest conveyed by Joseph Riehl to appellant. It was worth at least \$1,000. The consideration paid was \$365. Under the evidence we are convinced that Joseph Riehl was a victim of melancholia; that he had been suffering from this disease for several years before his mother's death; that he gradually grew worse, until finally he was committed to an insane asylum for treatment; that at the time the deed was executed he was still suffering from this mental malady. While none of the witnesses are able to swear what the condition of his mind was on the morning the deed was executed, still that may reasonably be inferred from the nature and progressive character of his disease. In our opinion the decree of the court setting aside this deed as a cloud upon the title of appellees is sustained by the evidence.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(248 Ill. 64.)

PEOPLE v. LEE

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HOMICIDE (§ 161*)—INTENT—EVIDENCE.

In a prosecution for mingling carbolic acid with beer with intent to cause the death of a human being, evidence offered by accused as to what quantity of carbolic acid mingled with beer would render it dangerous to human life was relevant on the question of intent, and was improperly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 302; Dec. Dig. § 161.*]

2. HOMICIDE (§ 142*)—EVIDENCE ADMISSIBLE UNDER PLEA OF NOT GUILTY.

Under a plea of not guilty in a prosecution for mingling carbolic acid with beer with intent to produce death, evidence offered by accused that the amount of acid placed in the beer was not sufficient to produce death was admissible

under the plea of not guilty, and an objection that such evidence was inconsistent with accused's denial that he placed the acid in the beer was not well taken.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. § 142.*]

3. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that "a reasonable doubt requires that there should be more than a mere possibility of the defendant's innocence. You must have, in order to justify acquittal, a reasonable doubt of the defendant's guilt growing out of the unsatisfactory nature of the evidence against him. This doubt must be such a one as would induce a reasonable man to say, 'I am not satisfied that the defendant is guilty.'" was erroneous, as the expression "the evidence against him" had a tendency to lead the jury to believe that they were to determine the question of reasonable doubt from a consideration of the state's evidence alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1906, 1907; Dec. Dig. § 789.*]

4. CRIMINAL LAW (§ 561*)—EVIDENCE—REASONABLE DOUBT.

In determining the question of reasonable doubt, the jury must consider all the evidence, that given against accused as well as that in his favor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

5. CRIMINAL LAW (§ 823*)—INSTRUCTION—REASONABLE DOUBT—CURE BY OTHER INSTRUCTION.

An instruction which is defective, in that it leads the jury to believe that, in determining reasonable doubt, they are to consider only the evidence unfavorable to accused, was not cured by a further instruction that the jury were to consider the whole evidence, and determine the question of guilt or innocence from such considerations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.*]

6. CRIMINAL LAW (§ 1035*)—APPEAL—OBJECTION IN TRIAL COURT.

Alleged misconduct of the court in propounding questions to witnesses on direct and cross examination will not be considered on appeal where no objections or exceptions were interposed in respect thereto in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1035.*]

Error to Circuit Court, Livingston County. G. W. Patton, Judge.

Christian Lee was convicted of an attempt to commit homicide, and he brings error. Reversed and remanded.

Graves & Gibbons and O. F. H. Carrithers, for plaintiff in error. W. H. Stead, Atty. Gen., and Bert W. Adsit, State's Atty., for the People.

VICKERS, J. The plaintiff in error, Christian Lee, was tried and convicted at the May term, 1910, of the Livingston county circuit court on an indictment charging him with mingling carbolic acid with beer, with an intent to cause the death of Emma Lee, his wife, in violation of section 230 of the Criminal Code (Hurd's Rev. St. 1909, c. 38), which makes it a felony to mingle any poison with food, drink, or medicine with an intent to cause the death of any person. Motions for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a new trial and in arrest of judgment were overruled, and plaintiff in error was sentenced to an indeterminate term in the penitentiary. A writ of error has been sued out of this court for the purpose of obtaining a review of the judgment of the circuit court.

It will not be necessary to consider all of the errors assigned upon this record, nor will it be necessary to go into an examination of the evidence in detail. The facts in general outline are as follows: Emma Lee is plaintiff in error's second wife. They have been married about 14 years and have three children: Sophia, 12 years old, Rosie, 10 years old, and Laura, 9 years old. The family formerly resided on a farm in Germanville township, Livingston county, but for the last several years have resided in the village of Strawn, in said county. About six years ago Mrs. Lee was adjudged insane, and sent to the hospital at Kankakee, Ill. Some three or four years ago she was released from the hospital, and since that time has been residing with the plaintiff in error and their children in the village of Strawn. There is evidence tending to show that plaintiff in error and his wife did not live happily together, either before she was sent to the asylum or after her return. On one occasion before Mrs. Lee was sent to the asylum, she took carbolic acid with suicidal intent, but through the treatment of Dr. John J. Klemme her life was saved. A few weeks before the alleged attempt to destroy her life by poison, and as a result of a domestic difficulty between her and plaintiff in error, Mrs. Lee left her home and went to the house of Mrs. Henry Ringler, who lived near the Lee house. She remained at Mrs. Ringler's home about two weeks, and then moved into a small house in the rear of the Lee residence. She lived alone in the small house from about February 10th to March 13th. On Saturday night, March 12, 1910, the plaintiff in error purchased three bottles of Schlitz beer from George Cook, a saloon keeper in Strawn, and took it home and placed it in a feed cutter in his barn. The three bottles of beer were wrapped together in a paper. During the forenoon on Sunday plaintiff in error was doing some chores about his barn, and his little girls, Rosie and Laura, were with him at the barn. The girls discovered the package in the feed cutter and asked their father what it was, and he told them that it was beer. Plaintiff in error drank one bottle of beer at the barn during the forenoon on Sunday. His daughters, Rosie and Laura, took one of the remaining two bottles over to their mother, and gave it to her. There is a conflict in the evidence whether the bottle of beer was taken to Mrs. Lee at the suggestion of the plaintiff in error, or whether it was first suggested by the children. The little girls both testified that they asked their papa if they might take one bottle of the beer to their mamma,

and that he said he did not care, but that he would not take it himself, and the girls took the beer in pursuance of their request, and their statement is corroborated by plaintiff in error. The testimony of the little girls is discredited to some extent by the testimony of their mother, who swears that when the girls gave her the beer they said that "papa sent it to you." The remaining bottle of beer was taken to the house of plaintiff in error, and served to the family at dinner. Mrs. Lee took the bottle of beer that was given to her over to Mrs. Ringler, and offered to share it with Mrs. Ringler. Mrs. Ringler said that she had just had her dinner, and did not care for any beer at that time, and suggested that Mrs. Lee put the beer on the back porch in a cool place, and that they would drink it later. Some time in the afternoon the bottle of beer was brought in from the back porch, two glasses procured, and the bottle was opened and the beer poured into the glasses. Mrs. Ringler testifies that before the beer was opened she remarked to Mrs. Lee that she would not trust that beer if Lee furnished it. Both of the women testify that, when the bottle was opened, it popped very loud, and when poured into the glasses it foamed more than beer usually does. When the beer was poured in the glasses, Mrs. Ringler insisted that it did not smell right and did not look right. She said that she smelt carbolic acid and refused to drink any of the beer, but told Mrs. Lee that she could drink it if she wanted to. Neither of the women tasted the beer. It was poured back in the bottle, except a small quantity that was spilled on the table. The beer was then exhibited to a number of persons, and finally was taken into the possession of the police and sent to the University of Illinois for chemical analysis. It was analyzed by Prof. Lindgren, a chemist for the engineering experiment station at the University of Illinois. Prof. Lindgren testified that he made a test of the bottle of beer sent him from Strawn and discovered that the bottle contained one and three-tenths grams of phenol. The foregoing is a general summary of the most important facts that were proven on the trial.

One of the errors assigned is that the court improperly refused to allow plaintiff in error to show by Dr. Klemme that two grams of carbolic acid placed in a pint of beer would not be dangerous to human life. In his testimony for the people Prof. Lindgren was asked what amount of pure carbolic acid, such as he found in this beer, would be necessary to destroy human life. His answer was, "That depends upon the person." Thereupon the court asked the witness, "Would it kill some persons?" to which the witness replied, "Yes; it would. It is not considered a fatal dose." Thereupon the court said: "It was not necessarily a fatal dose because some persons it would not kill." The witness finally said, in answer to the

court's further questions, that in his judgment the quantity of carbolic acid found in the pint of beer might kill some persons; that he did not believe it would kill a normal person. When Dr. Klemme was introduced for the plaintiff in error he testified that he had been a physician for twenty years; that he had known Mrs. Lee nine years, and that he had treated her eight years before, when she was suffering from carbolic acid poisoning; that he had experimented with putting carbolic acid in beer; that he had used a different brand of beer from that in question. After showing the doctor's familiarity with the effect of putting carbolic acid into beer, he was asked: "Are you able to state now what would be the effect of putting two grams of carbolic acid in beer?" This question was objected to and the objection was sustained. He was then asked if he knew what the effect of two grams of carbolic acid in a pint of beer would be—as to whether it would be dangerous, or otherwise, if drank. An objection was also sustained to this question, and the plaintiff in error duly excepted.

The court's ruling was apparently based on the fact that the doctor's experiments had been with Anheuser-Busch beer, and not with that known as Schlitz beer. The first question above to which objections were sustained had reference to the chemical change, if any, that would be made in the appearance and the effervescent character of the beer by the addition of two grams of carbolic acid in a pint of beer. The importance of this question is apparent in connection with the conflicting testimony upon the effect of opening a bottle of beer and adding two grams of carbolic acid and again closing the bottle. It will be remembered that the testimony of Mrs. Ringler and Mrs. Lee agrees that when they opened the bottle of beer in question it popped and foamed more than usual. Other witnesses testified that when a bottle of beer is first opened it will pop and foam, but, if it is closed and opened a second time, it will neither pop nor foam. But, conceding that the ruling was correct in respect to the first question because Dr. Klemme had not experimented with Schlitz beer, still the action of the court in sustaining the objection to the last question above set out cannot be sustained on that ground. Dr. Klemme had qualified as an expert. He was a physician of 20 years' experience, and, independently of any experiments, he was competent to give an opinion upon the question as to whether two grams of carbolic acid in a pint of beer would or would not be dangerous to human life. As already shown, the witness Lindgren, after a somewhat persuasive cross-examination conducted by the court, had stated that the quantity of carbolic acid found in this beer might be dangerous to human life. If the court regarded it as material for the prosecution to show the dangerous character of that quantity of

carbolic acid, we are at a loss to see why it would not be material and proper for plaintiff in error to show, if he could do so, that that small quantity of carbolic acid in a pint of beer would be harmless. This inquiry was not irrelevant. The offense for which the plaintiff in error was being tried could not be established without proof that the carbolic acid was mingled with beer with the intent to destroy the life of Emma Lee. As bearing upon the intent, it was competent for plaintiff in error to show that the quantity of carbolic acid which was found in the beer was wholly insufficient to produce death.

It is said by defendant in error that this evidence was inconsistent with the defense set up by plaintiff in error that he did not put any carbolic acid in this beer. The plea of not guilty to an indictment for a criminal offense is all that is necessary to render competent any evidence that tends to prove or disprove any issue involved, and it is no objection to testimony which tends to prove one defense that it is inconsistent with other defenses that may be relied on. The defendant is entitled to submit his testimony upon all defenses he has to the jury. Had the court permitted plaintiff in error to prove that the quantity of carbolic acid found in this beer was insufficient to produce death, it might have caused the jury to entertain a reasonable doubt whether the plaintiff in error was guilty of mingling carbolic acid with this beer with an intent to cause the death of his wife. The question propounded to the witness was proper, and the court erred in sustaining an objection thereto.

Numerous complaints are made by plaintiff in error in regard to the giving, refusing, and modification of the instructions. Instruction No. 2 given on behalf of the people is as follows: "A reasonable doubt requires in law that there should be more than the mere possibility of the defendant's innocence. You must have, in order to justify acquittal, a reasonable doubt of the defendant's guilt growing out of the unsatisfactory nature of the evidence against him. This doubt must be such a one as would induce a reasonable man to say, 'I am not satisfied that the defendant is guilty.'"

The objection pointed out to this instruction is that it requires that the reasonable doubt which will justify an acquittal must grow out of the unsatisfactory nature of the evidence against him, and by implication excludes a consideration of the evidence introduced on behalf of plaintiff in error from the consideration of the jury. The expression, "the evidence against him," might well be understood by the jury as requiring them to determine whether there was a reasonable doubt of the prisoner's guilt when viewed in the light of the evidence given on behalf of the prosecution. The law is that if the jury entertain a reasonable doubt of the prisoner's guilt upon a consideration of all the evidence—that given against him as well as

that for him—the accused is entitled to an acquittal. This instruction is inaccurate, misleading, and erroneous. It is true that in other instructions the court directed the jury to consider the whole evidence and determine the question of guilt or innocence from such consideration, but that does not cure the error in this instruction, since it is impossible to tell whether the jury followed the instructions which told them to consider all the evidence, or the one which seems to authorize a conviction upon a consideration of the evidence for the prosecution alone.

Plaintiff in error makes serious complaint of the action of the trial court in asking numerous questions of the witnesses, both upon their direct and cross-examination. A careful examination of the abstract will disclose that this complaint is not wholly unfounded, but upon examination of the record we find that no objection was made and no ruling required at the trial. Without such objections and exceptions the question is not properly preserved for review. *Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179, 22 N. E. 797.

Plaintiff in error insists that the court erred in refusing to grant a new trial on the ground that the evidence is insufficient to justify a verdict of guilty. Inasmuch as the judgment is to be reversed and the cause remanded to be submitted to another jury, we do not desire to express any opinion with reference to the questions of fact involved, except to say that the case is so close upon the facts as to require strict accuracy in the rulings of the court upon the evidence and the instructions.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

(347 Ill. 510.)

RUSSELL v. ROBBINS et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. EVIDENCE (§ 432*)—PAROL EVIDENCE—CONTRADICTING CONSIDERATION IN DEED.

A consideration duly acknowledged in a deed cannot be contradicted by parol to destroy the legal effect of the deed as a conveyance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1982; Dec. Dig. § 432.*]

2. DEEDS (§ 203*)—PAROL EVIDENCE—FRAUD—CONSIDERATION OF DEED.

Where it is admitted that a deed is sufficient to transfer the legal title, it is proper to show the actual consideration to determine whether the deed should be set aside for fraud inducing its execution.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 203.*]

3. DEEDS (§ 70*)—PROMISES AS CONSTITUTING FRAUD.

Ordinarily a promise to do something in the future does not amount to fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 168; Dec. Dig. § 70.*]

4. CANCELLATION OF INSTRUMENTS (§ 6*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

Where a grantor executes a deed in consideration of future support inasmuch as equity cannot compel the grantee to furnish the support and a court of law cannot make good with damages, where there is a substantial failure to furnish support, equity will set aside the deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 6.*]

5. DEEDS (§ 70*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

Where a contract by a grantee to support the grantor in consideration of his executing a deed was made with a fraudulent intent or where the contract has been abandoned, equity will set aside the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

6. DEEDS (§ 19*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

The failure of a grantee in a deed, executed by the grantor in consideration of future support, to perform, must be substantial and as to material matters before equity will set it aside.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

7. DEEDS (§ 196*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

Where a grantor executing a deed in consideration of future support prevents the grantee from carrying out the contract, there is no presumption of fraud justifying the setting aside of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 196.*]

8. DEEDS (§ 19*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

A grantee receiving a deed in consideration of supporting the grantor need not furnish support at any other place than his home, and the refusal of the grantee to compensate third persons for taking care of the grantor does not justify the setting aside of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

9. DEEDS (§ 19*)—CONSIDERATION FOR FUTURE SUPPORT—VALIDITY.

The court in determining whether the support furnished by a grantee in a deed made in consideration of supporting the grantor was proper must consider the condition in life of the parties at the execution of the contract.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. § 19.*]

10. DEEDS (§ 210*)—EVIDENCE—CONSIDERATION FOR FUTURE SUPPORT.

In a suit to set aside a deed executed in consideration of future support, evidence held not to show such a failure to furnish support as to justify setting aside the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 636; Dec. Dig. § 210.*]

Appeal from Superior Court, Cook County; Arthur H. Chettam, Judge.

Suit by Catherine Williams Russell against Mary A. Robbins and another. From a decree for plaintiff, defendants appeal. Reversed and remanded.

McCaskill & Son, for appellants. Birmingham & Swiney and John Stuart Roberts, for appellee.

CARTWRIGHT, J. On December 31, 1909, the appellee, Catherine Williams Russell,

filed her amended bill of complaint in the superior court of Cook county asking the court to set aside a deed executed by her on January 18, 1901, of four acres of land in said county, and two subsequent deeds of the same land, to Mary A. Thompson, who is now Mary A. Robbins, one of the appellants. A tenant of Mrs. Robbins was made defendant with her, but he had no substantial interest, and in this opinion Mrs. Robbins will be called the defendant. The ground for asking a cancellation of the deeds was that they were made in consideration of future support of the complainant, which was not furnished. The bill was answered, and the fact that the original deed was made in consideration that the defendant would support the complainant during her natural life was admitted, but the charge that the condition was not complied with was denied. The first deed conveyed the property and the two subsequent deeds conveyed nothing but were of a confirmatory nature. The chancellor heard the evidence of the parties, and entered a decree finding that the defendant had failed, refused, and neglected to furnish the complainant with reasonable care and support with the exception of about $2\frac{3}{4}$ years after the making of the first deed, and had failed and refused to compensate other parties with whom the complainant had lived the remainder of the time, for such care and support, and setting aside the deeds in accordance with the prayer of the bill.

On the first Sunday in January, 1901, the defendant went with a friend to an old house on the four acres of land in question, where the complainant lived. The complainant was about 73 years old and feeble, and her husband had recently died. It was a very cold day, and they found the complainant lying on a broken-down bed, with no fire in the house and covered with a lot of rags. The house was a cheap, old concern, that cost perhaps \$300 or \$400 when built, and was without a foundation, with no glass in the windows, and the kitchen doors broken down. The complainant was there alone in a house that was not habitable for a human being, and the defendant, who had worked for her four summers when the defendant was a child, and took some interest in her, proposed to take her home and take care of her. The defendant took something to the house for the complainant to eat and left it there, and the complainant said that, if she would take her home, she would give her her property, if there was any left. The defendant came back a few days afterward and took the complainant home with her, and on January 18, 1901, the complainant executed a deed of the four acres of land to the defendant. The deed recited the consideration of \$100 and future support during the natural life of the complainant. The land was of comparatively little value, being covered with stumps, the greater part of it dry and the remainder a wet slough. The defendant was a work-

ing woman of the poorer class, who did washing for others. There was no complaint by the complainant of her treatment, but in June, 1902, she went on a visit to the home of the defendant's sister, where she remained about three months, during which time the defendant called on her several times, and asked her if she wanted to come home, but was told that she was well enough off where she was. The defendant and her sister had some difficulty, and the complainant filed a bill to set aside her deed, but afterward dismissed the suit, and on September 2, 1902, executed a warranty deed reciting a consideration of \$800 and without any condition as to support. The defendant had put in windows, shingled the house, put water conductors on it, had a well put in, painted the house, and put in new floors, and rented it for \$5 a month. The \$800 was figured up from these improvements and costs paid by the defendant and for some settlement in probate court, and no other consideration was paid. The complainant then lived with the defendant for some time, but on some date, not made certain by the evidence, she went to the defendant's mother-in-law on an agreement that the mother-in-law would keep her for two weeks, until she could get a hired man. The complainant found the place pleasant for her and remained there about two years, during which time defendant took clothes and shoes to her, and told her she could always come back when she wanted to. The defendant was married to George R. Robbins in October, 1903. He was a well digger and later janitor of a public school. At the end of the two years the complainant, saying she was going to take a walk, left the mother-in-law, and upon search was found at the home of the defendant's sister, where she remained two years. The defendant visited her at various times during the absence of the sister, with whom she was not on good terms, and tried to get her to come back. While the complainant was away from the defendant's home, complainant had caused an attorney to place on record a notice that the second deed had been obtained by undue influence and was void for want of consideration. After two years with the sister the complainant went back to live with the defendant, and the two went to the office of an attorney, where the complainant executed a quitclaim deed on May 14, 1907, to remove the cloud created by the notice, and \$800 was named as the consideration in that deed. Complainant then continued to live with the defendant until August 1, 1908, when she walked out of the gate and disappeared. The defendant made search for her and left a notice at the police station, and she was found at the house of another woman who had once been a neighbor of the defendant, and who was at enmity with her. A police captain went there to get her to return, but she declined to do so, saying that she had been all right

at the defendant's house, but did not like to stay there, and was going to stay with the other woman. While at this other woman's house the complainant filed this bill, and while there she suffered a stroke of paralysis. About the middle of May, 1910, she came back to the defendant's, and was living there at the time of the hearing. The complainant was called to the stand and said that she was 82 or 83 years old; that she was living with the defendant, and had made a deed of the property to her; that she liked it at the defendant's very well, and she repudiated her solicitor in the case. The chancellor, being of the opinion that she was incapable of testifying, had her removed from the witness stand and appointed a guardian ad litem for her.

The deeds recited money considerations, from which it is argued that they could not be set aside because the complainant could not dispute the payment of such considerations. It is true that a consideration duly acknowledged in a deed cannot be contradicted by parol for the purpose of destroying the legal effect of the deed as a conveyance. *Kimball v. Walker*, 30 Ill. 482; *Illinois Central Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708. The legal effect of the deeds is not questioned in this case, but it is admitted that they were sufficient to transfer the legal title, and it was legitimate and proper to show the actual consideration for the purpose of determining whether there was fraud for which the deeds should be set aside in equity. Even on the face of the first deed which conveyed the property the future support was the material part of the consideration. It is also true, as claimed, that ordinarily a promise to do something in the future does not constitute a fraud, and a violation or disregard of such a promise does not amount to a fraud; but deeds such as those in question in this case belong to a peculiar class, distinguished in the decisions of this court from ordinary deeds of bargain and sale in the fact that the grantor gives up his property for the consideration of future support, which a court of equity cannot compel the grantee to furnish and a court of law cannot make good with damages. *Frazier v. Miller*, 16 Ill. 48. If the evidence is such as to justify a conclusion that a contract of that kind was entered into with a fraudulent intent or has been abandoned, a court of equity will set aside the conveyance. The failure to perform on the part of the grantee must be substantial and in relation to material matters (*Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699), and, if the grantor prevents the grantee from carrying out the contract, there can be no presumption of fraud which would justify setting aside a deed (*Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102; *Williams v. Langwill*, 241 Ill. 441, 89 N. E. 642, 25 L. R. A. [N. S.] 932). The complainant in this

case chose to remain away from the home of the defendant, and the defendant was not bound to furnish support at any other place. The chancellor found that the defendant had failed and refused to compensate other parties who took care of the complainant, but she was under no obligation to do so. The other persons who kept the complainant because they chose to do so—and two of them, perhaps, because of enmity towards the defendant—never had, or pretended to have, any claim against her. The defendant was not expected to pay in money for the support of the complainant or the services of other people which she could herself render.

In determining whether proper support was furnished, the condition in life of the parties at the time the contract was made must be taken into consideration. They were all poor people, and the complainant was not only unable to care for herself, but had no property that would have furnished her any support. Defendant was of the working class, and it was not anticipated by either that the support furnished would be different from or better than that pertaining to their station in life. The chancellor found that proper support was not furnished, and, as he saw the witnesses and heard them testify, he had better opportunities to judge of their credibility than we have, but, after giving due consideration to that fact, we are unable to agree with the conclusion reached. There was no evidence tending in any degree to show a failure on the part of the defendant to keep her contract from January 18, 1901, when the first deed was made, up to the summer of 1907, and the only testimony as to any facts occurring at that time came from two women who acknowledged their hostility and ill feeling toward the defendant and manifested a desire to injure her, if possible. One of them, who did washing and housecleaning, and at the time of the hearing was sweeping, cleaning, and dusting for the bureau of charities, and who for seven months, beginning in the fall of 1907, occupied a building on the rear of defendant's lot, testified to want of support and bad treatment, and she was corroborated by her sister to some extent, but there was a very clear preponderance of evidence coming from disinterested parties that the complainant was well cared for according to the station in life of the parties and was well and comfortably clothed. The complainant was fickle and changeable, and would disappear from any place where she might be, without notice and apparently without cause. Both she and her husband had been addicted to the use of intoxicating liquors, and she habitually smoked a pipe. The evidence shows that she had a comfortable room whenever she chose to stay with the defendant and was supplied with pipes and tobacco, but not with liquor, and that she spent her time largely in smoking her pipe, and did no work except such as she voluntarily did. Under

the evidence in the record the decree cannot be supported upon any correct view of the law.

The decree is reversed and the cause remanded, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(248 Ill. 11)

PEOPLE ex rel. BLUE DANUBE CO. v. BUSSE, Mayor, et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MANDAMUS (§ 10*)—PETITION—EXISTENCE OF LEGAL RIGHT.

Mandamus will be awarded only in cases where the petitioner shows a clear right to the writ and a clear legal duty on the part of defendant to perform the act sought to be enforced.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

2. EVIDENCE (§ 32*)—JUDICIAL NOTICE—MUNICIPAL ORDINANCES.

Courts do not take judicial notice of municipal ordinances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. § 32.*]

3. MANDAMUS (§ 154*)—PLEADING—MUNICIPAL ORDINANCES.

In mandamus to compel city officers to issue a building permit to plaintiff, the ordinances of the city conferring and defining the right to such permit must be pleaded in the petition for the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 309; Dec. Dig. § 154.*]

4. MANDAMUS (§ 154*)—PLEADING—CONCLUSION.

In mandamus to compel city officers to issue building permit to plaintiffs, an allegation that the proposed building is to be constructed of such material and in such manner as to meet all the building requirements is a mere conclusion of law.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

5. PLEADING (§ 214*)—DEMURRER—ADMISSION—CONCLUSION.

Mere legal conclusions are not admitted by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 527; Dec. Dig. § 214.*]

6. MANDAMUS (§ 154*)—PLEADING—RIGHT TO PERFORMANCE OF DUTY.

In mandamus to compel city officers to issue a building permit, an averment that defendant had declined to issue a permit for a specified reason does not excuse averment by plaintiff of other necessary prerequisites to the right to the permit.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 154.*]

7. THEATERS AND SHOWS (§ 3*)—ELIGIBILITY FOR LICENSE—"PLACE."

Under an ordinance providing that before issuing a license to operate a theater, dancing hall, or other place of public amusement, the mayor shall make an examination of the place for which the license is desired, to see that all the provisions of the building ordinances of the city have been complied with, and defining the word "place" as used in the ordinance as "the theater, opera house, auditorium, hall, park, grounds, garden, tent, or other inclosure within which it is intended to produce, offer, or present any such entertainments," it is not

contemplated that a license shall issue until the building in which the entertainment is to be given is completed.

[Ed. Note.—For other cases, see Theaters and Shows, Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5383-5388; vol. 8, pp. 7754, 7755.]

Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Mandamus by the People, on the relation of the Blue Danube Company, against Fred A. Busse, Mayor of the City of Chicago, and another. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Stedman & Soelke, for appellant. Edward J. Brundage, Corp. Counsel, William S. Stahl, and John J. Beilman, for appellees.

COOKE, J. Appellant, the Blue Danube Company, filed a petition for a writ of mandamus in the circuit court of Cook county against the appellees, Fred A. Busse, mayor of the city of Chicago, and Murdoch Campbell, commissioner of buildings, to compel the appellees to grant appellant a permit to erect a building at 4318 Indiana avenue, in the city of Chicago, and for a license to conduct a ballroom or dance hall therein. Appellees demurred to the petition, the demurrer was sustained, and appellant having elected to stand by its petition, judgment was rendered on the demurrer in favor of appellees, from which judgment appellant has prosecuted an appeal directly to this court; the trial judge having certified that the validity of a municipal ordinance is involved, and that in his opinion the public interest requires that the appeal should be taken directly to this court.

The petition for the writ alleges that appellant is a corporation organized under the laws of this state and is authorized to operate and conduct dances and amusements; that on December 21, 1908, the common council of the city of Chicago adopted an ordinance, which is set out in *hæc verba* in the petition, and which, in substance, makes it unlawful for any person, firm, or corporation to construct on any street in the city, in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, any building for a theatrical, dramatic, or operatic entertainment, show, amusement, game, or public exhibition of any kind intended or calculated to amuse, instruct, or entertain, where the same is given for gain, or for admission to which the public is required to pay a fee, without the written consent of a majority of the property owners, according to frontage, on both sides of such street, which written consent is required to be filed with the commissioner of buildings before a permit can be issued for the construction of any such building. The petition further alleges that

said ordinance is in full force and effect; that appellant is the owner of a certain lot, which is described, known as No. 4818 Indiana avenue, in the city of Chicago, and proposes to erect and maintain a suitable and first-class building and ballroom thereon for the purpose of conducting and operating dances therein, and to charge the public a fee for admission thereto; that on May 2, 1910, appellant made a demand upon appellees for a permit and license for the erection and operating of the building and ballroom above described; that plans and specifications were submitted, which show the building proposed to be erected to be in complete compliance with all the building requirements of the ordinances of the city, and that it thereupon became the duty of appellees to issue a permit or license to appellant for the erection of said building; that said building is to be constructed of such material and in such a way as to completely and adequately meet with the building requirements of the city of Chicago; that there was no frontage consent obtained or presented with the request for said permit and license; that a majority of the buildings within the block in which said building is proposed to be located are used for residence purposes, and that the appellees refused to honor the request and demand for such permit and license, for the reason that there was no frontage consent procured and filed with the application for said permit and license, as required by said ordinance; that said ordinance is unreasonable, null, and void, and that the city has no power to pass any valid ordinance requiring that frontage consents shall be secured as a condition precedent to the erection by appellant of said building and the operation of a dance hall therein; that it is necessary to procure a building license or consent to erect said building, and without the same appellant would not be authorized legally to erect and maintain the same.

The petition further shows that on December 17, 1909, the city adopted another ordinance, effective after January 1, 1910, which is also set out in *hæc verba*, and which expressly repeals the above ordinance of December 21, 1908. The ordinance of December 17, 1909, divides into 21 classes all theatricals, shows, and amusements offered, operated, presented, or exhibited for gain, or for admission to which the public is required to pay a fee, the fifth of such classes being, "dances, amateur theatrical entertainments, bazaars, and other entertainments of like character carried on or engaged in any hall, structure, or building." The ordinance makes it unlawful to give, conduct, produce, present, or offer for gain or profit any of the entertainments mentioned in the first 11 classes anywhere within the city, excepting in a duly licensed place, and requires any person or corporation desiring such license to make application in writing to the mayor, setting out, if a corporation, the full name

and residence of its principal officers, a description of the place for which a license is desired, a statement of the class of entertainment which it is intended to produce, offer, or present at such place, the highest price to be charged for admission to any entertainment offered or presented at such place, and the seating capacity of such place; whereupon the mayor is required to make, or cause to be made, an examination of the place where the entertainment is to be conducted, and if all the provisions of this ordinance, and of all ordinances of the city of Chicago relating to the giving of entertainments and of the location, construction, and maintenance of the places within which such entertainments are given, are complied with, and if the commissioner of buildings, the city electrician, and the fire marshal shall so certify, the mayor is required to issue, or cause to be issued, the license for which application is made, upon the payment of the license fee fixed by the ordinance, which for entertainments of the fifth class ranges from \$25 to \$100 per annum; the amount in a particular case depending upon the seating capacity or floor space of the room or building in which the entertainment is to be held. This ordinance also provides that, where the proposed place is on a street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, before any license shall be issued for any of the entertainments enumerated in certain classes, including the fifth class, at such place, the applicant shall obtain and file with the department of buildings the written consent of a majority of the property owners, according to frontage, on both sides of such street in such block.

A writ of mandamus will be awarded only in cases where the party applying for the writ shows a clear right to it and a clear legal duty on the part of the defendant to perform the act sought to be enforced. *People v. Illinois Central Railroad Co.*, 241 Ill. 471, 89 N. E. 744; *People v. Rose*, 225 Ill. 496, 80 N. E. 293; *People v. Rose*, 211 Ill. 252, 71 N. E. 1124. It appears from the petition that the ordinance of December 21, 1908, which required the written consent of a majority of the property owners on both sides of the street before a permit could be issued for the construction, in residence districts, of any building to be used for the purposes specified in the ordinance, has been repealed by the ordinance of December 17, 1909, and that the latter ordinance contains no such requirement. The application by the appellant for a permit and license was made after the latter ordinance had become effective, and its right to the writ of mandamus is in no manner dependent upon the provisions of the former ordinance. The petition alleges that it is necessary to procure a building license or consent to erect the building which appellant desires to erect, and that appellant would not be authorized legally to

erect and maintain such building without obtaining such license or consent; that appellant made a demand upon the mayor and commissioner of buildings for such permit, and submitted plans and specifications which showed that the building proposed to be erected complies with all the building requirements of the ordinances of the city, and that it thereupon became the duty of appellees to issue such permit. The provisions of the ordinances of the city relating to the erection of buildings are not set out in the petition, nor does the petition show what requirements of the ordinances of the city must be complied with before the applicant becomes entitled to such permit.

Courts do not take judicial notice of a municipal ordinance, but the party relying thereon must allege and prove it as a matter of fact. *Stott v. City of Chicago*, 205 Ill. 281, 68 N. E. 736. If there is in force in the city of Chicago an ordinance requiring a permit from the appellees before the appellant can lawfully erect the building in question, the appellant must plead such ordinance in order to show a legal duty on the part of appellees to issue the permit, and must also plead the ordinances of the city containing requirements with which the appellant must comply before it becomes entitled to such permit, and state facts showing compliance with all the requirements of such ordinances, in order to show a clear right on the part of appellant to demand said permit. The allegations that the proposed building is to be constructed of such material and in such manner as to meet all the building requirements of the city, and that the plans and specifications which were submitted to the mayor and commissioner of buildings showed that the proposed building complied with all the building requirements of the ordinances of the city, are mere legal conclusions, which are not admitted by the demurrer, and which must be wholly disregarded in determining whether appellant has by its petition shown a clear right to the writ of mandamus. *People v. Village of Crotty*, 93 Ill. 180; *Stannard v. Aurora, Elgin & Chicago Railway Co.*, 220 Ill. 469, 77 N. E. 254; 31 Cyc. 58. Rejecting the legal conclusions contained in the petition, nothing remains to show any duty resting on appellees to issue the permit, or any right on the part of appellant to demand the same.

It appears from the ordinance of December 17, 1909, that it is necessary to obtain a license in order to carry on the business in the city of Chicago in which appellant desires to engage, and that ordinance prescribes certain conditions precedent with which appellant must comply before it can rightfully demand such license. The validity of this ordinance as a whole is not attacked; but appellant in its petition denies that the city has any power to enact any ordinance requiring the consent of property owners in order to obtain a license to con-

duct a dance hall or ballroom in any portion of the city, and thereby inferentially attacks that portion of the ordinance requiring such consent. It is not, however, necessary to consider that provision of the ordinance in order to sustain the action of the court in denying the prayer of the petition, as there are various other conditions precedent prescribed by the ordinance, the validity of which are not questioned, with which, so far as the petition discloses, appellant has not complied. Among such is the requirement that the applicant for such license must make application in writing, setting out, if a corporation, the full name and residence of its principal officers, a description of the place for which a license is desired, a statement of the class of entertainment which it is intended to produce, offer, or present at such place, the highest price to be charged for admission to any entertainment offered or presented at such place, and the seating capacity of such place; also the requirement that the mayor shall make, or cause to be made, an examination of the place for which the license is required, and that the commissioner of buildings, city electrician, and fire marshal shall certify that the provisions of all ordinances of the city relating to the giving of entertainments, and the location, construction, and maintenance of the places within which such entertainments are given, are complied with before any license shall be issued. Neither does the petition disclose that the appellant tendered the fee fixed by the ordinance for the license which it attempted to obtain. The allegation of the petition that appellees refused to honor the request and demand for said license, for the reason that there was no frontage consent procured and filed with the application for such license, does not supply the want of allegations showing compliance with the conditions precedent above mentioned. The refusal to issue a license may have been based upon that ground, and yet there may have been other reasons why appellant was not entitled to the license. In order to obtain a writ commanding the mayor to issue a license, it must not only appear that the ground upon which such refusal was based was not a legal excuse, but that the petitioner has complied with all the valid requirements of the ordinances and is clearly entitled to the writ.

Moreover, the ordinance of December 17, 1909, defines the word "place," as used in the ordinance, as "the theater, opera house, auditorium, hall, park, grounds, gardens, tent, or other inclosure within which it is intended to produce, offer, or present any such entertainments," and the provision of the ordinance with reference to one of the conditions precedent above mentioned is that "the mayor shall make, or cause to be made, an examination of the place for which such license is desired, and if all of the provisions of this ordinance, and all of the ordinances

of the city of Chicago relating to the giving of entertainments and of the location, construction and maintenance of the places within which such entertainments are given, are complied with, and if the commissioner of buildings, the city electrician, and the fire marshal shall so certify," the mayor shall issue the license, etc. In order to render the provision of the ordinance last quoted effective, the building or structure in which it is intended to produce the entertainment for which a license is sought must have been erected before application can be made for such license, and the ordinance, therefore, necessarily prohibits the issuance of a license for conducting an amusement in a building which has not been erected. The petition shows that the building in which appellant intends to conduct the dance hall or ballroom for which it seeks to compel the issuance of a license has not been erected, and the license was properly refused for that reason.

The petition was clearly insufficient, and the circuit court did not err in sustaining the demurrer and entering judgment in favor of appellees. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(247 Ill. 586.)

HOLMES v. MINER et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. WILLS (§ 472*)—CONSTRUCTION—GENERAL RULES—ESTATES—DIFFERENT CLAUSES.

A subsequent clause in a will will not be construed so as to cut down or take away from the estate granted by a prior clause, unless the latter clause is unambiguous in its terms.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 990; Dec. Dig. § 472.*]

2. WILLS (§ 636*)—CONSTRUCTION—CLAUSE DIVESTING PROPERTY.

Unless the words of a will require it, the courts will not construe a gift over in such manner as to divest property already vested in possession.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518; Dec. Dig. § 636.*]

3. WILLS (§ 636*)—CONSTRUCTION—ESTATES—LIMITATION OVER ON DEATH OF DEVISEE.

A testator specifically devised certain property to his daughter in fee, and followed that by the devise of a remainder after a life estate to his wife. The clause devising the remainder provided that if, at the death of his wife, or at the testator's death in case he survived her, the daughter should have died leaving no heirs of her body, then all such lands devised to her in this will shall descend to another, etc. *Held*, that all such lands referred to the remainder only, and the clause did not divest the lands specifically devised.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518; Dec. Dig. § 636.*]

Appeal from Circuit Court, Pike County; Harry Higbee, Judge.

Action in ejectment by Mattie I. Holmes against Lester Miner and others. From a

judgment for defendants, plaintiff appeals. Affirmed.

W. E. Williams and A. Clay Williams, for appellant. William Mumford and Andersen & Matthews, for appellees.

CARTWRIGHT, J. Mattie I. Holmes, the appellant, brought this action of ejectment in the circuit court of Pike county for the recovery of the N. E. $\frac{1}{4}$ of section 36, in township 7 S., range 5 W., in Pike county, against Lester Miner, one of the appellees, a tenant of Otis D. Leach, the other appellee, who was afterward added as a defendant. A jury having been waived, the cause was tried upon a stipulation of facts. The court found the issues for the defendants, and entered judgment accordingly.

Both parties claim title from the same source; the plaintiff claiming as devisee under the will of her father, J. S. Irwin, and the defendant Otis D. Leach claiming under mesne conveyances from Ida E. Grimes, another daughter of the testator and devisee under the same will. The following facts were submitted to the court by the stipulation:

The testator, J. S. Irwin, was a lawyer of high standing and large experience, and he wrote his own will and executed it on March 27, 1892. He was then about 72 years old, and he died January 4, 1894. At the time of the execution of his will and at the time of his death his family consisted of Meribah P. Irwin, his wife, Mattie I. Holmes, a widowed daughter, with three children, aged, respectively, about 20, 12, and 10 years, and Ida E. Grimes, another daughter, the wife of Virgil A. Grimes. By the first paragraph of his will the testator provided for the payment of debts and funeral expenses, and by the second he devised to his daughter Mattie I. Holmes, the plaintiff, her heirs and assigns, all his real estate in the state of Iowa and certain land in Pike county specifically described in that paragraph. He also devised to her, after the death of his wife, if his wife should survive him, certain lands in Kansas and several tracts of land in Pike county, the lands so devised to be her sole property, free from any right of dower or curtesy of any present or future husband. By the third paragraph he devised to his daughter Ida E. Grimes certain lands in Pike county therein specifically described. That devise was followed by a devise of a remainder after a life estate in his wife, and a further provision, all in the following language: "I also devise and bequeath to my daughter Ida, after the death of my wife, if she should survive me, all the rest and residue of my lands not devised to my daughter Mattie. If at the death of my wife, or at my death, if I survive her, my said daughter Ida shall have deceased, leaving no heir

of her body alive, then all such lands devised to her in this will shall, at the death of myself and wife, descend to and become the property of my daughter Mattie, but if any heir of the body of the said Ida shall survive her and be alive at the death of the survivor of myself and wife, then the real estate so devised shall descend to and vest in such surviving child or children." By the fourth paragraph of the will the testator bequeathed to his wife, Meribah P. Irwin, if she should survive him, all his personal property absolutely, and devised to her during her natural life all the rest and residue of his real estate, except those lands devised absolutely and specifically to his daughters, Mattie and Ida, with full power to sell the lands so devised for the payment of debts, taxes, or her support. He then provided that the devise to his wife, if accepted by her, should bar her rights of dower in the lands devised specifically and absolutely to his daughters, Mattie and Ida. The daughter Ida E. Grimes died March 25, 1904, leaving Virgil A. Grimes, her husband, but leaving no child, and having never had a child. The widow, Meribah P. Irwin, died on November 25, 1909. The land, the title of which is in controversy in this case, is one of the tracts which was specifically devised to the daughter Ida E. Grimes, and in which the widow did not have a life estate.

The question upon which the rights of the parties depend is whether the gift to the plaintiff, Mattie I. Holmes, in the event of the death of the daughter Ida E. Grimes without leaving issue, applies to all the lands devised to her, or only to the lands in which the widow took a life estate. The testator first devised to his daughter Ida certain lands specifically described, in language sufficient to vest in her a fee-simple estate of inheritance upon his death, if a less estate was not limited by express words of the testator, or does not appear to have been devised by construction or operation of law. In determining whether a less estate was limited by express words, the rule of construction is that an estate given by one clause of a will cannot be cut down or taken away by a subsequent clause, except by clear and unambiguous terms. *Roberts v. Roberts*, 140 Ill. 345, 29 N. E. 886. The title to the lands specifically devised to Ida vested in her in possession on the death of the testator, and the courts are averse to construing a gift over in such a manner as to divest property already vested in possession, and will not do so unless the words of a will require such a construction. There are in this will no clear and unambiguous words apply-

ing to all the lands devised to the daughter Ida. The devise of a remainder after the life estate of the widow was in terms a devise of all the rest and residue of the testator's lands not devised to his daughter Mattie, the plaintiff; but it is evident that the reference was only to lands not specifically devised to either of his daughters. He had already devised specifically to his daughter Ida certain lands, and only lands not specifically devised could be described as the rest and residue of his lands. As applied to the lands in which there was a life estate in the widow, the gift was substitutionary and took effect at the termination of the life estate; but, if construed to apply to all the lands devised, it would operate to divest the fee which Ida took on the death of the testator, and it requires clear language to bring about such a result. Such language was not used by the testator, but in providing for the substitution he used the words "such lands devised to her in this will." This followed the devise of the remainder after the life estate, and the word "such" indicated lands particularized, as distinguished from all the lands devised. The lands so distinguished by the testator must have been those in which a remainder was to take effect at the time fixed for the substitution.

Another reason for concluding that the testator did not there refer to all the lands devised is found in the fourth paragraph, where the testator devised to his wife the life estate in the rest and residue of his real estate, "except those lands devised absolutely and specifically" to his daughters, Mattie and Ida. Again, he provided that the devise to his wife were intended, if accepted by her, to bar her rights of dower in the "lands devised specifically and absolutely" to his daughters. This language shows that he intended that some devise to his daughter Ida should be absolute, and that those which were specific should be of that character. The lands specifically devised to Ida were those in which the widow had no life estate, and the testator twice mentioned those lands as not only being devised specifically, but also absolutely, to her. We conclude that the substitutionary gift to the plaintiff was only of the lands in which the widow had a life estate, that the daughter Ida took a fee simple estate in the lands specifically devised, and that her conveyance vested such title in her grantee. The finding and judgment were in accordance with that view.

The judgment is affirmed.

Judgment affirmed.

(248 III. 101)

NAWROCKI v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 1095*)—FINDINGS OF APPELLATE COURT—CONCLUSIVENESS.

Though there be a dispute regarding evidentiary facts, the conclusion to be drawn from them must be determined by the Appellate Court, and its conclusion is binding on the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. § 1095.*]

2. APPEAL AND ERROR (§ 1089*)—REVIEW—DECISION OF APPELLATE COURT.

The Supreme Court cannot resort to the opinion of the Appellate Court to ascertain the conclusions reached by that court as to the facts, but must be governed by the recitals in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4298; Dec. Dig. § 1089.*]

3. APPEAL AND ERROR (§ 1095*)—FINDINGS—CONCLUSIVENESS.

When the Appellate Court recites its ultimate finding of facts, under that section of the practice act (Hurd's Rev. St. 1909, c. 110, § 120) requiring it to so recite them when its final determination of a cause is the result of a finding of the facts different from that of the trial court, such finding is conclusive on the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. § 1095.*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Action by Stanislaus Nawrocki, administrator, against the Chicago City Railway Company. A judgment for plaintiff was reversed on appeal to the Appellate Court, and, the Branch Appellate Court having granted a certificate of importance, the case was brought to the Supreme Court by appeal for further consideration. Judgment of Appellate Court affirmed.

N. L. Plotrowski and Cyrus J. Wood, for appellant. Franklin B. Hussey and Watson J. Ferry, for appellee.

CARTER, J. This is an action brought in the circuit court of Cook county by the administrator of the estate of John Tanka to recover damages for said Tanka's death, which it is alleged resulted from injuries received while a passenger on one of the Chicago City Railway Company's cars. On the first trial in the circuit court the jury disagreed. On the second trial a verdict was rendered in favor of appellant, and damages were allowed. The case was appealed to the Appellate Court, which reversed the judgment, with the finding of fact that appellee is "not guilty of the negligence charged in the declaration herein." One of the justices of the Branch Appellate Court, having heard the case in the lower court, took no part in the decision. The other two members of that court granted a certificate of importance, and

the case was then brought here by appeal for further consideration.

Appellee operated a system of street cars in the city of Chicago, including a line on Archer avenue, a street running northeast and southwest, and a line running on Pitney court and Thirty-First street. The Pitney court and Thirty-First street line of cars started in Pitney court, where the street comes into Archer avenue, and ran southeasterly in Pitney court and then east in Thirty-First street. The cars in their course come west on Thirty-First street, pass northerly on the east track in Pitney court, and stop at Archer avenue. These cars, in returning south from this point, switch to the west or south-bound track in Pitney court by a switch located a short distance southerly from Archer avenue, perhaps 60 or 80 feet. At this switch appellant's intestate, John Tanka, met his death by falling off the rear platform of one of the appellee's cars, thereby breaking his neck and dying in a few minutes. The accident occurred about noon, February 28, 1904, and from the evidence his fall must be regarded as occasioned by the swaying or jolting of the car at the switch. He was a passenger, coming from the Archer avenue line by transfer. The switch in question was automatic, and at the time of the accident was covered by water. It failed to work when the front wheels of the car passed, and the wheels kept upon the straight track. When the rear wheels came to the switch, they passed onto the other track. It was this that caused Tanka to be thrown from the car. After the accident occurred a large bolt was found under the water in the groove of the switch, at a point about a foot from the north end of the switch. This bolt, from the evidence, seems to have prevented the switch from working automatically.

The sole argument of appellant here is that on this record the Appellate Court erred in finding the facts different from the circuit court. No error of law is urged for our consideration, except that the opinion of the Appellate Court shows that that court erred in holding, as a matter of fact, that appellee was not negligent as charged in the declaration. It is urged in support of this claim that the evidence in this case shows that the doctrine of *res ipsa loquitur* applied; that appellant had made out a *prima facie* case of negligence on that account; that this was an error of law; and that it was also an error of law for the Appellate Court to hold that the switch was not under appellee's control. These are all evidentiary facts, and not the ultimate facts, which must be found by the Appellate Court. Even though there be a dispute in regard to these evidentiary facts, yet the conclusion or inference to be drawn from them must be determined by the Appellate Court, and that conclusion

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is final and binding on this court. It has been decided many times by this court—and nothing has ever been said to the contrary—that we cannot resort to the opinion of the Appellate Court to ascertain the conclusions reached by that court as to the facts, but must be governed by the recitals in the judgment. *Martin v. Martin*, 202 Ill. 382, 67 N. E. 1, and cases cited. There is no point of practice more firmly settled than that when the Appellate Court recites its ultimate finding of facts—under that section of the practice act (Hurd's Rev. St. 1909, c. 110, § 120) which makes it the duty of said court to so recite them when its final determination of a cause is the result of a finding of the facts different from that of the trial court—such finding is conclusive on this court. The argument of appellant in this case is one of the repeated attempts that have been made since this section of the practice act was passed to get this court to change, by ruling, the natural construction that has always been put upon that statute. There is but one question presented in a case like this for our consideration. That is, conceding the facts to be as found by the Appellate Court, was the law properly applied in that court? If appellee was not guilty of the negligence charged in the declaration, it is very clear that there can be no recovery in this case. *Peterson v. Sears, Roebuck & Co.*, 242 Ill. 38, 89 N. E. 696; *Bartlett v. Lumaghi Coal Co.*, 237 Ill. 372, 86 N. E. 587; *Berkowitz v. Terminal Railroad Co.*, 234 Ill. 450, 84 N. E. 1058; *Martewicz v. Mohr & Sons*, 236 Ill. 143, 86 N. E. 202; *Schaller v. Independent Brewing Ass'n*, 225 Ill. 492, 80 N. E. 334; *Toolen v. Chicago Towel Supply Co.*, 222 Ill. 517, 78 N. E. 825; *Craver v. Acme Harvester Co.*, 209 Ill. 483, 70 N. E. 1047; *Hawk v. Chicago, Burlington & Northern Railroad Co.*, 147 Ill. 399, 35 N. E. 130.

The decisions cited by counsel for the appellant holding that a finding of law is not changed by being called a finding of fact are not in point here. The finding of the Appellate Court in this case is a finding of fact.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

(248 Ill. 42.)

PEOPLE ex rel. CLINE, County Collector, v. KUNS.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. DRAINS (§ 68*)—ASSESSMENTS—PURPOSE—ANTECEDENT DEBT—VALIDITY.

A drainage district has no power to create in advance, either under the farm drainage act or under the levee act, any indebtedness for completing an improvement, and then levy an assessment to meet it.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 68.*]

2. DRAINS (§ 89*)—ASSESSMENT—ENFORCEMENT—EVIDENCE.

On hearing of an application for judgment against land for delinquent taxes and assessments, on objection to an assessment by drainage commissioners, the record of prior proceedings of the drainage commissioners, which were void because the commissioners had held them outside of the drainage district, and proof of the performance of part or all of the contract under such void proceedings, was admissible; a subsequent resolution of the commissioners levying the assessment in question being capable of being understood only by reference to the void proceedings.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 89.*]

3. DRAINS (§ 73*)—ASSESSMENT—VALIDITY.

That proceedings under which the original contract for the laying of a tile drain was let were invalid, so that the district incurred no liability, and in fact was not legally organized, does not render valid a renewal of the contract and a subsequent assessment, after the work had been partly or wholly performed under the original contract.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 73.*]

Appeal from Platt County Court; E. J. Hawbaker, Judge.

Application by the People, on the relation of J. H. Cline, County Collector, for judgment for delinquent taxes and assessment, with objections by Noah Kuns to a drainage assessment. From a judgment sustaining the objection, the People appeal. Affirmed.

A. C. Edie, for the People. James Hicks and Reed & Reed, for appellee.

CARTER, J. At the June term, 1910, of the county court of Platt county, upon the hearing of an application for judgment against certain lands for delinquent taxes and assessments for 1909, objections by appellee to an assessment alleged to have been made by the drainage commissioners of sub-district No. 2 of Union Drainage District No. 3 of the towns of Cerro Gordo and Willow Branch, in said county, were sustained, and judgment refused. This appeal was then prosecuted to this court on behalf of appellant.

The drainage district in question was organized under the farm drainage act (Hurd's Rev. St. 1909, c. 42). Subdistrict No. 2 was originally organized by an order of the drainage commissioners on August 17, 1908. The commissioners made a classification of the lands of the subdistrict and held a meeting on October 2, 1908, to hear objections to the classification. Said classification was confirmed by the commissioners, and an assessment of \$5,680 was made on the lands in the subdistrict. October 30, 1908, the commissioners held a meeting to receive bids for the work to be done in said subdistrict. One H. S. Walters bid the sum of \$6,109.13 for the work, and the contract was awarded to him at that figure. November 6, 1908, Walters

entered into a contract with the commissioners, agreeing to do the work according to the specifications, which were made a part of the contract, for the amount of his said bid. The work, which consisted of the construction of a tile drain as the main outlet of the lands in the subdistrict, was begun in December, 1908. It appears from the records of the former proceedings introduced in evidence that appellee refused to pay the assessment made October 2, 1908, against his lands. At the June term, 1909, of said county court, on application being made to sell his lands for failure to pay said assessment, the objections were sustained, and judgment refused. The meetings of the drainage commissioners for this drainage district for the said year 1908, it is conceded, were all held outside of the limits of the drainage district. After the decisions in *People v. Carr*, 231 Ill. 502, 83 N. E. 269, *People v. Schwank*, 237 Ill. 40, 86 N. E. 631, and other decisions of this court of like import, holding that all meetings of drainage commissioners required by statute of which a record was to be kept must be held within the limits of the drainage district, it was decided by the commissioners of this subdistrict that all their previous proceedings were illegal, and they undertook a reorganization of the district and the making of a new assessment. On September 28, 1909, they held a meeting for that purpose, and adopted a resolution which recited their previous meetings, and that, after they had publicly advertised, the bid of H. S. Walters was accepted, and that he "entered into a satisfactory contract for the performance of said work and is proceeding therewith; and whereas said bid was accepted at a meeting held in the village of Cerro Gordo, Ill., and outside said drainage district, and also before a valid and legal assessment had been made upon the lands of said subdistrict, and whereas since said letting the assessment to pay the said work has been legally made and the legal procedure therein corrected, and whereas at said first letting there was a number of competitive bids for said work, and the bid of H. S. Walters was the lowest, and the undersigned commissioners, after having made due investigation, are of the opinion that said work cannot be relet for as low a sum as that provided in said contract with said H. S. Walters, and that it would be * * * for the best interests of said subdistrict that said contract stand and be executed as originally made," it was therefore provided said contract be approved in all things.

From the records of the board of drainage commissioners it appears that three different payments, amounting to \$4,462.44, had been paid by said board to Walters for the work under the original contract, previous to said meeting of September 28, 1909. Under the terms of the contract this amount represented 80 per cent. of the value of the work

done at that time; that is, the contractor, previous to this meeting, as shown by this record, had done practically all the work under the contract. This court has held repeatedly that a drainage district under the farm drainage act has no power to create in advance, either under the farm drainage act or under the levee act, any indebtedness for completing an improvement, and then levy an assessment to meet it. *Drainage Com'rs v. Kinney*, 233 Ill. 67, 84 N. E. 34; *Vandalia Levee & Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715; *Schafer v. Gerbers*, 234 Ill. 468, 84 N. E. 1064; *Morgan Creek Drainage District v. Hawley*, 240 Ill. 123, 88 N. E. 465.

Counsel for the appellant first insists that the records showing the proceedings of the drainage commissioners were improperly permitted to be introduced in evidence, because they showed on their face that they were records of illegal and invalid proceedings. We think these records were properly introduced for the purpose of showing whether the work to be paid for by this assessment was the same work proposed to be done under the former proceedings, and whether that work had been, in fact, partly or wholly performed under the former contract. The intent and purpose of the resolution passed September 28, 1909, can only be fully understood by taking into consideration the void proceedings referred to. Those void proceedings were properly introduced for that purpose. *Baird v. Hutchinson*, 179 Ill. 435, 53 N. E. 567; *Patton v. People*, 229 Ill. 512, 82 N. E. 386; *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256, 21 L. R. A. (N. S.) 826.

Counsel for appellant argues that, as the proceedings under which the original contract was let were invalid, the district incurred no liability, and, in fact, was not legally organized, and hence the decisions cited above do not apply, as no indebtedness had been created. We cannot agree with this reasoning. If the drainage commissioners could have work of this kind done without entering into a legal contract, and thereafter could levy a legal assessment to pay for that work, thus avoiding the provisions of the statute in question and the decisions construing the same, by entering into a new contract which merely reaffirmed the old contract, the protection which was intended by the Legislature to be granted by said statute to the property owners would be absolutely nullified. No other conclusion can be drawn from this record than that this assessment was levied to pay for work that had already been done by said contractor under his original contract. The assessment was therefore illegal, and the court rightly sustained the objection to the application for judgment of sale against the lands of appellee.

The judgment of the county court will be affirmed.

Judgment affirmed.

(247 Ill. 330.)

PEOPLE v. MILLS.

(Supreme Court of Illinois. Dec. 21, 1910.)

APPEAL AND ERROR (§ 548*)—INHERITANCE TAX—PROCEEDINGS—REVIEW—BILL OF EXCEPTIONS—NECESSITY.

In order to review exceptions, taken at the trial in the county court in inheritance tax proceedings, as to the admission of evidence and its sufficiency, such exceptions must be preserved by a bill of exceptions as in common-law proceedings; a recital of an exception to the findings and judgment being insufficient without such a bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

Appeal from Morgan County Court; F. E. Baldwin, Judge.

Inheritance tax proceedings by the People of the State of Illinois against Nellie Epler Mills. From an order reducing the amount of the tax, plaintiff appeals. Affirmed.

W. H. Stead, Atty. Gen., and Robert Tilton, State's Atty. (Roy Wright and James H. Danskin, of counsel), for the People. J. J. Neiger, for appellee.

CARTER, J. This is an appeal taken by the state from an order of the county court of Morgan county reducing the inheritance tax in the estate of Richard W. Mills, deceased, from the amount theretofore approved by the county judge. It is argued that this reduction was made because the court held that certain lands deeded a few days before his death by Mr. Mills to his wife were not subject to the inheritance tax, for the reason that such lands were not deeded in contemplation of death, but that such lands were really held in trust by said Mills for his wife, and were, in fact, her property. The state insists that the evidence did not justify this finding of the court.

On appeal to the county court the trial there is de novo. The proceeding is a special statutory one; but the exceptions as to the admission of evidence, and as to the sufficiency of the evidence to sustain the finding of the trial court, must be preserved by a bill of exceptions as in common-law proceedings. No exception is preserved in the bill of exceptions to the finding and judgment of the court. Such an exception is recited in the judgment order; but it has been repeatedly held that under our statute the only way such an exception can be preserved for review in this court is by means of a bill of exceptions. *Bailey v. Smith*, 168 Ill. 84, 43 N. E. 75; *People v. Chicago, Burlington & Quincy Railroad Co.*, 231 Ill. 112, 83 N. E. 120; *People v. O'Gara Coal Co.*, 231 Ill. 172, 83 N. E. 140; *People v. Econo-mac*, 243 Ill. 107, 90 N. E. 302; *People v. Chicago, Indianapolis & St. Louis Railway Co.*, 243 Ill. 221, 90 N. E. 381. Even though the contention of the appellant be correct that the wife's testimony was not competent

(which question we do not decide), this record is in such condition, because an exception was not preserved as required by law, that this court cannot decide whether the evidence in the record was sufficient to sustain the finding of the trial court.

The judgment of the county court must therefore be affirmed.

Judgment affirmed.

(247 Ill. 333.)

PEOPLE ex rel. CHILCOAT et al. v. BUSSE, Mayor, et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MANDAMUS (§ 1*)—NATURE OF PROCEEDING. Mandamus is a common-law action, and the rules of pleading applicable thereto generally apply to mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

2. MANDAMUS (§ 154*)—PETITION—REQUISITES.

A petition for mandamus stands as the declaration in other common-law actions, and it must show by specific averments a clear right to the writ, and must distinctly set forth all material facts on which the petitioner relies.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

3. MANDAMUS (§ 154*)—PETITION—REQUISITES.

A petition in mandamus to compel the removal of obstructions across a street, and to throw open the street and alleys leading thereto to public use for street and alley purposes, which fails to specifically aver that there was any obstruction in the street and alleys is fatally defective, and is properly dismissed on demurrer.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

Error to Superior Court, Cook County; George A. Dupuy, Judge.

Mandamus by the People, on the relation of A. B. Chilcoat and others, against Fred A. Busse, Mayor of Chicago, and others, in which the Servite Fathers of West Chicago, a corporation, intervened. There was a judgment dismissing the petition, rendered after sustaining a general demurrer thereto, and relators bring error. Affirmed.

A. B. Chilcoat, for plaintiffs in error. Edward J. Brundage, Corp. Counsel, and John J. Bellman, for defendant in error City of Chicago. Matthew P. Brady, for defendant in error Servite Fathers of West Chicago.

VICKERS, C. J. Plaintiffs in error filed a petition in the superior court of Cook county for mandamus against the city of Chicago, Fred A. Busse, mayor, and the city council of Chicago, to compel respondents to forthwith remove the obstructions unlawfully placed across South Troy street at Jackson boulevard and West Van Buren street, and to open said portion of South Troy street, and certain alleys leading thereto, to public use for street and alley purposes. Upon a motion for that purpose the Servite Fathers

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of West Chicago, a corporation, was permitted to intervene and defend, and all of the respondents filed a general demurrer to the petition, which was sustained by the court. The petitioners having elected to abide by their petition, final judgment was rendered dismissing the petition at petitioners' cost. The present writ of error is sued out by the petitioners for the purpose of securing a reversal of the judgment below.

The only question presented for our consideration is the sufficiency of the petition. Plaintiffs in error, as citizens and electors of the city of Chicago, aver in their petition the platting of a subdivision in 1872 by James Couch, William H. Wood, and Francis A. Stevens, which said plat was duly acknowledged by the dedicators, approved by the board of public works of the city of Chicago, and properly recorded by the recorder of Cook county. It is not questioned that the plat was executed in accordance with the requirements of the statute, or that its acceptance by the city did not have the effect of vesting the fee in the streets and alleys thereon designated in the city. It is averred that on said plat a street known as South Troy street, 66 feet in width, was dedicated to the public as a street, and that a portion of said South Troy street was bounded on the south by the north line of West Van Buren street and on the north by the south line of Jackson boulevard, and extended north and south between lots 7 and 8 of the James Couch subdivision. It is also averred that intersecting said South Troy street (one each in lots 7 and 8) were two 16-foot alleys, 122.76 feet long, one extending east from said South Troy street and the other west; that said portion of South Troy street was opened and used by the public as a public street, with 7-foot concrete sidewalks on either side thereof. The petition further avers that the Servite Fathers of West Chicago is a religious body, and is conducting religious worship in conformity with the doctrine of the Roman Catholic church, and is conducting a school, giving religious and moral training to the pupils attending the same; that the said Servite Fathers owns lots 7 and 8 in said subdivision and uses the same for religious and educational purposes. The petition further alleges that on the 29th day of October, 1906, at the instance and through the influence of the said Servite Fathers of West Chicago, the city council of Chicago passed an ordinance, which was thereafter approved by the mayor, purporting to vacate that portion of South Troy street extending from Jackson boulevard to West Van Buren street, together with the two alleys above mentioned which intersected that portion of South Troy street. A copy of the ordinance is incorporated in the petition, and is as follows:

"Section 1. That that portion of South Troy street bounded on the south by the north line of West Van Buren street; on the north line of West Van Buren street; on the east by the west line of lot 7 of James

Couch's subdivision of north one-half (N. $\frac{1}{2}$), south one-half (S. $\frac{1}{2}$), northwest one-quarter (N. W. $\frac{1}{4}$), section 13, 39, 13; on the north by the south line of Jackson boulevard, and on the west by the east line of lot 8, James Couch's subdivision of north one-half (N. $\frac{1}{2}$), south one-half (S. $\frac{1}{2}$), northwest one-quarter (N. W. $\frac{1}{4}$), section 13, 39, 13; also that part of the first east and west 16-foot alley south of Jackson boulevard beginning at the west line of South Troy street and extending 122.76 feet west; also that part of the first 16-foot alley north of West Van Buren street beginning with the west line of South Troy street and extending 122.76 feet west, as shown in the space colored pink and marked 'To be vacated' in the attached plat, which for greater certainty is made a part of this ordinance, be and the same are hereby vacated and closed: Provided, however, that if any part of the street or alleys so vacated shall at any time hereafter be used for any other than religious or educational purposes, then and in such case this ordinance shall be void and the said vacation shall be for naught held: And provided further, that the city shall at all times have the right to maintain and operate any and all water pipes and sewers in said streets and alleys.

"Sec. 2. This ordinance shall take effect and be in force from and after its passage: Provided, however, that the owner or owners of the property abutting upon the street and alleys hereby vacated shall within thirty (30) days after the passage of this ordinance file with the recorder of deeds of Cook county, Illinois, a copy of this ordinance and the plat attached thereto."

The petition avers that section 2 of the ordinance was complied with by the Servite Fathers filing a copy of said ordinance and the plat with the recorder of deeds of Cook county within the time required by said section. The petition contains the following averment, which we quote in full from the record: "Your petitioners further show to the court that the said ordinance, purporting to vacate that portion of said South Troy street and alleys mentioned therein, was passed by the said city council of said city of Chicago at the urgent request and the direct influence of the said Servite Fathers of West Chicago, and clearly shows on its face that the object thereof was to vacate the said portion of said South Troy street, and the said alleys leading thereto, mentioned in said ordinance, for private uses and purposes, and to give to or confer upon the said Servite Fathers of West Chicago title to the land embraced in said portion of said South Troy street and alleys mentioned in said ordinance, to the end that they, the said Servite Fathers of West Chicago, might have private rights and benefits in said street and alleys mentioned in said ordinance not conferred upon the general public, and prejudicial to the rights of the general public, in violation of its statutory and constitutional rights

in said portion of said South Troy street, and the alleys leading thereto, mentioned in said ordinance, and in so doing authorized and empowered them, the said Servite Fathers of West Chicago, to obstruct said portion of said South Troy street, and the alleys leading thereto, designated by said ordinance, by means of a fence placed across said South Troy street at the south line of Jackson boulevard on the north and a fence across said street at the north line of West Van Buren street on the south, which acts and doings of said city council of said city of Chicago were not and are not within the powers conferred upon it by the dedication of the lands for the uses and purposes for which they were dedicated, and was and is in violation of the law of the land."

The petition avers that since the passage of said ordinance the said Servite Fathers has taken possession of said portion of South Troy street, and the alleys leading thereto, and is exercising acts of ownership, possession and control over the same. The prayer of the petition is in the following words: "Therefore your petitioners pray a writ of mandamus, under the seal of the said court, directed to the city of Chicago and Fred A. Busse, as mayor thereof, and to the city council of said city of Chicago, commanding them, respectively, as follows: Commanding said city of Chicago, and Fred A. Busse, mayor thereof, and the city council of said city of Chicago, to forthwith remove the obstructions, the fences so unlawfully placed across the said South Troy street at Jackson boulevard and West Van Buren street, and to throw open said portion of said South Troy street, and the alleys leading thereto, to public use for street and alley purposes; and that such open and unobstructed use by the public of said portion of South Troy street, and of the said alleys mentioned in and attempted to be vacated in and by said ordinance, be enforced, preserved, and maintained openly, freely, and without any unlawful obstruction whatever henceforth."

We have set out in full from the record all of those portions of the petition in which any reference is made to the existence of obstructions in the street in question. A careful reading of the petition will show that there is no affirmative averment therein of the existence or maintenance of any obstructions in either the street or alleys in question. The averment that the Servite Fathers is in possession and exercising acts of ownership over the street and alleys, when taken in connection with the reference in other portions of the petition to fences, would justify the inference that fences had been erected across South Troy street; but this fact is not averred anywhere in the petition.

Mandamus is a common-law action, and the rules of pleading applicable to such actions generally apply to this action. *Silver v. Peo-*

ple, 45 Ill. 224; *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33. Under the practice that has prevailed in this state since 1872, the petition stands as the declaration in other common-law actions (*People v. Glann*, 70 Ill. 232; *People v. Crabb*, 156 Ill. 155, 40 N. E. 319), and must show by specific averments a clear right to the writ (*People v. Crabb*, supra), and distinctly set forth all material facts on which the petitioner relies, so that the same may be admitted or traversed (*Canal Trustees v. People*, 12 Ill. 248, 52 Am. Dec. 488; *People v. Glann*, supra). The certainty required is described as that which sets out the facts issuably, distinctly, clearly, and specifically. 13 Ency. of Pl. & Pr. 674; *Canal Trustees v. People*, supra; *Lavalle v. Soucy*, 96 Ill. 467. The *Soucy* Case, above cited, was a mandamus proceeding commenced by petition in the circuit court of St. Clair county, stating that the petitioner had been elected supervisor of the village of Cahokia Commons and qualified as such, and averred that "Lavalle had held that office, and as such officer had possession and control of all the books, papers, and moneys of said commons," and that the respondent had refused to turn over the possession of such books, papers, and moneys so in his possession to the petitioner. There was no direct averment in the petition that there were any books, papers, and moneys belonging to the said commons. That fact was only stated inferentially. This court held that the petition was not sufficient, and that the demurrer thereto should have been sustained.

The absence of any specific averment in the petition in the case at bar that there was any obstruction in the street and alleys in question is a fatal defect, and sufficient to support the judgment sustaining the demurrer. Without reference to the sufficiency of the petition in other respects, which we do not pass upon, the judgment of the court below was clearly right, and should be affirmed, which is done.

Judgment affirmed.

(247 Ill. 490)

BARTLETT et al. v. FIRST NAT. BANK OF CHICAGO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. BILLS AND NOTES (§ 434*)—FORGED INDORSEMENTS OF DRAFT—PAYMENTS—LIABILITY.

A drawee who pays a draft to an indorser who derives title through a prior forged indorsement may recover back the money so paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268-1274; Dec. Dig. § 434.*]

2. ESTOPPEL (§ 72*)—EQUITABLE ESTOPPEL—ACTS MAKING INJURY POSSIBLE—INNOCENT PARTIES.

Where one of two innocent persons suffers loss by the wrongful acts of a third person,

made possible by the negligence of the other innocent person, the latter must stand the loss.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 188; Dec. Dig. § 72.*]

3. PRINCIPAL AND AGENT (§ 159*)—FORGED INDORSEMENTS OF DRAFT—PAYMENTS—LIABILITY.

An agent engaged in purchasing grain for his principal drew drafts on his principal to the orders of third persons, and, forging the indorsements, converted the proceeds. The principal knew that his agent drew drafts on him with which to obtain money from banks to pay for the grain, and that the agent persisted in drawing drafts and indorsing them in the names of the payees after he had been forbidden to do so. The principal did not inform the banks handling the drafts of the fact that the agent was wrongfully indorsing the drafts. *Held*, that the loss resulting from the act of the agent must fall on the principal, and not on the banks paying the drafts.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599-613; Dec. Dig. § 159.*]

4. BILLS AND NOTES (§ 381*)—FORGED INDORSEMENTS OF DRAFT—PAYMENTS—LIABILITY.

Where an agent drew drafts on his principal to the order of third persons, intending neither that such persons should have any interest in the drafts nor that the drafts should ever be delivered to them, nor that they should indorse them to receive payment therefor, nor to negotiate the same, the payees were not bona fide payees but fictitious persons, and the drafts were in law payable to bearer and were transferable by delivery, and, on their receipt by a bank, payment could be enforced against the principal without claiming through the indorsements made by the agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 994; Dec. Dig. § 381.*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; Harry Olson, Judge.

Action by William H. Bartlett and others against the First National Bank of Chicago. From a judgment of the Appellate Court affirming a judgment for defendant, plaintiffs appeal pursuant to a certificate of importance. *Affirmed*.

George P. Merrick (Louis M. Greeley, of counsel), for appellants. H. K. & H. Wheeler, Custer & Cameron, and Timothy H. Mullen, for appellee.

HAND, J. This was an action in assumpsit commenced by Bartlett, Frazier & Carrington against the First National Bank of Chicago, in the municipal court of Chicago, to recover the amount of 135 drafts drawn by the appellants, by their agent, R. L. Walsh, upon themselves, to the order of persons residing in the vicinity of Reddick, in Kankakee county, during the year 1906, and fraudulently indorsed by said R. L. Walsh in the names of the payees named in said drafts and paid to R. L. Walsh by the State Bank of Reddick, and to the State Bank of Reddick by the First National Bank of Chicago, and to the First National Bank of Chicago by the appellants. The declaration con-

sisted of the common counts, and the general issue was filed, and upon a trial the jury returned a directed verdict in favor of the defendant, upon which the court rendered judgment, after overruling a motion for a new trial, in favor of the defendant for costs. Said judgment was affirmed, on appeal, by the Appellate Court for the First District, and, said court having granted a certificate of importance, a further appeal has been prosecuted to this court.

It appears from the record that Bartlett, Frazier & Carrington were engaged in the buying of grain in the city of Chicago and at numerous places in the country; that in 1904 they were running an elevator at Reddick; that R. L. Walsh was the manager of the Reddick elevator; that he bought grain from the farmers residing in that vicinity, and paid them for their grain by delivering to them drafts drawn upon blanks in the following form, which were furnished R. L. Walsh by Bartlett, Frazier & Carrington:

"No. . . . Bartlett, Frazier & Carrington. \$. . . .
 "Pay to the order of
 Dollars for . . . bushels . . . Lbs. of
 Bartlett, Frazier & Carrington,
 By Agent,
 To Bartlett, Frazier & Carrington, Chicago,
 Illinois."

The blanks were filled up by R. L. Walsh with the farmers' names, the amount due them for grain, and the kind of grain purchased. The drafts were cashed by the State Bank of Reddick, and by that bank forwarded to the First National Bank of Chicago, and by that bank collected of Bartlett, Frazier & Carrington. In the year 1905, to accommodate the farmers and to meet competition, R. L. Walsh would fill out the drafts, as above indicated, for grain and pay the farmers for their grain in cash, and then, without authority, indorse the drafts with the farmers' names and obtain the amounts of the drafts from Bartlett, Frazier & Carrington by putting the drafts through the banks. There is no evidence that the banks knew R. L. Walsh was indorsing the drafts without authority from the payees, but Bartlett, Frazier & Carrington must soon have received notice of the fact that R. L. Walsh was indorsing the drafts in the names of the payees and without authority, as on September 8, 1905, they wrote R. L. Walsh the following letter: "Chicago, Sept. 8th, 1905. Mr. R. L. Walsh, Reddick, Illinois—Dear Sir: Yours of the 7th inst. at hand. In reference to your endorsing the farmer's name, we do not approve of this, as we do not consider it businesslike, unless you have direct, written authority from the farmer to do so. When you want to draw money from the bank yourself to pay currency to the farmer, make the check read, 'Pay to the order of currency account,' and then give the name of the farmer; then when you draw the money at

the bank, endorse your name, but not the farmer's name, on the back. This will make our records here show plainly to whom the money should be charged, and under our surety bond we will be protected in case any of our agents make a wrong use of the money. Very truly yours, B., F. & C. Dictated by H. J. P."

On the same day appellants wrote the State Bank of Reddick, which had been in the habit of cashing grain drafts drawn by R. L. Walsh, the following letter: "Bartlett, Frazier & Carrington, Chicago, Sept. 8, 1905. State Bank of Reddick, Reddick, Illinois—Dear Sir: In future will you kindly cash drafts drawn on us which read, 'Pay to the order of currency account,' (name of farmer to be inserted,) and then endorsed on the back by Mr. R. L. Walsh, our agent at Reddick, and, of course, signed by him? This will enable Mr. Walsh to draw all the currency necessary where the farmers wish payment in currency, and at the same time it will keep our records straight. Yours very truly, B., F. & C. Dictated by H. J. P."

There is nothing in the record up to this time to show that R. L. Walsh had been guilty of any dishonesty in indorsing the names of the payees in the drafts. In the month of May, 1906, there was a shortage in the oats which should have been on hand in the Reddick elevator; and the appellants sent their agent at Kankakee to Reddick to investigate the business at this point, and R. L. Walsh seems to have been able to satisfy the appellants that he was honestly conducting their business, although it clearly appeared he had disobeyed their instructions by continuing to draw drafts to the order of the farmers from whom he bought grain and indorsing them in their names without authority from the farmers. No notice of the manner in which R. L. Walsh had been conducting the business of the appellants was given to the State Bank of Reddick or the First National Bank of Chicago, but, apparently so soon as the appellants became satisfied that the money drawn upon said drafts so indorsed was being used to pay for grain which they were receiving, they seem to have become satisfied with the method in which R. L. Walsh was doing their business at Reddick, as on May 29, 1906, the appellants wrote R. L. Walsh the following letter: "Bartlett, Frazier & Carrington, Western Union Building. Chicago, May 29th, 1906. Mr. R. L. Walsh, Reddick, Illinois—Dear Sir: Your favor of the 28th inst. at hand in reference to the manner in which you have conducted our business at Reddick. As we have written you before, we think you have been rather careless in the manner in which you have written checks. It is a very bad habit to write your currency checks or large checks to your own order. To speak plainly, it puts it in a man's power to use them if he wishes to do so, and where there is an opportunity the temptation, of

course, is much greater, you must remember. We have had one or two other agents who have gone wrong in the last five or six years and generally in some such manner. We felt that an investigation would be a good thing, and you certainly must feel a good deal better that one has been made and that everything, as far as the writer knows, has turned out to show that you have been perfectly honest in your management of the affairs. We have a few other agents who sometimes advance money to farmers, but they always make the note to themselves, and when the money is returned insist on the farmer giving him a check payable to his own order, so as to keep their own personal affairs and funds entirely separate from the funds of the firm. You speak about the grain shortages, which certainly were entirely too large, but we trust you have taken such precaution now that no such large shortage will occur again. We trust you will continue to do the largest business at Reddick. Very truly yours, B., F. & C. Dictated by H. J. Patten."

In November, 1906, it was discovered by the appellants that R. L. Walsh, by means of issuing drafts without receiving any grain therefor and indorsing them in the names of the payees and procuring the cash thereon from the State Bank of Reddick and passing them through the First National Bank of Chicago, had obtained some \$12,500 in cash, which he had converted to his own use.

The appellants base their claim of liability against the First National Bank of Chicago upon the contention that the indorsements of the names of the farmer payees upon the drafts by R. L. Walsh were forgeries, and that when those drafts were presented by the First National Bank of Chicago to the appellants for payment, the First National Bank of Chicago guaranteed such indorsements to be true and genuine, and, as the amounts thereof were paid to the First National Bank of Chicago by the appellants in consequence of said forged and fraudulent indorsements, the appellants are entitled to recover from the First National Bank of Chicago, the amounts paid to said bank by them upon said drafts. It is undoubtedly the general rule that, when a drawee pays a draft to an indorser who derives title to the draft through a prior forged indorsement, he may recover back the money so paid. First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247. We think, however, the undisputed evidence in this record shows that the negligence of the appellants was so gross that they ought not as a matter of law to be permitted to recover from the First National Bank of Chicago the amounts of the drafts upon which the names of the farmer payees were forged by R. L. Walsh, who was the agent of the appellants. The appellants knew their agent, R. L. Walsh, was drawing drafts against them with which to obtain money from the banks to pay for grain

which he was buying upon their account, and that Walsh was wrongfully indorsing the names of the payees in whose favor said drafts were drawn upon said drafts. They knew that Walsh was short upon grain which he had purchased for them, and they also knew that Walsh persisted in drawing drafts and indorsing them in the names of the payees after they had forbidden him to do so. While in possession of this information they retained him in their employ, and permitted him to continue drawing and indorsing said drafts without informing the banks who were handling such drafts of the fact that Walsh was wrongfully indorsing those drafts.

When one of two innocent parties suffers loss by reason of the wrongful act or acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss. In this case, if the appellants had notified the banks who were handling said drafts that R. L. Walsh was forging the names of the farmer payees in order to get the money on the said drafts from the banks, the loss which was sustained by the passing of said drafts would never have occurred. This they did not do, but remained quiet so long as they thought they were getting the benefit of the money that was paid on said drafts, and only complained when they learned that their agent, Walsh, was taking advantage of the position in which they had placed him by his appointment as their agent, with authority to draw drafts, by drawing drafts to farmers who had not delivered grain, and indorsing the names of such farmer payees upon the drafts and drawing the money from the banks thereon and appropriating the same to his own use. We think it clear, if the appellants enjoyed the benefits which accrued to them from the business done by Walsh so long as it was done honestly, that, when Walsh became dishonest and appropriated the money which he drew by reason of forged indorsements, they should suffer the loss which followed his rascality, and not be permitted to unload such loss upon the banks that innocently handled said drafts.

The drafts drawn by R. L. Walsh in the name of the appellants against themselves were all made payable to some person who resided near Reddick, or bearer, and in the sense that there were such individuals as payees the payees named in the drafts were not fictitious persons. At the time, however, Walsh drew said drafts, he did not intend that the persons whose names he inserted as payees in said drafts should have any interest in said drafts, or that said drafts should ever be delivered to said pay-

ees, or that said payees should indorse said drafts in order to receive payment therefor or for the purpose of negotiating the same. In the eye of the law, therefore, the payees named in said drafts were not bona fide payees, but mere fictitious persons. Said drafts were therefore, in law, payable to bearer, and were transferable, therefore, by delivery, and upon their receipt by the appellee payment thereof could be enforced against the appellants by the First National Bank of Chicago without claiming through the said forged indorsements, but as the holders of negotiable paper made payable to bearer. In *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, the cashier of the Sumpter Bank drew drafts in its name against the Mercantile Bank to the order of various persons with whom the Sumpter Bank did business. He then indorsed the drafts in the names of the payees to the order of certain stockbrokers, who collected them from the Mercantile Bank. It was held that the payees named in the drafts were in law fictitious persons, and the drafts, in legal effect, were payable to bearer. In *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 590, 70 Atl. 876, 128 Am. St. Rep. 780, Snyder was a depositor in the bank, and sued to recover the amount of certain checks alleged to have been wrongfully paid and charged to his account. The checks were drawn by a clerk employed by the plaintiff to the order of one Charles Niemann. The clerk then indorsed the name "Niemann" upon the checks, and delivered them to R. M. Miner & Co., bucket shop men. The name Charles Niemann was used by the clerk as that of a fictitious person. The court said: "The intent of the drawer of the check in inserting the name of the payee is the sole test of whether the payee is a fictitious person, and the intent of the drawer of these checks, as attorney for the appellant, must, as just stated, be regarded, as against the bank upon which they were drawn, as the intent of the appellant himself." The First National Bank did not, therefore, make out its title to said drafts through a forged indorsement, and appellants could not, therefore, recover back the money paid to the bank on said drafts.

Numerous other grounds are urged in support of the judgments of the trial and appellate courts, but the two grounds herein considered are so conclusive against the right of the appellants to recover, upon the undisputed evidence, that we do not think it necessary to consider the other grounds urged in the briefs.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(247 Ill. 536)

MEYER v. MEYER.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. DEEDS (§ 19*)—CANCELLATION—FAILURE OF CONSIDERATION.

A deed made in consideration of the support of the grantors for life will only be set aside in equity where there has been an entire failure or refusal to perform the agreement, or at least such a substantial failure to perform as will render the performance of the rest a thing different from what was contracted for, and a slight or partial neglect to observe some of the terms of the agreement does not justify a rescission.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 19.*]

2. APPEAL AND ERROR (§ 747*)—QUESTIONS REVIEWABLE—CROSS-ERRORS.

Where appellee does not assign cross-errors assailing findings against him, the question of the correctness of the findings is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3063; Dec. Dig. § 747.*]

3. DEEDS (§ 210*)—CANCELLATION—FAILURE OF CONSIDERATION—EVIDENCE.

In a suit by a parent to set aside a deed to a son, made in consideration of the support of the parent by the son, evidence held to show a substantial compliance with the agreement, depriving the parent of the right to relief.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 635, 636; Dec. Dig. § 210.*]

Appeal from Circuit Court, Vermillion County; W. B. Scholfield, Judge.

Suit by Israel S. Meyer against Harry E. Meyer. From a decree for plaintiff, defendant appeals. Reversed and remanded.

G. W. Salmans, for appellant. Charles G. Taylor, for appellee.

COOKE, J. This is a bill in chancery filed May 6, 1908, in the circuit court of Vermillion county, by Israel S. Meyer, the appellee, to set aside a certain deed of conveyance made to his son, Harry E. Meyer, the appellant, on October 3, 1895. The instrument sought to be set aside was a voluntary conveyance, in the form of a contract, made by appellee, who was then 75 years of age, with the appellant, his son, by which he conveyed to the appellant his farm of 145 acres and certain personal property thereon; the consideration being that the son should care for the grantor and his wife, Sophia Meyer, and should support, maintain, and furnish them with the necessaries of life, and provide a home for them in the homestead then upon the premises for and during their natural lives and the life of the survivor of them, and that he should pay all the legal indebtedness of the grantor then existing except security debts, and that at the death of the survivor of his parents he should pay to Bruce A. Meyer, son of the grantor, the sum of \$250, without interest, and \$250, without interest, to Annie L. Ray, a daughter of the grantor. The instrument also pro-

vided that the appellant should not sell the real estate conveyed, or any part thereof, until the death of the grantor and his wife, and also in case that appellant should fail to keep the covenants and agreements assumed by him, or any part of the same, during the lifetime of the grantor or the said Sophia Meyer, then the conveyance should be forfeited by appellant and become of no effect. This instrument was drawn and executed by Israel S. Meyer without the knowledge of appellant, and the first knowledge appellant had of the intention of his father to make such a conveyance and his desire to enter into such contract was when his father presented the instrument to him for his signature. Appellant was reluctant about accepting the conveyance and entering into the contract but was prevailed upon by his father to do so, and thereupon took possession of the real estate and the personal property so conveyed. At that time the mother was 58 years of age, and the family consisted only of herself, appellee, and appellant. About 10 years later appellant married. In the spring of 1907 Sophia Meyer was taken sick, and she died in August of that year. A few days before her death appellee filed a bill in the circuit court of Vermillion county to set aside this same instrument, but that bill was dismissed for want of prosecution. By the present bill appellee sets up the execution of the instrument and the delivery of the property to his son, and alleges that appellant has not complied with his part of the contract; that he had not furnished appellee and his wife a suitable and proper home, and had not properly maintained them and furnished them with the necessaries of life during the lifetime of Sophia Meyer, and had not since the death of Sophia Meyer furnished him with a suitable home and the necessaries of life, but that, on the contrary, appellant had treated Sophia Meyer unkindly during her lifetime, and did not at all times furnish her with the comforts of a home; that during the joint lives of himself and wife the appellant had frequently treated them both with unkindness; and that since the death of Sophia Meyer appellee had frequently been left without sufficient clothing, bedding, and food. The bill further alleged that the wife of appellant had treated appellee and his wife with disrespect and unkindness, and that both appellant and his wife had failed to treat appellee with kindness and furnish him with a comfortable and pleasant home, and were neglectful of his pleasure and comfort. By an amendment to the bill appellee set up that the appellant had sold portions of the real estate in violation of the contract. Appellant answered, denying all the allegations of the bill in respect to his neglect of his parents and his failure to comply with his part of the con-

tract. The cause was referred to the master in chancery to take the proofs and report the same, together with his conclusions. The master reported, finding all the allegations of the bill in reference to the treatment of appellee and his wife by appellant had been proven except that in reference to the insufficiency of the bedding furnished, and recommended that a decree be entered setting aside and declaring void the deed in question and reinvesting the complainant with title to the premises. The court overruled appellant's exceptions to the master's report, and entered a decree in accordance therewith. From this decree appellant has brought the case by appeal to this court.

The only matter presented by this record for review is the question of fact whether appellant has failed to comply with his part of the contract. Appellee testified in his own behalf, and from his testimony it appears that he has lived continually with his son from the time the contract or deed was made until the time of the hearing, and at that time was still living with appellant, and was being supported by him. He admitted that up until the time his son was married his treatment of him and his wife had been everything that could be desired, and that he had often boasted that appellant was the best boy in the state of Illinois, and that even since the time of his marriage the appellant had never spoken an unkind word to him. The ill treatment he complained of was that the wife of appellant did not wait upon him properly when the family were seated at the table, and did not hand food to him as she did to her husband, and that he was left to rely upon his son to wait upon him or to help himself; that on one occasion he was taken sick and his son telephoned for the doctor; that, when the doctor arrived, he made an examination of appellee and held a conversation with the son, of which appellee heard but a part, and left some medicine to be administered to him; that appellant afterwards went to his room upstairs, together with his wife, where they retired for the night, leaving appellee to take the medicine himself. He testified that he did take the medicine as directed, and by morning had practically recovered from the illness; that on another occasion he was taken ill in the night and suffered great inconvenience, but admitted that he did not inform either his son or his wife of the illness, and that they did not know of it; that in the morning he walked to the office of his physician, secured some medicine for his ailment, and soon recovered; that appellant and his wife did not furnish him with sufficient bedclothing to keep him warm, and that on one occasion when he was sick it became necessary for him to get up in the night and procure fuel to replenish his fire; that appellant did not furnish him with sufficient wearing apparel, and that the wife of appellant did not wash his clothing as

promptly as he thought it should be done; and that on one occasion, upon returning from a visit to the city of New York, he arrived at Danville Junction, in Vermillion county, and, having no money left, was compelled to walk from there (12 miles) to the home of his son. As to the matter of the bedclothing, the master found against appellee, and held that contention was not supported by the evidence.

Appellee further testified that during the last illness of his wife the appellant and his wife both neglected her and failed to give her proper attention; that she was allowed to remain upon her sick bed in an unclean condition, and without proper food and attention. Except as to the treatment of Sophia Meyer by appellant and his wife, appellee was not supported by the testimony of any other witness. The daughter, Anna, was married and resided in the city of Chicago. Upon receipt of a telegram from appellant that her mother was very ill, she went to his home, in Vermillion county, and testifies that she found her mother in a very unclean condition, and that she was not receiving any attention from either appellant or his wife. In this Mrs. Ray is supported by the testimony of one neighbor woman and to some extent by the attending physician, who testified that Mrs. Meyer, for about a week prior to the arrival of Mrs. Ray, had not been kept in as cleanly a condition as she could have been. The doctor, however, testified that appellant did everything for his mother that he could, and was only prevented from doing more by reason of lack of knowledge and experience. In addition to the condition alleged to have existed during the last illness of Mrs. Meyer, appellee testified that on a number of occasions appellant and his wife had left the old people on Sundays, and had remained away all day without leaving proper or sufficient food for them. On the other hand, a large number of the neighbors and acquaintances of Israel S. Meyer and his son testified that during the whole time, from the execution of the contract in question until the time of the hearing, they had visited frequently at the home of appellant and appellee and had observed the conduct of appellant and his wife toward appellee and his wife and their treatment of them, and without exception they testified that appellant and his wife had treated the old folks with the utmost kindness and consideration, and that there apparently existed between them a high degree of good will and affection. It was shown that, as soon as Mrs. Meyer was taken sick in the spring of 1907, her son summoned a physician, and from that time until her death she was constantly under medical care; that prior to the time he sent for his sister Mrs. Ray, he, together with the physician, had attempted to secure the services of a nurse for his mother; that immediately after Mrs. Ray's arrival a trained nurse was

secured and took charge of Mrs. Meyer for a period of several weeks, until she was discharged by Israel S. Meyer; that thereafter a neighbor girl was employed to assist in taking care of the mother, and after a short time the mother was removed to a hospital, where she remained until she had recovered somewhat of her illness and desired to be taken home. Upon her removal to her home the services of another nurse were procured by appellant, and that nurse remained in attendance upon her until the date of her death.

It is not claimed or testified to by any witness that during the time from the employment of the first nurse until the death of Mrs. Meyer she did not receive the best possible care and attention. Many neighbors testified that Mrs. Meyer told them, during her last illness, of her deep affection for the wife of her son, and that she always referred to her and addressed her in affectionate and endearing terms, and frequently expressed her appreciation of what she and her son had done for her. One of appellee's witnesses, a neighbor woman, who was called to testify to Mrs. Meyer's condition and the care given her during her last sickness and prior to the time any nurse was employed, testified that she visited there during that time, and that Mrs. Meyer had good care and was kept as clean as could be expected, that she never saw her mistreated, and that appellant was always attentive to her and solicitous of her health and welfare.

The evidence tends to prove that, before the appellee filed his former bill to set aside this deed, he went to the residence of a neighbor to telephone to his attorney in Danville, at which time he explained to this neighbor that his son had done nothing to offend or displease him, but that he had been a good boy. After the bill had been filed he told another friend—a neighbor—that he had started to do something that he did not know was exactly right; that he had undertaken to set aside the deed he had made his son about 12 years before; that he did not like his son's wife, and that his daughter and his other son wanted him to do this, but he did not think he would pay any attention to it, but would just let it go, as upon reflection he did not think it was right. This neighbor then asked him if his son had been mean to him and mistreated him, and he said he had not, and that a better boy than Harry had never lived. The appellant testified that his father told him, after he had filed the former bill, he wanted to drop the matter, and that he would make a visit to Oklahoma and allow the matter to go by default, and that upon his father's request he furnished him with the necessary money. The trip to Oklahoma was made and the bill dismissed. While there is no direct proof that she attempted to influence her

father in this matter, it is significant that the principal testimony, aside from that given by the appellee and relied upon to sustain the bill, is that of Mrs. Ray, who is described by one of the neighbors as doing nothing while she was visiting her mother during her last sickness except to make trouble. The only disinterested witness who testified to any substantial matters in support of the allegations of the bill was Mrs. Bennett, and she is contradicted by the testimony of all the other friends and neighbors who were called as witnesses.

From a fair consideration of all the testimony, it is apparent that appellant had substantially and fairly complied with his contract. Even were this not so and he had failed in some small particular to treat his parents as he should have treated them under his contract, the court would not be warranted in setting the deed aside and wholly depriving appellant of all the fruits of his labor on that account. "A slight or partial neglect on the part of one of the contracting parties to observe some of the terms or conditions of the contract will not justify the other party in abandoning or rescinding the same. A deed or contract made in consideration of the support of the grantors will only be set aside in equity where there has been an entire failure or refusal to perform the agreement, or at least such a substantial failure to perform the contract in respect to material matters as would render the performance of the rest a thing different from what was contracted." *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699.

Appellee contends that by the sale of timber and gravel appellant so violated the terms of the contract that appellee is entitled to have the conveyance set aside. The master specifically found against appellee in this contention, and appellee neither objected nor excepted to this finding. The decree was in conformity with the findings of the master. No cross-errors are assigned, so that question has not been preserved for review. The testimony shows that the timber and gravel were sold with the full knowledge and consent of appellee, and that he even assisted in the removal of that which was sold and received a part of the money paid for it.

It is apparent from the evidence here presented that appellant has up to the time of the filing of the bill herein substantially complied with his contract. The court erred in overruling appellant's exceptions to the master's report and in decreeing the relief prayed for by the bill.

The decree of the circuit court is reversed and the cause is remanded to that court, with directions to sustain the exceptions to the master's report, and to dismiss the bill for want of equity.

Reversed and remanded, with directions.

(247 III. 543)

THOMAS v. THOMAS et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. WILLS (§ 634*)—CONSTRUCTION—DEVISE TO CLASS—APPLICATION OF RULE.

The rule that, where a devise is to a class, none will be permitted to take except such as are in esse at the time of distribution, and more especially where the only words in the will importing the gift are those employed to denote the time of division, applies generally to those cases where the postponement of the period of distribution is for reasons personal to the devisee, or where the language clearly indicates an intention that the remainder is to vest only in such members of the class as survive the period of distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1502; Dec. Dig. § 634.*]

2. WILLS (§ 634*)—VESTED OR CONTINGENT REMAINDERS.

Where the enjoyment of an estate for the period of distribution is postponed for the convenience of the fund, and not for reasons personal to the devisee, the remainder is vested; and this notwithstanding the possibility of after-born children coming into the class.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

3. WILLS (§ 634*)—CONSTRUCTION—RIGHTS OF REMAINDERMEN.

Testator devised certain described land to his daughter for life, and at her death to be divided among her children in fee, share and share alike, making the devise subject to the payment of an annuity to testator's wife for life, etc. The daughter had three children living at the death of testator, but one of the daughters died intestate before the death of her mother, leaving complainant, her father, her mother and two brothers as her heirs. *Held*, that the remainder vested in the daughter's children immediately on testator's death, so that, on the death of such child intestate, a part of her interest passed to complainant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Bill by John Thomas against John Thomas, Jr., and others. Decree for complainant, and defendants appeal. *Affirmed*.

H. M. Kelly, for appellants. Butters & Armstrong, for appellee.

VICKERS, C. J. This was a bill for partition, brought in the circuit court of La Salle county by appellee, John Thomas, against his two minor sons, who are appellants here, for the partition of about 84 acres of land. Appellee claimed that he owned a one-twelfth undivided interest in the real estate involved. Appellants by their answer denied that appellee had any interest in said land and claimed the entire estate. The court below, being of the opinion that John Thomas was the owner in fee of one-twelfth undivided interest, sustained the bill, rendered a decree for partition, and appointed commissioners, who reported that the premises were indivisible, whereupon a decree for sale was entered. The only question presented for our consideration is whether the court properly found the interests of the parties.

Christian Eggert, the grandfather of appellants, died testate October 23, 1897. The lands in controversy were disposed of by the third clause of his will, which is as follows:

"I give and devise to my daughter, Lizzie Thomas, the north half (½) of the southwest quarter (¼) of section fifteen (15), in township thirty-two (32) north, in range three (3) east of the third (3d) principal meridian, in the county of La Salle and state of Illinois, and the north four (4) acres of the south half (½) of the southwest quarter (¼) of said section fifteen (15), to have, hold, use and enjoy the same for and during her natural life, and at her decease the same shall be divided among her children in fee, share and share alike. But this devise is made subject to the payment of \$100 per year to my said wife, Catherine M. Eggert, for and during the life of my said wife, and subject also to the payment of all taxes legally assessed against and upon said lands, and the keeping of said lands in good condition during the lifetime of my said wife and during the lifetime of my said daughter."

Lizzie Thomas, the life tenant under the foregoing clause of the will, had three children living at the death of the testator—Carrie Thomas and the two appellants herein, John Thomas, Jr., and Arthur Thomas. Carrie died intestate before the death of her mother, but long after the death of the testator. Carrie Thomas left surviving her the appellee (her father), her mother, Lizzie Thomas, and her two brothers, who are minors.

Appellants contend that under the third clause of their grandfather's will the remainder given to the children of Lizzie Thomas was contingent, and did not vest until the death of their mother, and that, since they were the only survivors of the class to whom the remainder was given at the time it vested, they took the entire estate upon the death of their mother; while appellee contends that the estate in remainder vested in the children of Lizzie Thomas immediately upon the death of the testator, and that when Carrie died leaving no children, but leaving her parents and two brothers as her only heirs, appellee, as her surviving father, inherited one-fourth of one-third, or one-twelfth, under the second clause of section 1 of our statute of descent (Hurd's Rev. St. 1909, c. 39). Appellants contend that, where a devise is to a class, none will be permitted to take except such as are in esse at the time of distribution, and more especially where the only words in the will importing the gift are those employed to denote the time of division.

The rule contended for by appellants is applicable in cases where the postponement of the period of distribution is for reasons personal to the devisees, or in cases where the language clearly indicates an intention that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the remainder is to vest only in such members of the class as survive the period of distribution. There is clearly no word of survivorship in the clause in question, nor is there anything in this clause or in the context of the will which will warrant us in concluding that the postponement was for any other reason than to let in a life estate for the testator's daughter, Lizzie. Where the enjoyment of the estate or the period of distribution is postponed for the convenience of the funds of the estate, and not for reasons personal to the devisees, the remainder is vested. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351; *Carter v. Carter*, 234 Ill. 507, 85 N. E. 292; *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934. The possibility of after-born children coming into the class does not interfere with the operation of this rule. In such case the estate vested will open up to let in subsequently born children. In this case there were no children born to Lizzie Thomas subsequent to the death of the testator. In *Scofield v. Olcott*, supra, on page 373 of 120 Ill., and page 353 of 11 N. E., this court said: "But even though there be no other gift than in the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, as where the future gift is postponed to let in some other interest—for instance, if there is a prior gift for life or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life or after payment of the debts—the gift in remainder vests at once, and will not be deferred until the period in question. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time."

The case at bar cannot be distinguished, in principle, from the late case of *Carter v. Carter*, supra. On the authority of that case, as well as of the cases above cited, the court below ruled correctly in holding that the remainder vested in the children of Lizzie Thomas immediately upon the death of the testator. Appellee became the owner of one-twelfth interest in these premises upon the death of his daughter, Carrie.

No other question is presented which is of importance enough to require our consideration. The decree of the circuit court of La Salle county will be affirmed.

Decree affirmed.

(248 Ill. 20)

STURM v. CONSOLIDATED COAL CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

In a servant's action for injuries through the sudden starting of a cable he was adjusting, whether at the time plaintiff was standing astride the cable or elsewhere, and whether his

position was so negligent as to bar a recovery, held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 208*)—ASSUMPTION OF RISK—RISKS ASSUMED.

While a servant assumes all ordinary risks incident to his employment, he does not assume extraordinary ones, or those whereof he has no knowledge, and by reason of lack of such knowledge no opportunity to guard against.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 543; Dec. Dig. § 208.*]

3. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTIONS OF FACT.

The questions of contributory negligence and assumed risk are questions of fact; and where the evidence is conflicting, or where reasonable minds may legitimately draw different conclusions from the undisputed facts established by the evidence, the Supreme Court cannot hold as a question of law that an injured servant was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8321; Dec. Dig. § 842.*]

4. MASTER AND SERVANT (§§ 288, 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—SUBMISSION TO JURY.

In an action for injuries to a coal mine employé, the evidence held to warrant the submission to the jury of the question of contributory negligence and assumed risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1132; Dec. Dig. §§ 288, 289.*]

5. MASTER AND SERVANT (§ 287*)—INJURY TO SERVANT—FELLOW SERVANTS—QUESTIONS FOR JURY.

In a servant's action for injuries through the sudden starting of a cable which he was adjusting, which starting required the concurrent action of several other employes, who were so situated that all reasonable minds would not agree that they were fellow servants with plaintiff within the meaning of the law, the question was properly left to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1062-1066; Dec. Dig. § 287.*]

6. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—EVIDENCE—PLEADING.

In a servant's action for injuries through the alleged negligent sudden starting of a cable he was adjusting, it was not error to admit proof that there was a custom in force in defendant's mine not to start the cable for 10 minutes after it had been stopped, though no such custom was pleaded; the evidence bearing directly on the question of contributory negligence and assumption of risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

7. DAMAGES (§ 225*)—PERSONAL INJURIES—EVIDENCE.

In a personal injury action, plaintiff was entitled to prove the value of medical services rendered him and of the amount he expended for medicine subsequent to commencing suit in attempting to be cured.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 567; Dec. Dig. § 225.*]

8. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—PRESUMPTIONS.

In a servant's action for injuries through the sudden starting of a cable plaintiff was adjusting, an instruction that if the evidence showed there was a custom in defendant's mine not

to start the cable for 10 minutes after it stopped, and the custom was one of long standing, defendant would be presumed to have knowledge thereof, and be bound thereby, correctly stated the law.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.*]

9. MASTER AND SERVANT (§ 201*)—INJURIES TO SERVANT—COMBINED NEGLIGENCE OF MASTER AND FELLOW SERVANT.

Where a servant is injured through the combined negligence of the master or his representative and that of a fellow servant, the master cannot escape liability on the ground that the negligence of the fellow servant contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 515; Dec. Dig. § 201.*]

Error to Appellate Court, Third District, on Appeal from Circuit Court, Macoupin County; Robert B. Shirley, Judge.

Action by Jacob Sturm against the Consolidated Coal Company. A judgment for plaintiff was affirmed by the Appellate Court for the Third District, and defendant brings error. Affirmed.

Brown, Wheeler, Brown & Hay and John T. Creighton (Mastin & Sherlock, of counsel), for plaintiff in error. Edward C. Knotts and Peebles & Peebles, for defendant in error.

HAND, J. This was an action on the case commenced by the defendant in error in the circuit court of Macoupin county, against the plaintiff in error, to recover damages for a personal injury alleged to have been sustained by the defendant in error while in the employ of the plaintiff in error. The jury returned a verdict in favor of the defendant in error for the sum of \$5,000, upon which verdict the circuit court rendered judgment for \$2,500 after requiring a remittitur by the defendant in error of \$2,500, which judgment was affirmed by the Appellate Court for the Third District, and the record has been brought into this court for further review by writ of certiorari.

This case was submitted to the jury upon a declaration containing five counts, which charged common-law negligence. The first, second, and third counts of the declaration charged, in substance, that the plaintiff in error was engaged in operating a coal mine; that cars were hauled in the mine over a track laid in the entryways of the mine by means of a wire cable which ran over certain rollers; that there were curves in the track, at which points there were placed rollers, called "crowd rollers," to keep the cable in place; that at one curve in the track the crowd rollers were out of repair; that the plaintiff in error knew of the defective condition of the crowd rollers at said point, and the defendant in error, in consequence of the negligence of the plaintiff in error in permitting said crowd rollers to be out of repair, while in the exercise of due care for his own safety, was injured. The fifth and sixth

counts of the declaration (the fourth count having been taken from the jury) charged, in substance, that defendant in error was assisting to replace the cable, by means of which cars were propelled in the mine, upon the crowd rollers in which it ran and from which it had slipped at a curve in the track in the mine; that while defendant in error was engaged in such work the cable was stationary, and that it was the duty of the plaintiff in error, while the defendant in error was at work in close proximity to the said cable, not to start said cable but permit it to remain stationary; that the plaintiff in error, while the defendant in error was standing near said cable and engaged in removing a pin from a tie, without warning to the defendant in error, caused the said cable to be suddenly and violently set in motion, by means of which said cable was thrown off of the crowd rollers at that point and the person of defendant in error was caught by said cable, and, being unable to extricate himself therefrom, he was severely injured.

At the close of the defendant in error's case, and again at the close of all the evidence, the plaintiff in error moved the court for a directed verdict, which motion was overruled, and the action of the court in overruling said motion has been assigned as error.

The evidence fairly tends to show that the defendant in error, who was an experienced workman, had been in the employ of the plaintiff in error in its coal mine for a number of years; that the cars used in hauling coal were propelled to and from the bottom of the shaft by a cable, which was operated by a steam engine situated upon the surface of the ground near the mouth of the shaft; that the cable was made of twisted wires, was three miles in length, and was laid in the mine in the form of a loop; that the cable ran upon horizontal rollers fastened in the center of the track, about thirty feet apart, except at points where the track curved, at which curves the rollers were placed in a position perpendicular to the track and ran upon pins driven into the ties upon which the rails forming the track rested, which perpendicular rollers were called crowd rollers; that it was the duty of defendant in error to grease said rollers and keep them in repair; that at the curve where defendant in error was injured there were placed fourteen crowd rollers, only six of which, at the time defendant in error was injured, were in repair, the others being worn and broken; that on the occasion of the injury to the defendant in error the cable had slipped from the rollers at the curve where said crowd rollers were defective, and the defendant in error, the pit boss of the plaintiff in error, and three gripmen went to that point to re-

place the cable upon the crowd rollers; that the engine which furnished the power that propelled the cable was stopped by the engineer, the cable was slacked and was then replaced upon the crowd rollers by the defendant in error and the other workmen, and then the defendant in error attempted to remove a pin from which a crowd roller had been broken, to prevent it from injuring the cable; that, while he was engaged in removing the said pin from the tie into which it had been driven, the cable was suddenly started without notice to defendant in error, and it thereupon slipped from the crowd rollers, and he was caught by the cable and drawn along with the cable and thrown against the rib side of the entry, and before he was able to extricate himself he was severely and permanently injured.

It is first contended that the court erred in declining to take the case from the jury on the ground that the defendant in error was guilty of such contributory negligence at the time he was injured as to defeat his right to recover. It is undisputed that the defendant in error was an experienced workman and familiar with every detail of the work in which he was engaged at the time he was injured, and that he fully realized that if he was inside of the curve and in close proximity to the cable while it was in motion, and it slipped from the crowd rollers, he was in a place of the most imminent danger. At the time the defendant in error was injured, the cable started suddenly and violently without notice to the defendant in error, and he was injured so suddenly that neither he nor any one of the other workmen who were present and who testified upon the trial was able to state just how the accident occurred. After the defendant was extricated, it was found that the principal injury which he had sustained was on the inside of his left leg, a hole having been worn in the inside of that leg, which showed that the cable had rubbed the leg at that point, and the plaintiff in error bases upon that fact—that is, the character of the injury—an argument that the defendant in error must have been standing astride the cable at the time it started, and it is urged that for an experienced workman to have assumed so dangerous a position with reference to the cable, although it was stationary at that time, was such a negligent act on his part as to bar a recovery in case the cable was suddenly started and without notice to him. The defendant in error testified that at the time he was working upon the defective pin, with the view of removing it from the tie, he was not standing astride of the cable but was standing upon the outside of the curve, and that the cable was between his person and the pin. None of the other workmen who were present observed the precise situation of the defendant in error's person at the time the cable started. It may be also observed that, even if the defend-

ant in error was standing astride the cable while at work, he would not have been injured if the cable had remained stationary. We are unable to say as a matter of law that the testimony of the defendant in error that he was standing on the outside of the curve and beyond the cable at the time it started is so inconsistent with the other facts proven in the case that his testimony upon that question can be rightfully disregarded, but, in view of all the proven facts, we are of the opinion the questions whether the defendant in error was standing astride the cable or upon the outside of the curve when the cable started, or what position his person was in when the cable was started, and whether the position which he had assumed when the cable started was so negligent as to bar a recovery, were questions for the jury.

It is further urged that the case should have been taken from the jury on the ground that the defendant in error assumed the risk of being injured in the manner in which he was injured, and that, by reason of the assumption of risk, there can be no recovery on behalf of the defendant in error for the injury which he sustained. It is true that a servant assumes all the ordinary risks which are incident to the employment in which he is engaged, but a servant does not assume extraordinary risks and such risks as he has no knowledge of, and, by reason of the want of such knowledge, no opportunity to guard against. The evidence shows that the cable used to propel the cars in said mine was three miles long, that it was operated by an engine on the surface of the ground near the mouth of the shaft, and that signals to start and stop the cable were communicated by the cager from the bottom of the mine to the engineer at the top of the mine by a bell or by writing instructions upon the sides of the cars which were being hoisted, and that there was no way of communicating with the engineer except by going to the bottom of the shaft and first communicating with the cager, and the uncontradicted evidence showed that a custom had prevailed in the mine of the plaintiff in error for a number of years that, when the cable had stopped, it should remain stationary for ten minutes, and that it should not be started before the lapse of that length of time, and the evidence in this case tended to show that the cable had not been stationary more than half of that time—that is, for a period of five minutes from the time it was stopped until it was again started and the defendant in error injured. The defendant in error had notice of this custom in this mine, and the point where the cable slipped from the crowd rollers and where he was at work was one-half mile from the bottom of the shaft, and he had no way of notifying the engineer that the repairs at the point where he was injured had not been completed and not to start the

cable until they were completed, except by going or sending a man to the bottom of the shaft. We are of the opinion that in making such repairs the defendant in error, in view of the custom prevailing in plaintiff in error's mine, had a right to rely upon that custom, and to assume that the cable would not be started until after ten minutes had elapsed from the time it was first stopped and to proceed during that time with his work, and that if the cable was started within that period, and he was injured by reason of the starting of the cable within that time, he had the right to have submitted to the jury the question whether or not he had assumed the risk of being injured by reason of the cable being started, without warning to him, during the period while he was engaged in making the repairs at the time he was injured. The questions of contributory negligence and assumed risk are questions of fact, and, where the evidence is conflicting or where reasonable minds may legitimately draw different conclusions from the undisputed facts established by the evidence, this court cannot hold as a question of law that a defendant in error was guilty of contributory negligence, or that he assumed the risk which caused his injury. In view of the evidence as disclosed by this record, we are of the opinion the court properly submitted the questions of contributory negligence and assumed risk to the jury.

It is further contended that the relation of fellow servants existed between the defendant in error and the gripman, the cager at the foot of the shaft who gave the signal to start the cable, and the engineer on the surface of the ground at the mouth of the shaft who started the engine which set in motion the cable, and for that reason the defendant in error cannot recover. The defendant in error was engaged in greasing the rollers upon which the cable ran and in keeping said rollers in repair. The gripman was engaged in hauling cars by attaching them to the cable by an appliance attached to the car. The cager was engaged at the bottom of the shaft in assisting to elevate the cars to the surface of the ground, and the engineer ran the engine on the surface near the mouth of the shaft which elevated and lowered the cars, and also operated another engine which furnished the power which operated the cable. It is apparent that it required the concurrent action of these several workmen to start the cable, and we think that they were so situated that all reasonable minds would not agree that they were, within the meaning of the law, fellow servants, but think the question whether they were fellow servants was properly left by the court to the jury. Especially was this true as to the relation existing between defendant in error, the cager, and the engineer. In *Norton Bros. v. Nadebok*, 190 Ill. 595, 599, 60 N. E. 843, 844, 54 L. R. A. 842, it was said: "As a general

rule the question whether servants of the same master are fellow servants is a question of fact, to be determined by the jury from all the circumstances of each case. *Lake Erie & Western Railroad Co. v. Middleton*, 142 Ill. 550 [32 N. E. 453]; *Louisville, Evansville & St. Louis Railroad Co. v. Hawthorn*, 147 Ill. 228 [35 N. E. 534]; *Mobile & Ohio Railroad Co. v. Massey*, 152 Ill. 144 [38 N. E. 787]; *Chicago & Alton Railroad Co. v. House*, 172 Ill. 601 [50 N. E. 151]; *Chicago & Alton Railroad Co. v. Swan*, 176 Ill. 424 [52 N. E. 916]. If, however, the facts are conceded or there is no dispute with reference thereto, and all reasonable men will agree, from the evidence and the legitimate conclusions to be drawn therefrom, that the relation of fellow servants exists, then the question becomes one of law, and not of fact. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 830 [52 N. E. 921]." What is stated in that case we think applies with equal force to this case.

It is also urged that the court erred in admitting proof that there was a custom in force in the mine of the plaintiff in error not to start the cable for ten minutes after it had been stopped, as no such custom was averred to exist in the declaration. We do not think the court committed error in admitting this proof, as the evidence bore directly upon the question whether defendant in error was guilty of contributory negligence, or whether he assumed the risk of being injured in the manner in which he was injured. In *North Chicago Street Railroad Co. v. Irwin*, 202 Ill. 345, 347, 68 N. E. 1077, 1078, it was said in disposing of a similar question: "There was no allegation in the declaration that propelling the car northward upon the westerly or south-bound track was an act of negligence, still the court did not err in permitting appellee to prove the existence of the custom of running all north-bound cars on the east track and all south-bound cars on the west track. The existence of this custom entered into the consideration of the question whether the motorman was in the exercise of ordinary care in propelling the car northwards on the west track at such a rate of speed as 12 or 15 miles per hour, and also bore upon the question of the carefulness or negligence of the deceased in leaving the space between the tracks and going upon the west track in order to be out of danger from a car moving northward."

It is further urged that the court committed error in admitting proof of the fact that the defendant in error had incurred doctor bills and drug bills in attempting to be cured since the date of the commencement of this suit. In the course of the trial the defendant in error made proof that he had employed physicians to treat him, and that he had purchased medicines which he had taken, but the physicians and druggist by

whom he made such proof, while they fixed the amounts of their respective bills, did not discriminate between the value of their services or the amount of drugs furnished the defendant in error before and subsequent to the date of the commencement of this suit. In this we think no reversible error was committed. The defendant in error must recover in this suit for all damages he has sustained in consequence of his injury, which would include his doctor bills and the amounts paid out by him for medicine, and the fact that he had not been fully healed at the time he brought his suit would not bar him from having a physician to treat him, or from purchasing medicine to cure him, or from making proof of the value of such medical services or the amount expended for medicine purchased subsequent to the date of the commencement of this suit. The question here raised has been determined by this court, in principle, adversely to the contention of the plaintiff in error in *Chicago City Railway Co. v. Henry*, 218 Ill. 92, 95, 75 N. E. 758, 759, where it was said: "He [the plaintiff] must exercise reasonable care to effect a cure and mitigate the effect of the wrongful act and is entitled to recover all legitimate expenses incurred for that purpose, and, if it is proved that further expenses for a surgical operation or medical treatment or attendance will necessarily be required, the jury may take that fact into account. It was competent for the plaintiff to show, by evidence, the value of the expenses which he had incurred for medical and surgical services, and, if he would be subject to like expenses in the future, it would be competent to prove the fact." In the case at bar the evidence went further than the rule announced in the *Henry Case*. In that case the evidence would have been largely speculative, while in the case at bar the facts that medical services had been furnished and medicine had been purchased, and the value thereof, were definitely proven.

It is also urged that the court committed reversible error in giving and refusing instructions. It is claimed that the court erred in giving defendant in error's fifth instruction. That instruction informed the jury that if the evidence showed there was a custom in the mine of the plaintiff in error not to start the cable for 10 minutes after it had been stopped, and the custom had been of long standing in the mine, plaintiff in error would be presumed to have knowledge of it, and would be bound by such a custom. We think this a correct statement of the law. It was not necessary to prove the plaintiff in error had established such custom by express rule, as, if such proof had been produced, it would have tended to show there was a rule to that effect in force in plaintiff in error's mine, and not a custom. Neither was it necessary to

prove express notice of the custom to the plaintiff in error, as proof that the custom was one of long standing in the mine was sufficient to establish the custom as against the plaintiff in error, as, if the custom existed in the mine for a long time, plaintiff in error would be presumed to have full knowledge of it.

It is further urged that the court erred in refusing to give to the jury plaintiff in error's sixth refused instruction. That instruction was upon the fellow servant question, and we think was properly refused, as it ignored the fact that if the cable was started by the concurrent negligence of the cager and the engineer, who were not fellow servants of defendant in error, as well as by the negligence of the gripman, who was a fellow servant with the defendant in error, still there might be a recovery. The rule in this state is, where a servant is injured through the combined negligence of the master or his representative and that of a fellow servant, the master cannot escape liability on the ground that the negligence of the fellow servant contributed to the injury. In *Kennedy v. Swift & Co.*, 234 Ill. 606, 610, 85 N. E. 287, 289, 123 Am. St. Rep. 113, it is said: "The law is well settled that, although the negligence of a fellow servant of the appellee contributed to his injury, still if such injury was caused, in part, by the negligence of the appellant the appellee may recover, as the general rule is, where a servant is injured through the part negligence of the master and a fellow servant, the master cannot escape liability on the ground that the fellow servant also contributed to the injury."

The plaintiff in error has complained of the refusal by the court of other instructions offered on its behalf. We think, however, we have substantially disposed of its contentions in that regard in what has been said in discussing the questions of contributory negligence, assumed risk, and the right of the defendant in error to establish the custom said to exist in the mine not to start the cable for ten minutes after it had been stopped. Suffice it to say, we have considered all of the contentions of the plaintiff in error, and we are of the opinion the court committed no reversible error in its rulings upon the instructions given or refused.

Finding no reversible error in this record the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(247 Ill. 357)

PEOPLE ex rel. WAYMAN v. COWAN.
(Supreme Court of Illinois. Dec. 21, 1910.)
CORPORATIONS (§ 14*)—PURPOSE OF INCORPORATION—HOLDING REALTY.

The objects of a purported corporation, claimed to have been incorporated in 1884 under the general incorporation act (Laws 1871-

72, p. 296), was stated to be to lease, for a term not to exceed 99 years, certain lots, as described, for the purpose of erecting thereon a building for the accommodation of tenants, to make leases, collect rents, and do all things incident to the management of the property. *Held*, in view of the purposes of its incorporation, that the charter of the purported corporation was invalid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 14.*]

Appeal from Circuit Court, Cook County; H. S. Pomeroy, Judge.

Quo warranto by the People, on the relation of John E. W. Wayman, against Wm. R. Cowan. From a judgment of ouster, defendant appeals. Affirmed.

Taylor & McWilliams and Harry S. McCartney, for appellant. W. H. Stead, Atty. Gen., and John E. W. Wayman, State's Atty. (Zach Hofhelmer, of counsel), for appellee.

COOKE, J. An information was filed in the circuit court of Cook county against appellant and others, charging them with acting as a corporation, under the name of "Imperial Building Company," without being legally incorporated. To the information the respondents filed eight pleas, to which demurrers were sustained, and, the respondents having elected to stand by their pleas, judgment of ouster was rendered. From this judgment, appellant has perfected this appeal.

The first plea sets out the incorporation of the Imperial Building Company under the general incorporation act of Illinois (Laws 1871-72, p. 296); the final certificate bearing date September 12, 1884. The objects of the corporation were stated as follows: "To lease for a term not to exceed ninety-nine (99) years, lots four (4) and nine (9), and part of lots five (5) and eight (8), all in block one hundred and fifteen (115), in School Section addition to Chicago, for the purpose of erecting thereon a building for the accommodation of tenants, to make leases, collect rents, and do all things incident to the management of said property."

The second plea sets out that the Imperial Building Company ever since its incorporation has been actively engaged in the business specified in its charter, has acquired a lease of the premises named in the charter, erected an office building thereon, equipped it with all necessary apparatus, has at all times been in open possession, operating this building as a business, furnishing janitors and other workmen and agents, maintaining an office therein for such management and operation, and has paid all taxes on the property; that this possession and use have been known to all officers of the state and never questioned; and that stock of the company has changed hands from time to time and been transferred to bona fide purchasers upon the faith that the exercise of the franchise was legal and unquestioned.

The third plea sets forth a lease by the Imperial Building Company of part of this building to the Chicago Open Board of Trade, and avers occupancy under such lease, and estoppel of the lessee to question the corporate capacity of the lessor, and that this proceeding is instituted and prosecuted in the sole interest and at the sole request and expense of the Chicago Open Board of Trade.

The fourth plea sets out the incorporation as averred in the first plea, and alleges the uniform construction, since its enactment, of the general incorporation act of 1872 as authorizing corporations for this purpose, the issuing of numerous charters under this act for such purposes, and the failure of the state to ever question the right of such corporations to exist; that in Chicago alone \$100,000,000 have been invested in the stock and \$50,000,000 in the bonds of such companies; that the courts of the state have uniformly recognized and treated such companies as valid, and the plea gives a list of over 25 such charters, with dates of issue, ranging from 1873 to 1908, and amounts of capital from \$50,000 to \$2,000,000.

The fifth plea sets forth the allegations of the first, second, and fourth pleas, and then alleges that respondents own stock in the Imperial Building Company acquired prior to July, 1908, upon the faith that the charter was valid, and the state was estopped; that the proceeding seeks to impair the obligation of contracts, in violation of section 10 of article 1 of the federal Constitution, and to deprive respondents of property without due process of law, in violation of section 1 of the fourteenth amendment to the federal Constitution.

The sixth plea is the same as the fifth, except that it claims protection also under sections 2 and 14 of article 2 of the Constitution of Illinois.

The seventh plea again sets forth the allegations of the first, second, and fourth pleas, and alleges that respondents own stock in the Imperial Building Company, acquired prior to July, 1908, upon the faith that it was valid, and the state estopped; that since the enactment of the act of 1872 corporations have been organized under it to operate hotels and safety deposit vaults, and the purpose of such corporations has been declared lawful; and that to uphold the right in those cases and to deny it in this is a denial of the equal protection of the laws, contrary to section 1 of the fourteenth amendment to the federal Constitution.

The eighth plea is the same as the seventh, except that it claims also the protection of section 22 of article 4, section 14 of article 2, and section 11 of article 1, of the Constitution of Illinois.

In the collateral proceeding of Imperial Building Co. v. Chicago Open Board of Trade, 238 Ill. 100, 87 N. E. 167, the charter here in question was held to be invalid. In *People v.*

Shedd, 241 Ill. 155, 89 N. E. 332, the same questions which are involved here were presented, and determined adversely to the appellant's contentions in this case. It would serve no useful purpose to repeat here the reasons we then gave for the conclusions reached in those cases. For the reasons there assigned, the judgment of the circuit court is affirmed.

Judgment affirmed.

(248 Ill. 72)

ALBRECHT et al. v. HITTLE et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. PROCESS (§ 96*)—NONRESIDENTS—AFFIDAVIT—SUFFICIENCY.

An affidavit for publication of notice of process, stating that certain defendants were not residents of the state, and that affiant was informed and believed that they resided at certain named places in other states, was sufficient; the provision of the statute for stating that process cannot be served on a defendant relating only to one who is concealed within the state or on due inquiry cannot be found.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

2. WILLS (§ 55*)—TESTAMENTARY CAPACITY—INSANE DELUSIONS—SUFFICIENCY OF EVIDENCE.

Evidence held to show that a testator was the subject of insane delusions, affecting his children and influencing the provisions of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

3. WILLS (§ 322*)—TESTAMENTARY CAPACITY—EVIDENCE—ORDER OF PROOF—EXPERT WITNESSES.

While it is proper for the proponent of a will to offer all his evidence of testamentary capacity in the first instance, yet, after, contestant has offered his evidence, proponent may examine expert witnesses as to what conclusions, in their opinion, should be drawn from such evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 763-764; Dec. Dig. § 322.*]

Appeal from Circuit Court, Lee County; Richard S. Farrand, Judge.

Suit by William Albrecht and others against Caroline Hittle and others. From the decree, defendants appeal. Affirmed.

Louis H. Burrell, Trusdell, Smith & Leech, and John E. Erwin, for appellants. W. H. Winn and Brooks & Brooks, for appellees.

CARTWRIGHT, J. In this suit, brought by the appellees against the appellants, the circuit court of Lee county entered a decree upon the verdict of a jury setting aside the will of Frederick Augustus Albrecht and the probate of the same.

Three of the defendants were nonresidents of the state, and were brought under the jurisdiction of the court by publication of notice, which is claimed to have been insufficient on account of a defective affidavit.

Two of the nonresident defendants appeared in the cause, but one of them was defaulted. The principal objection to the affidavit is that it did not state that process could not be served upon the defendants. It stated that they were not residents of this state, and that the affiant was informed and believed that they resided at certain places therein named, in other states. If a defendant is not a resident of this state, it is not necessary to say that he cannot be served with process, and in this case the summons issued to the sheriff was returned not found as to the three defendants. The provision of the statute for stating that process cannot be served upon a defendant relates only to one who is concealed within the state or on due inquiry cannot be found. One making an affidavit as a basis for publication of notice is bound to make due inquiry to ascertain the place of residence of a nonresident defendant, and he may state the fact of his own knowledge; but, if his information is the result of inquiry, he must necessarily state the residence upon information and belief. The statute, therefore, contemplates that such an affidavit may be made, and the objections to the affidavit are not good.

The proceedings at the trial were not entirely free from error; but no different result could be expected upon another trial, and therefore the decree ought not to be reversed on account of them. The testator, Frederick Augustus Albrecht, executed the will on March 19, 1900, and by it he first provided that his wife should have only what the law would allow her. His wife died in his lifetime, so that the provision relating to her did not become operative; and he died on January 1, 1909, leaving 11 children and 7 grandchildren, his heirs at law. By the will the whole estate was given to 5 of the children. The proponents of the will proved that the testator was capable of transacting ordinary business, and there was no evidence to the contrary, so that he was shown to be capable of making a will, if it was not invalidated by insane delusions affecting its provisions. The ground of attack upon the will was that the testator was the subject of such delusions, and the contestants proved that he was in the habit of speaking of his wife to neighbors and acquaintances as a bitch and a whore, and that he denied the paternity of his children. He said that they were bastards and sons of bitches, and did not belong to him. At one time he said that he had 16 children, but 12 of them were not his: that the dark-haired ones belonged to a man that he named, and the light-haired ones to another person whose name he gave. At another time he said that the children were not his with the exception of one, and he was doubtful about that one. It was a common thing for him to make these assertions, and he accused a merchant of improper relations

with his wife, because they went down in the basement of a store to see if she could pick out some carpet rags to make a carpet. When he went away from the house, he would tell a girl who was working there to watch and see if any man came there, and tell him. He would go in the house in a sneaking way to see if any other man was there. When he would come home, he would ask if there were any men there that day. He slept with two revolvers in his bed, and threatened to shoot his wife, and at one time held a revolver to her head. There was not the slightest reason for any of his charges or suspicions. His wife was a virtuous woman and of good repute, and the only rational conclusion that could be reached by the jury from the evidence was that he was the subject of insane delusions, affecting his children and influencing the provisions of his will. His belief as to his wife and the paternity of his children was based on no evidence whatever, and was a belief which no sane person would entertain for a moment.

The only error affecting the merits of the case was the exclusion of testimony in rebuttal. After the contestants had given evidence of the conduct of the testator and his charges concerning his wife and children, the defendants produced expert witnesses, to whom hypothetical questions were put embracing such facts, for the purpose of getting the opinions of the experts before the jury that in their opinion such facts were not evidence of insane delusions. The court sustained the objections, on the ground that the evidence should have been offered by the proponents in making out their case. The error in the ruling is apparent, from the fact that the proponents of the will could not have known what would be testified to by the contestants' witnesses until their evidence had been given. It is proper for the proponent of a will to offer all his evidence of testamentary capacity in the first instance, and if he desires to present to the jury the opinions of experts based on hypothesis of facts testified to by his witnesses he should do so before closing in chief (*Slingloff v. Bruner*, 174 Ill. 561, 51 N. E. 772); but after the contestant has offered his evidence the proponent has a right to examine expert witnesses as to what conclusions, in their opinion, should be drawn from such evidence. In this case, however, it seems clear to us that no number of experts would be able to convince a jury that the beliefs of the testator were merely false ideas, as distinguished from insane delusions, as was proposed by the solicitor in offering the evidence. Jurors of ordinary intelligence would inevitably conclude that the testator was so far affected with insane delusions as would render him incapable of making a valid disposition of his estate between his children.

The decree is affirmed.

Decree affirmed.

(247 Ill. 393)

PEOPLE ex rel. ARNOLD, County Collector,
v. ADAIR et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. DRAINS (§ 76*) — SPECIAL ASSESSMENT — CLASSIFICATION OF LANDS—VALIDITY.

The classification of lands for drainage assessment, made by commissioners at the office of their attorney outside the drainage district, was valid, where the hearing of objections to the classification, following due notice of the time and place of such hearing, was held at the house of one of the objectors in the drainage district.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

2. DRAINS (§ 83*)—ADDITIONAL ASSESSMENTS —CONDITION OF FUND—DRAINAGE RECORD.

An additional assessment cannot be levied on lands of a drainage district, unless the drainage record shows a deficiency of funds.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 83.*]

3. DRAINS (§ 90*)—ADDITIONAL ASSESSMENT—ACTION ATTACKING—EVIDENCE BY OBJECTORS.

Where objectors to an additional drainage assessment had no other opportunity to question the propriety of the additional levy, they will be allowed to present their objections in an action to enforce the assessment.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. § 92; Dec. Dig. § 90.*]

Appeal from La Salle County Court; W. H. Hinebaugh, Judge.

Action by the People, on the relation of Henry L. Arnold, County Collector, to subject the property of Theron Adair and others to satisfy an additional drainage assessment. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

R. D. Mills and Butters & Armstrong, for appellants. James J. Conway and Henry M. Kelly, for appellee.

PER CURIAM. This was an application by the county collector of La Salle county for judgment and order of sale in the county court of said county against the lands of appellants to satisfy a second additional assessment levied by Drainage District No. 2 of the town of Ophir, for the purpose of building bridges and prosecuting an appeal in a certain mandamus case in which the drainage district was interested. The appellants appeared and filed objections to judgment and order of sale, and the objections were either overruled or stricken from the files, and judgment and order of sale was entered against the lands of appellants to satisfy said assessment, and this appeal followed.

The objections were: (1) That each and every one of the meetings at which the lands in said district were classified and said assessment was levied was held outside the district; (2) that the assessment exceeds the amount of the estimate of the cost of the proposed improvement; (3) that no plans for new or additional work were made prior to

the levy of the assessment; (4) that the record does not show any accounts or reports of money collected and disbursed, and shows no deficiency of the funds of the district to complete the improvement; (5) that the assessment is levied to pay an existing debt; (6) that a previous assessment of \$1,000 had been levied for the purpose of building bridges; (7) that the estimate of the cost of the improvement was \$7,212, and an original assessment of \$9,000 and an additional assessment of \$1,000 had been levied and collected, which is in excess of the estimate; (8) that the funds of the district have been paid out for illegal purposes, and no deficiency exists; and (9) that no legal meeting was held to levy the present assessment. Objections Nos. 2, 3, 4, 6, 7, and 8, and part of 1, were stricken from the files, and no evidence was allowed to be introduced in support of said objections.

The first proposition argued in the briefs is that the assessment was void by reason of the fact that the classification of the lands of the district was made outside of the district. This additional assessment is based upon the original classification and if that classification was made outside of the district it was void, and would not support the present assessment. *Carr v. People*, 224 Ill. 160, 79 N. E. 648. The record shows the classification was made by the commissioners at the office of their attorney in the city of Ottawa; that it was filed in the town clerk's office of Ophir township; that a time and place were fixed for hearing objections thereto at the house of one of the objectors, who resided in the district; that due notice was given of the time and place where objections would be heard to the classification; that the commissioners held the meeting in the district at the time and place fixed for hearing objections to the classification, and after a hearing the classification was confirmed. We think this a compliance with the statute, and that the original classification was a valid classification.

It is further contended that the appellants were not permitted to show upon the hearing that there was no deficiency of funds with which to complete the improvement and that there was no necessity for the levy of this assessment. The levy of an additional or supplemental assessment proceeds upon the theory that there is not enough money in the hands of the commissioners to pay for completing the improvement and to pay the legitimate expenses incurred by the district in the prosecution of the work for which it was established. The statute requires the commissioners to keep accurate accounts and to make annual reports, and that they be filed with the clerk and recorded in the drainage record. While in a proper case an additional or supplemental assessment may be levied by the commissioners, we do not think they should have the right to make such levy, unless their drainage record shows

there is a deficiency. This was the only opportunity the objectors had to question the propriety of an additional or supplemental levy (*People v. Carr*, 231 Ill. 502, 83 N. E. 269), and we think the court erred in not permitting them to show that there was no necessity for the levy of the present assessment. Had the drainage record been kept in such shape that it would show (as the law requires it should) the total receipts and disbursements of the commissioners, it could readily have been determined whether or not an additional or supplemental assessment was necessary, and as it did not show the necessity of an additional or supplemental levy the court should have denied judgment and order of sale. The landowners of a drainage district have the right to be informed as to the financial condition of the district at all times, and they are entitled to be informed upon the subject by the drainage record, which record, as we understand the statute, must show a deficiency of funds before the lands of the district can be taken from the owners of such lands by forced sale to satisfy an additional or supplemental assessment. In the *Carr Case*, last above cited, on page 506 of 231 Ill., and page 270 of 83 N. E., it was said: "When the law requires records of proceedings to be kept by drainage commissioners, as in this instance, they are the only lawful evidence of the action to which they refer, and such records cannot be contradicted, added to, or supplemented by parol."

The judgment of the county court will be reversed, and the cause remanded to that court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(247 Ill. 406.)

PEOPLE ex rel. ARNOLD, County Collector,
v. LEONARD et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

Appeal from La Salle County Court; Joseph Davis, Judge.

Application by the County Collector of La Salle County for judgment and order of sale against the lands of William Leonard and others to satisfy an additional drainage assessment. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

See, also, 244 Ill. 429, 91 N. E. 534.

Butters & Armstrong, for appellants. B. F. Lincoln, John Garland, and D. L. Dunavan, for appellee.

PER CURIAM. This was an application by the county collector of La Salle county for judgment and order of sale in the county court of the aforesaid county against the lands of the appellants to satisfy an additional assessment levied by the commissioners of Union District No. 1 of the towns of Freedom and Ophir, in La Salle county. The record of the drainage district in this case is the same as the record of Drainage District No. 2 of the town of Ophir, considered by this court at this term in the case of *People v. Adair*, 93 N. E. 352 in so far as the drainage record fails to show that the funds of the district have been exhausted

and a necessity exists for the levy of an additional assessment in said drainage district.

The judgment of the county court will be reversed, and the cause remanded.

Reversed and remanded.

(247 Ill. 606)

LOGUE et al. v. BATTERTON et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—
CREATION OF SCHOOL DISTRICT—PROCEEDINGS FOR ORGANIZATION—REVIEW.

Where a written notice of appeal from the action of township trustees of schools on a petition for the organization of a school district to an appellate board of county superintendents of schools is filed with the township trustees within 10 days, as required by section 55 of the school law (Hurd's Rev. St. 1909, c. 122), the clerk's failure to place the file mark thereon cannot defeat the right of appeal.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 45; Dec. Dig. § 27.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—
CREATION OF SCHOOL DISTRICT—JURISDICTION OF BOARD OF TOWNSHIP TRUSTEES—RECORD.

Where a board of township trustees has jurisdiction of a petition for the organization of a school district by virtue of compliance with the requirements of School Law (Hurd's Rev. St. 1909, c. 122) § 46, cl. 4, and sections 52-54, prescribing the form of the petition, the number of names necessary, and the time and notice of filing, it is not necessary to the validity of their action that the record of proceedings should show a finding of compliance with the requirements of the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 45; Dec. Dig. § 27.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—
CREATION OF SCHOOL DISTRICT—POWERS OF BOARDS—STATUTES.

The school law (Hurd's Rev. St. 1909, c. 122) provides, by section 46, cl. 4, that the petition for the organization of a school district shall be signed by a majority of the legal voters of each district, or by two-thirds of the legal voters residing within the territory described within the petition, containing not fewer than 10 families. Section 52 provides for the time of filing the petition and giving notice thereof. Section 53 makes it the duty of the trustees to ascertain whether these provisions have been complied with, and section 54 relates to hearing and action by the trustees. Section 56 empowers the county superintendent, or the superintendents of several counties, to investigate the case on appeal. *Held*, that the jurisdiction of a board of trustees depends on a compliance with the requirements of the statute, but that its decision as to whether it had jurisdiction, and its action in granting or denying the petition on that ground, or any other ground, is reviewable by the county superintendents.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 45; Dec. Dig. § 27.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 27*)—
CREATION OF SCHOOL DISTRICT—JURISDICTION OF TOWNSHIP TRUSTEES.

School Law (Hurd's Rev. St. 1909, c. 122) § 46, cl. 4, requires a petition to the trustees of townships for the organization of a school district to be signed by a majority of the legal voters of each district, or by two-thirds of the legal voters residing within the territory described in the petition, containing not less than 10 families. A petition was filed with a board

of township trustees, stating that the proposed district "will not have less than 10 families resident in it." *Held*, that the language of the statute should be construed to mean that there were then resident in the proposed district 10 families, and when organized into a district it would not contain less than 10 families, and therefore the petition was a compliance with the requirement of the statute.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 45; Dec. Dig. § 27.*]

Dunn, J., dissenting.

Appeal from Circuit Court, Menard County; Guy R. Williams, Judge.

Petition by James Logue and others for a writ of certiorari, directed to Eva B. Batterton and others. From a judgment entered on an order quashing the writ, petitioners appeal. Affirmed.

Peter Murphy and Masters & Masters, for appellants. Thomas P. Reep and Smoot & Laning, for appellees.

FARMER, J. Appellants, by leave obtained of one of the judges of the circuit court of Menard county in vacation, filed their petition in said circuit court for a writ of certiorari, directed to appellees, Eva B. Batterton, county superintendent of schools of Menard county, Edgar C. Pruitt, county superintendent of schools of Sangamon county, and D. F. Nichols, county superintendent of schools of Logan county, commanding them to bring into court all papers and records of the board of trustees of township 18 N., range 4 W., and township 18 N., range 5 W., together with the transcript of the proceedings before said boards of trustees, upon a petition for the organization of a new school district; also the papers, records, and transcript of the proceedings before the said three county superintendents of schools, acting as a board of appeals, upon an appeal from the boards of trustees, to the end that the said proceedings might be reviewed and quashed by the circuit court. The proceedings sought to be reviewed and quashed were proceedings had upon a petition presented to said boards of trustees for the organization of certain territory lying within school districts numbered 40, 180, and 181, in the counties of Menard, Sangamon, and Logan, into a new district. The petition for a writ of certiorari was filed by certain parties who are freeholders and taxpayers in said school districts numbered 40, 180, and 181. The prayer of the petition for the organization of the new district presented to said boards of trustees was denied, and an appeal was taken from their action to Eva B. Batterton, county superintendent of schools of Menard county. As the organization of the proposed new district affected territory in school districts lying in Menard, Sangamon and Logan counties, she called in to aid in passing upon the appeal the county superintendents of Sangamon and Logan counties. The board of ap-

peals reversed the action of the boards of trustees, granted the prayer of the petition, declared the new district organized, and notified the clerks of the respective boards of trustees of their action, as by law required. Upon the return to the writ of certiorari being filed by appellees, appellants moved to quash it, which motion was overruled, the return held sufficient, and a motion by appellees to quash the writ was sustained, the writ quashed, and the petition dismissed. From the judgment so entered, the petitioners for the writ have prosecuted this appeal.

While the argument of the appellants embraces a wide range, the only question involved is: Was the return to the writ of certiorari sufficient to justify the judgment of the court in quashing the writ and dismissing the petition? This question is preserved for review without a bill of exceptions, and some points discussed, which appellees contend were not preserved by bill of exceptions, need not be referred to. Appellants say in their brief: "The only question for the court to determine is whether appellees, acting as a board of appeals under the statute, had such papers before them on the appeal as conferred jurisdiction." The papers, records, and transcripts of the boards of trustees and of the board of appeals are set out in the return and numbered as exhibits. The petition to the boards of trustees sets out and describes the territory sought to be detached from other districts and organized into a new district. It was filed with the boards of trustees in proper time to be acted upon at their April meetings, 1910, and proof of service of notice of the intention to file said petition was made as required by law. We think the record shows the petition was signed by the requisite number of persons authorized to sign a petition for the organization of a new district, and that it was in substantial compliance with the requirements of the law. The return shows that the trustees of township 18 N., range 4 W., considered the petition at their regular annual meeting, April 4, 1910, and denied the petition on the ground that it did not have the signatures of the necessary two-thirds of the voters of the territory. The trustees of township 18 N., range 5 W., took up the petition at their regular meeting, April 4, 1910, but adjourned to meet April 9th to further consider it. At the adjourned meeting the prayer of the petition was denied, "on the ground of irregularity of lines." On April 12th Eugene Baugher and six others filed notice of appeal to the county superintendent of schools of Menard county.

It is contended that the appeal was not properly taken, and the county superintendents had no jurisdiction to entertain it, because it does not appear, except from an amendment made after the appeal was disposed of, that the notice of the appeal was filed with the trustees of township 18 N., range 5 W., within 10 days after the decision

of the trustees, as the law requires. We do not think there is any merit in this contention. The return sets out the notice of appeal, which bears a file-mark of April 12, 1910, and the return recites that it was filed with the board of trustees on that date, but that the file-mark on said notice was placed thereon after it was filed with the board of appeals. The records and papers of the trustees of both townships were transmitted by the proper officer to the superintendent of schools of Menard county on the 14th day of April, 1910, and it thus clearly appears that the appeal was taken within the time required by law. If the notice was filed (and it appears that it was) within the time required by law, the failure of the clerk to place the file-mark thereon could not defeat the right of appeal.

The original transcript of the proceedings of the board of trustees of township 18 N., range 5 W., stated the board had considered the petition and denied it on account of irregularity of lines; but it contained no finding or recitals of the facts required by law to give the board jurisdiction. The return sets out an amended transcript of the proceedings of said board, made after the appeal was disposed of. Said amended transcript finds all steps had been taken and all facts existed necessary to give the board jurisdiction of the petition. The original record of the action of appellees as a board of appeals sets out the hearing of the appeal by said board May 2, 1910, and the action of the board reversing the action of the trustees and the granting of the prayer of the petition creating a new district as prayed. An amended transcript of the record, which was prepared after the issuance of the writ in this case, finds and recites all the jurisdictional facts required to give the trustees jurisdiction; also all facts necessary to give the board of appeals jurisdiction; that said board of appeals had made full investigation, and, finding that it was to the best interest of all parties to create the new district, it was ordered that said district be created, and that the action of the trustees be reversed. Both the original and amended records of the board of appeals were signed by all three of the superintendents; but the action of the said board was arrived at by the affirmative vote of the county superintendents of Menard and Sangamon counties, the county superintendent of Logan county having voted in the negative. It is insisted that these amended transcripts set out in the return are not entitled to be considered in determining the sufficiency of the return to the writ.

By the fourth clause of section 46 of the school law (Hurd's St. 1909, c. 122) the trustees, at their regular meeting in April, are given authority "to create a new district from territory belonging to two or more districts, when petitioned by a majority of the legal voters of each district; or, when petitioned by two-thirds of the legal voters re-

siding within the territory described in the petition, containing not fewer than ten families, asking that such territory be created into a new district." Section 52 provides that no petition shall be acted upon by the trustees unless it has been filed with the clerk at least 20 days before the regular meeting in April, nor unless a copy of it, with a notice in writing signed by one or more of the petitioners, shall be delivered by the petitioners, or one of them, to the president or clerk of the directors of each district whose boundaries will be changed if the petition is granted, 10 days before the day the petition is to be considered. Section 53 makes it the duty of the trustees to ascertain whether these provisions have been complied with, and, if they have not, then the board may adjourn for not longer than 4 weeks, in order that compliance may be had with said provisions. Section 54 provides that if it appears on the day of the regular meeting, or at an adjourned meeting, that such provisions have been complied with, the trustees shall consider the petition, hear any of the legal voters of the district or districts affected by the proposed change who may appear and oppose the petition, and the trustees shall grant or refuse the prayer of the petition without unreasonable delay; that "after the trustees of schools have considered the petition, no objection shall be raised as to its form, and their action shall be prima facie evidence that all requirements have been complied with." Section 55 provides for the right of appeal to the county superintendent of schools by filing with the clerk of the trustees a written notice of appeal within 10 days after final action by the trustees. Section 56 makes it the duty of the clerk to transmit, within 5 days after the notice of appeal has been filed, all papers in the case, with a transcript of the record of the trustees showing their action thereon, to the county superintendent of schools. Section 57 provides that, where the district affected by the proposed change is divided by county line or lines, the appeal may be taken to the county superintendent of schools of any one of the counties in which the district is partly located; that said county superintendent shall then forthwith give notice to the other county superintendent or superintendents of the pendency of the appeal, and of the time and place when and where it will be heard, and all of said county superintendents shall meet and together hear and determine the appeal. When the appeal is determined, the county superintendents are required to at once notify in writing, the clerk by whom the papers in the case were transmitted of the action taken on the appeal.

It might be the better practice for boards of trustees to make a record of their findings as to whether the requirements of the statute necessary to give them jurisdiction

had been complied with; but we do not think this is necessary to the validity of their action, if they did, in fact, have jurisdiction. Neither do we think the decision of the board of trustees that it did or did not have jurisdiction is conclusive upon the county superintendent in case of an appeal. Whether the board has jurisdiction depends upon whether the requirements of the statute have been complied with, and not upon what the board decides upon that question. Where there is a failure to comply with any of the essential requirements of the statute in order to give the board jurisdiction, the action of the board in taking jurisdiction and deciding upon the petition would be subject to reversal upon appeal, if it was found by the county superintendent, upon investigation, that the board did not have jurisdiction. Here one of the boards must have found that it had jurisdiction; for it considered and passed upon the petition and denied its prayer, but not for lack of jurisdiction. The other board decided that one of the requirements of the statute necessary to give it jurisdiction had not been complied with; but this, we think, was so decided under a misapprehension. By the provisions of the statute, if the petition is entertained and acted upon, the action of the trustees is prima facie evidence that all the requirements have been complied with necessary to give the board authority to act; but the action of the board is only prima facie evidence that the requirements of the statute have been complied with, and we think the intention of the Legislature in enacting the law was that the action of the board of trustees in passing upon the petition, whether denying or granting it, and upon whatever grounds their action may have been based, is subject to review upon appeal to the county superintendent. The statute makes it the duty of the county superintendent, on appeal, to "investigate the case, make such change or changes, or refuse to make them, reversing, if need be, the action of the trustees." The authority "to investigate the case" we construe to mean that the county superintendent has power to do more than merely look at the papers sent up; but he is authorized, in his investigation of the case, for the purpose of determining whether the action of the trustees is proper, right and legal, to do anything that is necessary to enable him to determine whether the jurisdictional requirements of the statute had been complied with before presentation of the petition to the trustees, and to enable him to reach a proper and correct decision. The statute makes his decision final. Of course, if the trustees had no jurisdiction to entertain the petition, then the county superintendent would have no jurisdiction; but in our opinion it is sufficiently shown here that the trustees did have jurisdiction, that the appeal from their decision was taken in conformity with the

requirements of the statute, and that the county superintendents had jurisdiction to entertain and act upon said appeal.

The fourth clause of section 46 above quoted requires the petition to the trustees to be signed by a majority of the legal voters of each district, or by two-thirds of the legal voters residing within the territory described within the petition, containing not fewer than 10 families. The petition filed with the boards of trustees stated that the proposed district "will not have less than 10 families resident in it, and that no district from which the territory will be taken will be left with less than 10 families." It is argued that the statement in the petition is not that the territory proposed to be organized into a new district has 10 families residing in it, but that it will at some future time have 10 families residing in it. We are not inclined to resort to the most technical construction in construing the language of petitions of this character. Certainly the territory proposed to be organized into a new district must have at the time of the organization not fewer than 10 families residing in it. The trustees would have no jurisdiction to entertain a petition to organize a district containing less than 10 families. The criticism made of the petition is that, instead of stating the territory *has* not less than 10 families resident in it, it states the said district *will not have* less than 10 families resident in it. The reasonable meaning of the petitioners in the language used, we think, was that there were then resident in the proposed territory 10 families, and that when organized into a district it would contain not fewer than 10 families. It is not contended that the trustees denied the prayer of the petition because, as a matter of fact, the territory did not contain 10 families.

Carrico v. People, 123 Ill. 198, 14 N. E. 86, relied on by appellants, is not in conflict with the views we have expressed. That case was a quo warranto proceeding to oust certain parties, claiming to be school directors of a district that had been previously organized out of territory taken from other districts. The plea, among other things, set up the petition filed with the trustees for the organization of the district. It purported to be a petition by two-thirds of the legal voters in the territory proposed to be organized into a new district, but contained no statement or reference whatever of the number of residents of the territory, and it was held that the petition was fatally defective, and did not give the trustees jurisdiction.

A considerable portion of the arguments of counsel is devoted to a discussion of the right to amend the transcript of the record of the trustees and of appellees as a board of appeals; but, in the view we entertain, a determination of that question is not necessary to a decision of this case.

In our opinion the circuit court was justified in quashing the writ and dismissing the petition, and the judgment is affirmed.

Judgment affirmed.

DUNN, J., dissents.

(247 Ill. 528)

BROWN v. BROWN et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. PERPETUITIES (§ 4*)—CREATION OF FUTURE ESTATES.

A deed conveyed to the grantor's wife a tract in fee simple, to take effect in possession at his death, but provided that, when their adopted daughter became 18 years of age, the land should be transferred to her for life, with remainder for life to her children, if any, and, in case of the death of her and her children, the land to revert to the grantor's wife and her heirs. *Held*, that while the rule against perpetuities prohibited the creation of future estates, which would not necessarily vest within a life or lives in being at its creation and 21 years thereafter, it did not apply to a vested estate, though its enjoyment was postponed beyond the time limited, and the limitation over to the children of the adopted daughter did not violate the rule against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

2. PERPETUITIES (§ 4*)—SUSPENDING POWERS OF ALIENATION.

The grantor's wife took a reversion in fee upon the termination of the life estates, and hence had a vested estate, so that the rule against perpetuities did not apply thereto.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. § 4.*]

3. REMAINDERS (§ 1*)—"VESTED REMAINDER."

A "vested remainder" is one which gives the remainderman or his heirs the right to immediate possession whenever the preceding estates may terminate.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7305-7307; vol. 8, pp. 7828, 7829.]

4. REVERSIONS (§ 1*)—DEFINITION.

A "reversion" is a future interest remaining in the person creating estates in favor of others, after such estates are taken out, and to which the grantor or his heirs will be again entitled upon the termination of such other estates.

[Ed. Note.—For other cases, see *Reversions*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6212, 6213.]

Appeal from Circuit Court, Douglas County; Solon Philbrick, Judge.

Bill by Odie L. Brown against Harry Brown and others. From a decree in part for complainant, he appeals. Reversed and remanded, with directions.

John H. Chadwick, for appellant. W. Thomas Coleman, guardian ad litem, for appellee Harry Brown.

CARTWRIGHT, J. The appellant, Odie L. Brown, filed his bill in the circuit court of Douglas county against his infant son, Harry Brown, and others, who are appellees, praying the court to correct mistakes in con-

veyances of a tract of land to which he claimed title by virtue of a deed to him from Catherine Bagley, and to declare that he was vested with title in fee simple. A guardian ad litem was appointed for the infant defendant and filed an answer. The cause was referred to the master in chancery, who found and reported that there were mistakes in the conveyances, and he recommended a decree correcting the same and declaring the complainant to be the owner of the premises in fee simple. The guardian ad litem excepted to that portion of the report which found title in fee simple in the complainant, and the court, upon a hearing, sustained the exceptions and entered a decree correcting the errors, but finding that the complainant acquired no title or interest by virtue of the deed from Catherine Bagley, and that the title was in the heirs at law of Fern Brown; two-thirds being in the complainant, her father, and the remaining one-third in the defendant Harry Brown, her half-brother.

John E. Bagley was the owner of the premises in question, and on March 23, 1886, executed a statutory warranty deed of the same to his wife, Catherine Bagley, reserving a life estate to himself. Following the description of the land were the following provisions: "This land to be transferred to Cora Stephens (known as Cora Bagley) when she becomes eighteen years old; she, Cora Stephens, to have and to hold the said land during her life, and to her children, if she have issue, during their lifetime. In case of her death and the death of her children, then this land is to revert back to Catherine Bagley and her heirs." The deed was recorded in Deed Record 41 of the records in the recorder's office of Douglas county, at page 11. John E. Bagley died on April 14, 1886, and upon his death Catherine Bagley took possession of the premises as grantee under said deed, and occupied the same until September 21, 1895, when Cora Stephens, who was an adopted daughter of John E. Bagley and Catherine Bagley, reached the age of 18 years, and Catherine Bagley then executed her statutory warranty deed conveying the premises to the said "Cora Stephens (known as Cora Bagley)," with this statement in the deed: "This deed is made in compliance with the deed made by John E. Bagley to his wife, Catherine Bagley, which appears more fully of record in Deed Record 41 of Douglas county Deed Records, at page 11." Cora Stephens immediately entered into the possession of the premises, and was afterward married to the complainant, Odle L. Brown. She died on April 22, 1901, leaving the complainant, her husband, and Fern Brown, her daughter and only heir at law. Fern Brown took possession of the premises and occupied the same until her death. The complainant married again after the death of Cora Stephens Brown, and the defendant Harry Brown is

a child of the second marriage. Fern Brown died on October 21, 1909, and Catherine Bagley took possession of the premises, and on February 1, 1910, she executed a quitclaim deed of the same to the complainant, Odle L. Brown, in consideration of \$2,700.

The deed from John E. Bagley conveyed the premises to Catherine Bagley, but with a provision that when the adopted daughter, Cora Stephens, should become 18 years old, the grantee should convey to her an estate for life, with remainder to her children for life. It was further provided that, in case of the death of Cora Stephens and the death of her children, the land was to revert back to Catherine Bagley and her heirs. If the limitations contained in that deed were valid, Catherine Bagley owned the fee in the premises after the death of Fern Brown, and her conveyance to the complainant transferred such title to him. The only possible question as to the validity of such limitations is whether any of them are void because in violation of the rule against perpetuities. That rule forbids the creation of future interests in real estate which will not necessarily vest within a life or lives in being at the creation of the interest and 21 years afterward. *Waldo v. Cummings*, 45 Ill. 421; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083; *Owsley v. Harrison*, 190 Ill. 235, 60 N. E. 89; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363; *Pitzel v. Schnelder*, 216 Ill. 87, 74 N. E. 779; *Kales on Future Interests*, § 254. The rule has been established by judicial decisions, and its purpose is to prevent the creation of interests to take effect on the happening of remote contingencies. It does not apply to interests which are vested. No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within the time limited by the rule; but a vested interest cannot be subject to a condition precedent, and, if an estate is vested in interest, it is not subject to the rule against perpetuities, although the enjoyment of the estate is postponed beyond the limits of the rule. *Lunt v. Lunt*, 108 Ill. 307; 30 Cyc. 1471; 22 Am. & Eng. Ency. of Law (2d Ed.) 705. The limitation to the children of Cora Stephens could not possibly be considered subject to the rule, since she was in being both when the deed was made by John E. Bagley and when the deed was made by Catherine Bagley, and as the life estates in her children were to take effect at her death they were not postponed beyond a life in being. There could be no children of Cora Stephens born after the termination of her life estate by her death, and the life estate of Fern Brown, her daughter, vested in possession immediately upon such death and was not subject to the rule. *Gray's Rule against Perpetuities* (2d Ed.) § 205; *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356. The life estates were not within the rule, and, if the

reversion or limitation to Catherine Bagley after the termination of the life estates did not offend against the rule, the title to the property passed to the complainant.

If the provision in the deed of John E. Bagley for a reversion to Catherine Bagley at the termination of the life estates be regarded as a remainder limited by the deed, it was a vested remainder. A future interest must necessarily await the determination of a preceding estate; but if the remainder is ready to turn into a present estate in possession whenever and however the preceding estate is determined, it is vested. A vested remainder is one which throughout its continuance gives to the remainderman or his heirs the right to the immediate possession whenever and however the preceding estates may determine. Gray's Rule against Perpetuities (2d Ed.) § 101. A remainder to Catherine Bagley, limited to take effect in case of the death of Cora Stephens and the death of her children, would be a vested remainder. *Cheney v. Teese*, 108 Ill. 473, where the devise was to take effect after the death of the testator's daughters; *O'Melia v. Mullarky*, 124 Ill. 506, 17 N. E. 36, where land was conveyed in trust for certain heirs at law, to vest absolutely in them at the death of their uncle; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135, where an estate was to be equally divided between the testator's children after the death of his wife; *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. 304, where there was a limitation by will, in the event of the death of any of the testator's children, to the surviving children; *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934, where estates were limited upon or at the death of the life tenant; and *Bowler v. Bowler*, 176 Ill. 541, 52 N. E. 437, where there was a deed which was to be of no force or effect until after the death of the grantor.

The deed from John E. Bagley to his wife, Catherine Bagley, conveyed to her a fee-simple estate in the tract of land to take effect in possession at his death, but with the provisions, before stated, that when Cora Stephens should become 18 years old the land was to be transferred to her for life, with remainder for life to her children, if she had any, and at her death and the death of her children the land was to revert back to Catherine Bagley and her heirs. It was the intention of John E. Bagley, plainly expressed in the deed, that Catherine Bagley should have the fee, except so far as life estates in Cora Stephens and her children should be created out of it; and while we have considered the effect of regarding the estate limited to Catherine Bagley after the termination of the life estates as a remainder, we think the correct view is that such estate was a reversion in fee. Questions discussed by counsel as to the relation of Cath-

erine Bagley to Cora Stephens created by the provision for the transfer of the life estates, the proper term to be applied to Catherine Bagley, and the right of Cora Stephens to enforce the provision for her benefit, are not material, for the reason that the conveyance was made as directed. The deed to Cora Stephens recited that it was made in compliance with the deed of John E. Bagley, and it must be construed as conveying precisely what was directed to be conveyed. As we interpret the deed of John E. Bagley to Catherine Bagley, she owned the title in fee simple to the tract of land, subject to its being divested only to the extent that the life estates might take effect if Cora Stephens reached the age of 18 years and had surviving children. *Gatenby v. Morgan*, 1 Q. B. D. 685. The reversion in fee in Catherine Bagley was vested, because all reversions are vested. A reversion is a future interest remaining in the person creating estates in favor of other persons after taking out such estates, and upon the termination of such estates the creator of them, or his heirs, will be again entitled. A reversion, therefore, is always ready to become a present estate in possession whenever and however the preceding estates are determined; and, being a vested estate, it is not subject to the rule against perpetuities. 30 Cyc. 1473.

It follows, from what has been said, that at the termination of the life estate of Fern Brown the reversion in fee, which had all the time been vested in Catherine Bagley, became an estate in possession, and was not affected in any manner by the rule against perpetuities. Her deed conveyed an absolute fee-simple title to the complainant, Odie L. Brown, and the chancellor erred in his conclusion that Fern Brown had title in fee, which descended to her father and half-brother as her heirs at law.

The decree is reversed, and the cause remanded, with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded, with directions.

(247 Ill. 580.)

NALL v. TAYLOR et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. NEGLIGENCE (§ 59*)—LIABILITY.

One is liable for all of the consequences of his acts which might have been foreseen and expected as a result thereof; but he is not liable for those which he could not have foreseen, and therefore was under no obligation to consider.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 72; Dec. Dig. § 59.*]

2. NEGLIGENCE (§ 136*)—PROXIMATE CAUSE—QUESTION FOR JURY.

What is the proximate cause of an injury is ordinarily for the jury, and it becomes a question of law only when the facts are undisputed, and are such that there can be no differ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ence in the judgment of reasonable men in the inferences to be drawn therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 327-332; Dec. Dig. § 136.*]

3. NEGLIGENCE (§ 136*)—FIRES—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether a fire set on premises by the occupant thereof was the proximate cause of the destruction of property by fire on adjacent premises held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 327-332; Dec. Dig. § 136.*]

4. NEGLIGENCE (§ 108*)—PLEADING—SUFFICIENCY.

A declaration, in an action for loss of property by fire set by defendant on his premises and escaping on adjacent premises, which states facts from which the law raises a duty, and which shows an omission of duty on defendant's part, resulting in injury, states a cause of action, though it is based on Cr. Code (Hurd's Rev. St. 1909, c. 38) div. 1, par. 18, punishing any person willfully or negligently setting a fire, regardless of the proper construction of the statute.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 108.*]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Cass County; Harry Higbee, Judge.

Action by Harry S. Nall against R. C. Taylor and another. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendants appeal; the Appellate Court granting a certificate of importance. Affirmed.

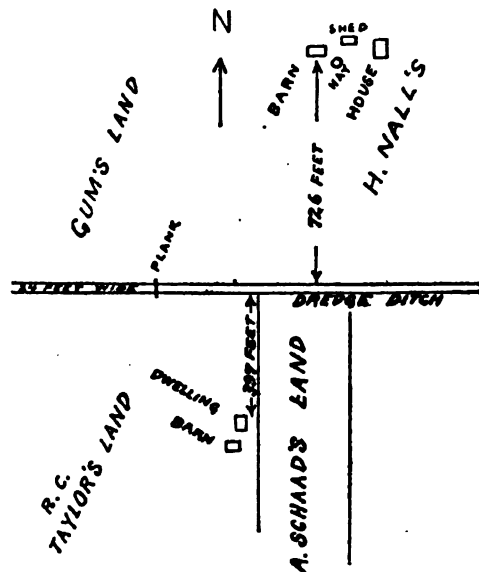
J. J. Neiger, for appellants. J. N. Gridley and Milton McClure, for appellee.

CARTER, J. This is an action on the case, brought by the appellee, Harry S. Nall, against appellants, R. C. Taylor and George Cline, in the circuit court of Cass county. Judgment was obtained against said appellants for \$250, which, on appeal to the Appellate Court, was affirmed. The Appellate Court granted a certificate of importance, and this appeal followed.

The first count of the declaration upon which the cause was tried charged, in substance, that on October 13, 1908, the plaintiff was lawfully possessed of a certain tract of land described therein, upon which then and there he had certain personal property, and that on said date, "on the prairie near to and adjoining the said premises of the plaintiff. * * * and on lands owned by the defendant Taylor, which land was then and there thickly grown over with dry grass and weeds, and while there was a strong wind blowing from the direction of the said prairie towards the premises of the plaintiff, where his said personal property was located, the defendants negligently, carelessly, and intentionally kindled and set a fire in the dry grass and weeds on the said prairie, and so negligently tended and watched the said fire that the same communicated and extended into and upon the said premises of

the plaintiff, and consumed" said goods and chattels. The second count, it is claimed, was based upon paragraph 18 of division 1 of the Criminal Code (Hurd's Rev. St. 1909, c. 38), which reads: "If any person shall, at any time hereafter, willfully and intentionally or negligently and carelessly set on fire, or cause to be set on fire any woods, prairies or other grounds whatsoever, he shall be fined not less than \$5 nor more than \$100: Provided, this section shall not extend to any person who shall set on fire or cause to be set on fire any woods or prairies adjoining his own farm, plantation or inclosure, for the necessary preservation thereof from accident by fire, between the last day of November and the first day of March, by giving to his neighbors and the owner or occupant of such land, and any person likely to be affected thereby, two days' notice of such intention: Provided, also, this section shall not be construed to take away any civil remedy which any person may be entitled to for any injury which may be done or received in consequence of any such firing."

The evidence shows that appellant Taylor, on October 13, 1908, was, and had been for some time, the owner of a farm bounded on the north by a drainage ditch 24 feet wide, separating said Taylor's land from that occupied by appellee; on the east by a pasture belonging to one Schaad; on the west by a cornfield; and on the south by another drainage ditch. The situation of the land, with the surroundings, is shown approximately by the following plat:



All of these properties were bottom or overflow lands, which had been more or less reclaimed by a drainage district. No timber was on it, and only part of it had been cul-

tivated. During 1908 the river overflowed this bottom land and prevented the raising of any crops thereon for that year. As a result, on the date in question the land was covered with a thick growth of grass and weeds. For some time previous there had been a protracted drought, which made the vegetation very dry and inflammable. Appellee was a tenant farmer living on the premises, as shown on the plat. The weeds and grass on the Taylor land grew up almost to the house and log barn on said land, and extended northward to his north-line at the drainage ditch. The water in the drainage ditch at the time in question was low, having a width of a few feet, and a depth, in some places, of five or six inches. North of this ditch the land was used as a pasture, and the weeds and grass were not so high, although there is evidence tending to show that the grass and weeds in this pasture were somewhat dense and inflammable, and extended to the buildings of appellee. The north part of the Taylor land had been leased for the season of 1909 to the appellant Cline, and the south part to Schaad. On the part leased to Cline the dwelling house and barn were located, being occupied by one Ora Cummings and family. We infer from the record that there were no fences about the house and barn on the Taylor land, or any yard, properly so called.

On the day in question Taylor, Cline, and Schaad had decided to burn the weeds and grass on the Taylor land. Before setting fire for that purpose, in order to protect the house and barn upon the land, they set a back fire around the buildings. The evidence tends to show that the wind was blowing very strongly that day from the southwest, and while the evidence is not all in harmony on the question, there is also evidence tending to show that shortly after starting this back fire the wind suddenly veered to the west, causing the barn, and afterwards the dwelling house, to catch fire, and both were destroyed. While the parties were watching the burning buildings, smoke was noticed coming from the barn on the premises of appellee, Nall. None of his family were at home that day, and he did not reach there until his buildings were burned. Taylor and Cline made some investigation as to the fire on the Nall premises. They testified that they thought it started in a pile of rubbish near the barn, and was communicated to the barn and then to the implement shed, all of which were eventually destroyed. There is testimony to the effect that Taylor said at that time that he thought the fire on the Nall premises had been set by burning shingles blown over from his property. Cummings, who reached his house on the Taylor farm about the time the buildings caught fire, testified positively that the fire burned practically over all of the land between the Taylor premises and

the ditch, and over Nall's pasture, to the barn. There is no controversy in the record that Taylor and those with him used every effort to extinguish the fire and to prevent the destruction of the property.

At the close of all the evidence appellants asked the court to instruct the jury that the evidence failed to support the allegations of either count in the declaration, and after that asked an instruction to the effect that there was no evidence to support the second count of the declaration. Both of these instructions were refused.

It is first insisted by appellants that there was no evidence in the record which justified the jury in finding that the fire on the Taylor premises was the proximate cause of the burning of appellee's property, nearly a quarter of a mile away. The rule is that a person is held liable for all of those consequences which might have been foreseen and expected as a result of his conduct, but not for those which he could not have foreseen and was therefore under no moral obligation to take into consideration. *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, 14 Am. Rep. 18; *Brown v. Brooks*, 55 N. W. 395, 21 L. R. A. 255, and note; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *McNally v. Colwell*, 91 Mich. 527, 52 N. W. 70, 30 Am. St. Rep. 494, and note; *Needham v. King*, 95 Mich. 308, 54 N. W. 891. In *Illinois Central Railroad Co. v. Siler*, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, this court held that the act of a railroad company in setting fire to grass along its right of way—which the plaintiff's intestate, using due care for her safety, attempted to suppress and prevent from setting fire to her dwelling, but was burned to death by her clothes being ignited—was the proximate cause of said death, for which the railroad was liable. In *Houren v. Chicago, Milwaukee & St. Paul Railway Co.*, 236 Ill. 620, 86 N. E. 611; 20 L. R. A. (N. S.) 1110, 127 Am. St. Rep. 309, it was held that the damage caused by the spreading of fire, due to the inability of the fire department to reach the fire because of the blockading of a street crossing by a string of freight cars having no engine attached, was not too remote to be regarded as the proximate result of the railroad's negligence in blockading the crossing. What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. It only becomes a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference in the judgment of reasonable men in the inferences to be drawn therefrom. *Illinois Central Railroad Co. v. Siler*, supra; *Waschow v. Kelly Coal Co.*, 245 Ill. 516, 92 N. E. 808; *Fent v. Toledo, Peoria & Warsaw Railway Co.*, supra. On the evidence in this case, the court did not err in refusing to take the case from the jury.

Appellants insist that under the ruling of this court in *Toledo, Wabash & Western Railway Co. v. Muthersbaugh*, 71 Ill. 572, the jury should have been instructed to find a verdict in favor of the defendants. We cannot so hold. The rules of law laid down in that case do not in any way conflict with the authorities heretofore referred to. Each case must necessarily be decided on its own special facts.

It is next urged that the court committed reversible error in not instructing the jury to find for appellants on the second count, which it is claimed was based on said paragraph 18 of the Criminal Code; the argument being that said section applies to wild, uncultivated, and uninclosed lands, and not to such as are involved in this cause. We do not find it necessary to consider or decide this question. While the count did not specifically allege that the appellants were guilty of negligence which resulted in the injury, it did state facts from which the law will raise a duty, and show an omission of duty on their part, which resulted in the injury in question. When that is done, it is unnecessary to allege that the act was negligent. *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161; *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376, 62 N. E. 822. The count was therefore good, regardless of what should be the proper construction of said section of the Criminal Code.

Appellants also criticize the rulings of the trial court as to instructions. Substantially all of these criticisms are based upon the contentions which we have already considered. These instructions, while they may not all have been technically accurate, were in substantial harmony with the views we have expressed.

We find no reversible error in the record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(347 Ill. 418)

HEISEN v. ELLIS et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. PERPETUITIES (§ 4*)—CONSTRUCTION—VESTED OR CONTINGENT ESTATES—LEGACIES CHARGED ON REAL PROPERTY.

A will directed the executors to reduce the personality and a part of the realty to cash as soon after the death of the testatrix as could be done for a fair price, and, after the payment of the debts of the estate, to pay the bequests in the order named in the will, and, if the amount received from that source should be insufficient to pay all the bequests, the executors were directed to use the income from the remaining real estate to pay the balance, and by a residuary clause the testatrix devised and bequeathed to the executors all the remainder of the estate, real and personal, to be held by them in trust, to assign, transfer, and deliver it to a residuary legatee. *Held*, that the devise of the residue of the estate after the payment of debts and legacies referred only to the quantum of the estate devised, and not to the time

when the title should vest, and that the title vested in the executors immediately, subject only to the payment of any balance of the bequests, and hence there was no violation of the rule against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. § 7; Dec. Dig. § 4.*]

2. WILLS (§ 440*)—CONSTRUCTION—INTENTION OF TESTATOR.

It is the duty of the court in construing a will to ascertain the intention of the testator as disclosed by the instrument, and to give it such a construction as will carry the intention into effect.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 956; Dec. Dig. § 440.*]

3. WILLS (§ 629*)—CONSTRUCTION—CONSTRUCTION IN FAVOR OF VESTING.

Where estates, legal or equitable, are given by will, they will be construed as vesting immediately, unless the testator has clearly manifested an intention that they should be contingent on a future event.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.*]

4. WILLS (§ 470*)—CONSTRUCTION—INTENTION OF TESTATOR—ENTIRE WILL CONSIDERED.

In the construction of a will, the intention of a testator is to be ascertained from a consideration of the entire will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 988; Dec. Dig. § 470.*]

5. WILLS (§ 446*)—CONSTRUCTION—CONSTRUCTION TO RENDER VALID.

Where a will is susceptible of two constructions, one of which renders it valid and the other void, the court will, if it can do so without doing violence to the intention of the testator, adopt that construction which will render the will valid.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 962; Dec. Dig. § 446.*]

Error to Superior Court, Cook County; A. H. Chetlain, Judge.

Complaint by Charles C. Heisen against A. C. Ellis, Jr., and others, for the construction of a will. From the decree against her title and interest, the defendant Violet Hamblly brings error. Affirmed.

Robert F. Kolb, for plaintiff in error. Lackner, Butz & Miller, for defendants in error.

FARMER, J. Defendant in error, Charles C. Heisen, filed his bill in chancery against A. C. Ellis, Jr., and Lewis B. McCornick, as executors of the last will and testament of Jennie D. Thompson, deceased, and Lackner, Butz & Miller, their agents and attorneys in fact, praying an injunction restraining them from forfeiting a certain lease held by complainant to certain premises on Dearborn street, in the city of Chicago. The bill alleged that the complainant leased the premises May 1, 1891, from Mary Young, the then owner, for a term of 99 years, at an annual rental of \$3,000 payable in quarterly installments on the 1st day of May, August, November, and February of each year; that complainant took possession of the premises and afterwards Mary Young died, and Jennie D. Thompson became seised and possessed.

ed of said real estate; that about October 29, 1907, the said Jennie D. Thompson died leaving a will, in which Ellis and McCornick were named as executors, but the original bill alleged the will had not been probated and no letters testamentary had been issued thereon. The bill alleged that Lackner, Butz & Miller, acting as agents and attorneys for Ellis and McCornick, about October 18, 1909, served a written notice on complainant declaring his lease had been forfeited by reason of his default in the payment of the quarterly installment of rent due August 1, 1909, and on the same day said agents and attorneys demanded immediate possession of the premises, and began forcible detainer proceedings therefor in the municipal court of the city of Chicago. The bill alleged that the lease provided for forfeiture, without demand or notice, for default in the payment of rent for 30 days, but further alleged that all rent had been paid to August 1, 1909, and that many payments had been made after the time stipulated in the lease and the lessors and executors had never sought to forfeit it because of a failure to pay the rent in accordance with the provisions of the lease; that they never intimated they would take advantage of said clause, but, by repeatedly accepting payment long after it became due, they induced complainant to believe no advantage would be taken of his failure to pay the rent promptly according to the terms of the lease, and thereby induced him to exercise less vigilance and promptness in the payment of rent than he would otherwise have exercised; that his failure to pay the rent was not willful, but was due to inadvertence and oversight and to the long continued custom between the parties. The bill alleged the complainant had tendered the rent due, with interest thereon from the time it became due; that it had been refused by defendants, and the complainant brought it into court and made tender thereof. The bill further alleged complainant was preparing to erect a 20-story building upon the premises; that he was then having plans drawn and excavations for the foundations made, had entered into a contract for the razing of the old building on the said premises and the erection of a new one, and had arranged for a loan of \$1,500,000 therefor, at an expense of \$6,800, most, if not all of which facts defendants knew. The executors and Lackner, Butz & Miller were duly served with process and filed their answer. Afterwards, on March 7, 1910, Heisen filed an amended bill, in which he alleged that the will of Jennie D. Thompson was duly admitted to probate in the county of Salt Lake, Utah, November 23, 1907, and letters testamentary issued to Ellis and McCornick; that a duly authenticated copy of the will was filed in the probate court of Cook county, Ill., February 18, 1908. The will is set out in the bill. The will, which will be hereafter more fully referred to, provided for the payment of tes-

atrix's debts, the erection of a monument and the payment of six bequests in money, amounting, in the aggregate, to \$19,000, and the order in which said bequests should be paid. It authorized the executors to sell the testatrix's personal property and her real estate in Salt Lake City, Utah, for the payment of the debts, costs of the monument and the bequests, and the residue of her estate she devised to her executors, to be conveyed by them to the regents of the University of California. The bill then alleges that the estate attempted to be created in Ellis and McCornick is in violation of the rule against perpetuities and void; that Jennie D. Thompson died without issue and her next of kin is plaintiff in error, Violet Hambly, a sister of the testatrix, residing in Bradford, Pa.; that the executors had discharged all their duties as executors; that they had paid off the charges and liabilities of the estate, erected the monument, and had paid to the beneficiaries all the bequests made in the will; that, if the attempted disposition of the residuary estate was not void, the title thereto was not in the executors, but was in the regents of the University of California, and the executors had no power to declare a forfeiture of the lease; that, if the attempted disposition of the residuary estate is void, then the title thereto vested in plaintiff in error, Violet Hambly, as the sole heir of Jennie D. Thompson, deceased, and she would be entitled to the rents under the lease. The bill prayed a construction of the will and a determination whether the residuary clause of the will constituted a perpetuity and was therefore invalid, and whether the title vested in the regents of the University of California, and to whom, as successors in title, the complainant was authorized to pay the rent in the future. Plaintiff in error, Violet Hambly, and the regents of the University of California were made parties defendant to the amended bill.

On February 23, 1910, Heisen, the complainant, made an affidavit that Violet Hambly was a nonresident of the state of Illinois, and that she resided in the city of Bradford, state of Pennsylvania. The affidavit was sworn to before a notary public in Garland county, Ark., and was filed with the clerk of the court where the suit was pending on March 7, 1910. Publication was made of the pendency of the suit, and on March 28, 1910, notice was duly mailed by the clerk to Violet Hambly, addressed to her at her place of residence as stated in the affidavit. The executors, Lackner, Butz & Miller (their attorneys), and the regents of the University of California filed demurrers to the amended bill on March 25, 1910. Plaintiff in error was defaulted on May 4, 1910. On May 6, 1910, the demurrers were withdrawn and all the parties except plaintiff in error filed answers to the bill. A decree was then entered. The decree recites the service, by publication, on plaintiff in error, her default,

and a hearing of the case upon oral and documentary proofs offered in open court. The decree finds that the complainant was entitled to the relief prayed and enjoined the prosecution of the forceable detainer suit for the possession of the premises. The decree further finds that Ellis and McCornick had fully performed their duties under the will, and had conveyed, in accordance with its provisions, the title in fee of the premises to the regents of the University of California, subject to the terms of the lease held by complainant, who had paid all arrears of rent and was reinstated in all his rights in the premises, according to the terms and conditions of the lease, for the full remainder of the term. The decree further found that plaintiff in error had no right, title, or interest in said premises, or any part thereof and no right to receive the rent due or to become due thereafter. The decree was entered May 6, 1910, and on June 4th, which was during the same term of court, leave was given counsel for the plaintiff in error to file a certificate of evidence within thirty days. A motion was also made by plaintiff in error to vacate and set aside the default and decree, and this motion was continued to the next term of court, when it was overruled, and Violet Hambly has brought the case here for review by writ of error.

It is first contended that the court had no jurisdiction of the person of plaintiff in error, because, it is claimed, the affidavit of nonresidence was not filed within a reasonable time after it was sworn to in the state of Arkansas, and because it contained no certificate of the officer who administered the oath that he had authority, under the laws of the state of Arkansas, to administer an oath, and no evidence otherwise was produced of such authority in a notary public in said state of Arkansas, prior to the entry of the decree. We shall not determine this question, as the other branch of the case is the one the plaintiff in error is particularly desirous of having passed upon. In her brief her counsel say: "We are particularly desirous of having this court pass upon the question of whether or not the will of Jennie D. Thompson, deceased, violates the rule against perpetuities, because, if it does not, there is no need for Violet Hambly to further prosecute her suit, even though this decree must be reversed for want of jurisdiction over her." We therefore take up consideration of the important question involved in the case.

The first eight paragraphs of the will contain directions for the payment of the testatrix's debts, the erection of a monument, and certain money bequests. The ninth paragraph directs the order in which the money legacies should be paid. The tenth, eleventh, and twelfth paragraphs of the will are as follows:

"Tenth—I hereby direct and enjoin upon the executors of my estate to reduce to cash, as soon after my death as may be proper in

order to obtain a fair and reasonable price therefor, all my real estate situated in Salt Lake City, Utah, and also my personal estate, and from the proceeds thereof I direct my said executors to pay, first, all the indebtedness of my estate and to provide for the monument in this will specified; and second, to pay the above bequests in the order named herein. And if the proceeds of the sale of my said real estate shall be insufficient to pay all of said bequests, I direct my executors to use the income of my property situated on Dearborn street, Chicago, Illinois, to pay any balance on said bequests, or any of them.

"Eleventh—All the rest, residue and remainder of my estate, both real and personal and wherever situated, after the payment of said bequests as aforesaid, I give, devise and bequeath unto the executors of this my last will and testament, hereinafter named, to be held by them in trust for the following uses and purposes, namely: To assign, transfer, convey and deliver all of said property, both real and personal, unto the regents of the University of California as a perpetual endowment fund, to be known as and called the 'Willard D. Thompson Memorial Fund,' for the purpose of establishing and founding scholarships for the higher education of worthy young men and women residents of Utah and who shall have completed at least a four years' course at some high school of recognized standing. The beneficiaries of said memorial fund shall be ascertained and determined in such manner as may be prescribed and dictated by the said regents of the said University of California, or by the president and academic council, or committee thereof, of the said University of California. And whereas, a portion of my said real estate consists of real estate situated on Dearborn street, Chicago, Illinois, which is under lease for a term of ninety-nine years, about eighty years of which term are yet to run; and whereas the said real estate cannot be sold for any sum approximating the amount for which the same may be sold at or near the termination of said lease, it is my wish and desire, and I hereby enjoin and direct, that said Chicago real estate be not sold during the term or continuance of said lease, but that the income therefrom be devoted to the purposes of such memorial during the term of said lease, and that thereafter the said real estate be held and disposed of as shall then seem proper to the said regents of said University of California, for the education of young men and women of Utah, as aforesaid; but in no event shall the principal of said endowment fund be devoted to any purpose, it being my wish that only the income of such memorial fund be so used, in order that this endowment may be lasting.

"Twelfth—I hereby nominate, constitute and appoint A. C. Ellis, Jr., and Lewis B. McCornick, of Salt Lake City, Utah, as the executors and trustees of this my last will

and testament, hereby authorizing and empowering them to sell, compromise and adjust any claims due to my estate in such manner and upon such terms as they may deem best; also authorizing and empowering my said executors and trustees to execute and deliver deeds in fee simple to any real estate of which I may die seized, as aforesaid, and to do all that may be necessary in connection with my estate in order to carry out the provisions of this my last will and to cause the establishment of said memorial to my son."

No property other than the Dearborn street lot in Chicago, upon which Heisen has a long-term lease, is involved in this litigation. That property was attempted to be disposed of by the residuary paragraph of the will.

Plaintiff in error contends that the executors took no immediate title to the property under the will; that their title to the property in dispute was a future one, preceded by no other estate; that the time when the title was to vest in them was contingent upon the payment of the legacies provided in the will, which might or might not happen within a life in being at the time of the death of the testatrix and 21 years thereafter, and in case of a posthumous child a few months more, allowing for the period of gestation. Upon this ground, and no other, it is insisted that the devise made by the residuary paragraph of the will is void, as the event upon the happening of which the title is to vest in the executors is too remote and the devise violates the rule against perpetuities. We will treat the case as presented by counsel in their brief and argument.

It will be seen the tenth paragraph of the will directs the executors to reduce the personal estate and the Salt Lake City real estate of testatrix to cash as soon after her death as it can be done for a fair and reasonable price, and, after the payment of the debts and the cost of the monument, to pay the bequests in the order mentioned in the will, and, if the amount received from that source should be insufficient to pay all the said bequests, the executors are directed to use the income from the Chicago property to pay the balance. By the residuary paragraph the testatrix devised and bequeathed to the executors all the rest, residue, and remainder of her estate, real and personal, to be held by them in trust, for the purpose of assigning, transferring, and conveying it to the regents of the University of California. Plaintiff in error insists that the intention of the testatrix was, and the legal effect that should be given to the words used by her is, that the devise of the residue of her estate to the executors "after the payment of said bequests, as aforesaid," did not vest immediate title in the executors, but title was to vest in them only after the bequests were paid. The argument is made that Ellis and McCornick were made both executors and trustees, and that their rights and duties in these capacities were entirely different, that

they acted in the capacity and were clothed with the powers of executors until the legacies were paid, and then the title to the residuary estate was to vest in them as trustees, to be conveyed to the regents of the University of California. The word "trustees" is used in the twelfth paragraph of the will, but is not found anywhere else in that instrument, and we find no warrant for holding that the testatrix intended by the use of that word, in the sense and connection in which it was used, to appoint Ellis and McCornick trustees and vest them with title to property and duties to perform separate and distinct from their title and duties as executors. It will be observed that the devise in the residuary paragraph is to "the executors of this my last will and testament, hereinafter named," to be by them conveyed to the regents of the University of California. If they took any title under the devise, they took it as executors, and the powers conferred and duties enjoined upon them with reference to the property was in their capacity as executors.

We do not consider the construction of the will contended for by plaintiff in error the necessary or reasonable construction that should be given to that instrument. If the intention of the testatrix was that the title to her residuary estate should vest immediately in her executors, charged with and subject to the payment of the legacies, and the language used by her is sufficient to give effect to that intention, then it is not denied that plaintiff in error is without interest in the property. In our opinion the reasonable construction of the devise of the residue of testatrix's estate after the payment of the legacies has reference to the quantum of the estate devised, and not to the time when the title should vest. As we construe the will, the title vested in the executors immediately, subject to and charged with the payment of any balance of the legacies, except the Chicago property, and as to that, only the income from it was charged with such payment. There can be no doubt of the intention of the testatrix that the residuary estate should not go to plaintiff in error, but should go to the regents of the University of California. By her will testatrix gave plaintiff in error a legacy of \$5,000, and the bill alleges, and the decree finds, that all the legacies provided in the will had been paid to the legatees. If the construction be given the will contended for by plaintiff in error, then the intention of the testatrix must be defeated.

It is a familiar rule of construction that the law favors the vesting of estates rather than that they should be held contingent. *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. 287. In *Chapman v. Cheney*, 191 Ill. 574, 583, 61 N. E. 363, 366, this court said: "It is the duty of the court in construing a will to ascertain

as nearly as possible the intention of the testator as disclosed by the instrument, and to give it such a construction as will carry such intention into effect. It is, of course, true that the will cannot carry into effect the intention of the testator in violation of law, and, if any of the provisions of the will in controversy violate the rule against perpetuities, such provision or provisions must be declared void, for it is the duty of courts to enforce the rule, and not to fritter it away by adverse construction. But when a will is susceptible of either of two constructions without doing violence to the intention of the testator as disclosed by the instrument, one of which would render the instrument void and the other valid, that construction should be adopted which would enforce the will as a valid instrument, and not that which would defeat its operation." In *Scofield v. Olcott*, 120 Ill. 362, 374, 11 N. E. 351, 354, the court said: "It has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent on a future event." This language was quoted with approval in *Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94.

Another rule in the construction of wills too familiar to require the citation of authorities is that the intention of the testator is to be ascertained from a consideration of the entire will, and, when ascertained, is to be given effect, unless it is in violation of a rule of law. If the language used by testatrix in her will attempted to create an estate that was in violation of the rule against perpetuities, the court would not, as said in *Chapman v. Cheney*, supra, be justified in frittering away the rule by adverse construction in order to give effect to the intention of the testatrix. Here, however, as we construe the will, the language meant to, and did, immediately vest title to the residuary estate in the executors, and to give it any other construction would defeat the intention of the testatrix. In our opinion the only reasonable construction to be given the language used in the will is that the title vested immediately in the executors and was not postponed to such time as the legacies should be paid. We do not think it is susceptible of any other construction, but, if it were, it is certainly susceptible of the construction we have placed upon it, and where a will is susceptible of two constructions, one of which will render it valid and the other void, courts will, if they can do so without doing violence to the intention of the testator, adopt the construction that will render the will valid. *Chapman v. Cheney*, supra; *Schuknecht v. Schultz*, 212 Ill. 43, 72 N. E. 37.

Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564, relied upon by the plaintiff in error, is not in conflict with the views we have expressed. In that case the testator devised a farm to his executor, to hold for the space of 25 years "from and after the date of the probate of this will," and it was held that the title of the executor could not vest until the will was probated. There was no other clause or provision in the will that indicated he intended the title to vest before that event. In the will before us, as we have before said, the will vests title immediately in the executors.

The superior court properly held that plaintiff in error had no title or interest in the property in controversy, and its decree is affirmed.

Decree affirmed.

(247 Ill. 523)

DONALDSON v. VILLAGE OF DIETERICH.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. APPEAL AND ERROR (§ 1095*)—FINDINGS—CONCLUSIVENESS.

When the Appellate Court finds the facts different from the trial court, and incorporates a finding of the ultimate facts in its judgment, the Supreme Court is bound by such finding, and cannot review the evidence to determine whether it justifies the same, though it may determine whether the Appellate Court properly applied the law to the facts as found by it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. § 1095.*]

2. APPEAL AND ERROR (§ 1095*)—FINDINGS—CONCLUSIVENESS.

A finding by the Appellate Court that defendant had a village attorney de facto, and that no notice such as is required by Acts 1905, p. 111, § 2 (Hurd's Rev. St. 1909, c. 70, § 7), concerning personal injury suits against cities, etc., was filed by plaintiff in the office of such village attorney, was conclusive on the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4268, 4329, 4330; Dec. Dig. § 1095.*]

3. MUNICIPAL CORPORATIONS (§ 812*)—ACTIONS—PERSONAL INJURIES—NOTICE—SERVICE—STATUTORY PROVISIONS—"CITY ATTORNEY."

Acts 1905, p. 111, § 2 (Hurd's Rev. St. 1909, c. 70, § 7), requires one, about to sue a city, village, etc., for personal injuries, to within six months, etc., file in the office of the city attorney (if there be one), and also in the office of the city clerk, a written statement, giving the name of the person injured, the date and place where the accident occurred, etc. Section 8 (Hurd's Rev. St. 1909, c. 70, § 8) provides that, if the notice is not filed, the suit shall be dismissed and the action be forever barred. Held, that the city or village attorney referred to must be a licensed attorney having an office or place of business, and where a village has no such attorney the notice may be served on the village clerk.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1704; Dec. Dig. § 812.*]

4. APPEAL AND ERROR (§ 1122*)—FINDING OF FACTS—DUTY OF APPELLATE COURT.

It is the duty of the Appellate Court, on making a finding of facts, to recite in its judgment all the ultimate facts concerning every material issue submitted to the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4420; Dec. Dig. § 1122.*]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Effingham County; Thomas M. Jett, Judge.

Action by Frank Donaldson, administrator, against the Village of Dieterich. A judgment for plaintiff in the circuit court was reversed by the Appellate Court, which thereafter granted a certificate of importance, and plaintiff appeals. Judgment of Appellate Court reversed, and judgment of circuit court affirmed.

R. C. Harrah, for appellant. S. F. Gilmore (Wood Bros. & Rickleman, of counsel), for appellee.

HAND, J. This was an action on the case, commenced by the appellant in the circuit court of Effingham county against the appellee to recover damages for the death of his intestate, John Donaldson, alleged to have been caused by a defective street in the appellee village, over which said John Donaldson was driving a span of mules hitched to a wagon. The declaration contained two counts, and among other things stated that the appellant had given the notice required by section 2 of "An act concerning suits at law for personal injuries and against cities, villages and towns" (Hurd's Rev. St. 1909, p. 1248), by filing the same in the office of the clerk of the appellee, and averred that the appellee had no village attorney at the time he filed said notice with the city clerk. The general issue was filed, and upon a trial a verdict was returned in favor of the appellant for the sum of \$500, upon which verdict the court, having overruled a motion for a new trial, rendered judgment in favor of the appellant. The appellee prosecuted an appeal to the Appellate Court for the Fourth District, where the judgment of the circuit court was reversed, without remanding the cause. The Appellate Court incorporated in its judgment the following finding of facts: "We find as ultimate facts that at the time of the occurrence of the injuries which resulted in the death of the appellee's intestate, John Donaldson, and for more than six months thereafter, Charles A. Field was a village attorney de facto of the said village of Dieterich, and that no notice, such as is required by section 2 of the act of 1906, concerning suits at law for personal injuries against cities, villages, and towns, was filed in the office of said city attorney within said six months." The Appellate Court having

granted a certificate of importance, the appellant has prosecuted this appeal.

When the Appellate Court finds the facts different from the trial court, and incorporates a finding of the ultimate facts in its judgment, this court is bound by such finding of facts, and cannot review the evidence for the purpose of determining whether the finding is justified by the evidence. This court may, however, conceding the finding of facts to be true, determine whether the Appellate Court properly applied the law to the facts as found by it. In this case the Appellate Court found that the appellee had a village attorney de facto, and that no notice such as is required by section 2 of the act of 1906, concerning suits for personal injuries against cities, villages, and towns, was filed in the office of said village attorney, within six months from the date of the injury, by the appellant, and that for that reason there could be no recovery. Under the practice governing the review, in this court, of appeals from the Appellate Court, this court is powerless to determine whether the appellee had a village attorney de facto, or whether a notice was filed in the office of the said village attorney. Upon those questions the court is bound by the finding of the Appellate Court. We may, however, determine the question whether it is necessary to file the notice provided by said section 2 in the office of a de facto village attorney who has no regular office where he does business.

The section of the statute requiring such notice to be filed in the office of the village attorney reads as follows: "Sec. 2. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

This section of the statute is quite drastic, and the succeeding section provides that if the notice is not filed as provided to be by section 2 of said act the suit shall be dismissed, and the person to whom such action shall have accrued for a personal injury shall be forever barred from further suing upon said cause of action. We think this statute should be strictly construed, and that for a city, village, or town to avail itself of the provisions of the said statute it should clearly be made to appear that there was an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

attorney duly appointed for the municipality who has an office at a fixed place, so that a person who has been injured by the negligence of the city, village, or town may know with reasonable certainty with whom and in what place to file the notice required to be filed by the statute; otherwise, the injured person might be defeated upon a just claim by reason of the fact that he was unable to determine with whom to file such notice.

It is provided by the statute that the president and board of trustees of a village may appoint a village attorney, and that such village attorney shall qualify by giving bond and taking the oath of office. If a village desires to avail itself of the provisions of section 2 of the act of 1905, we are of the opinion it must make it appear that it has a village attorney, and that the village attorney has an office at some known place, where the notice required by the statute may be served by filing such notice in the office of the village attorney. The object of the statute is to furnish timely notice to the city, village or town of the fact that the party claims to have sustained an injury and that he proposes to enforce his claim for damages against the said city, village, or town by suit, and thereby enable said city, village, or town to investigate the claim while the facts are fresh and the justice of the claim can be readily ascertained. While the statute is a wholesome measure, it ought not to be so construed as to defeat the claims of persons who have just demands against a city, village, or town, by requiring such claimants to serve the statutory notice upon a party who claims to be the de facto attorney of the city, village, or town, and who may be a butcher, an undertaker, a blacksmith, or a grocer, and who has no office other than in his hat, and who has never appeared for the city, village, or town, as its legal representative, in a court of record, but who may on one or two occasions have appeared before a police magistrate for the said city, village, or town and prosecuted some one for being drunk or disorderly. It is obvious that the statute used the words "city attorney" in the sense of a licensed lawyer; and to accommodate those cities, villages, and towns who do not desire to employ resident attorneys, the statute has provided that a city, village, or town may employ as an attorney one who resides out-

side of the corporate limits of the city, village, or town.

We are constrained to hold that the city or village attorney referred to in section 2 of the act of 1905 must be a licensed attorney, and must have an office or place of business where he can be found, and that in a case where a village has no regular village attorney who maintains an office, the service of the notice required by section 2 of the act of 1905 may be had upon the village clerk, by filing the same in his office. The Appellate Court erred in holding that, because the appellee had a de facto village attorney and no notice of the claim of appellant had been filed in his office, appellant was barred of his action. The Appellate Court, therefore, improperly applied the law to the facts found by it.

It will be observed that the statute provides that the notice required by section 2 of the act of 1905 shall be in writing and shall be filed in the office of the village attorney. The Appellate Court found appellee had a de facto village attorney, but it did not find that the de facto attorney of the appellee had an office. It appears from the record that the person said to be the de facto attorney of the village was not a licensed attorney, that he had never represented the appellee in a court of record, and that his only connection as an attorney with the village was that he had on one or more occasions appeared before a police magistrate on behalf of the village and prosecuted some one for being drunk and disorderly. It was the duty of the Appellate Court, when it undertook to make a finding of facts, to recite in its judgment all the ultimate facts concerning every material issue submitted to the trial court; otherwise, a judgment in favor of the plaintiff might be reversed by the Appellate Court on one issue, while on an issue not considered by that court the trial court decided properly in favor of the plaintiff. *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 14 N. E. 606. The Appellate Court did not find that the de facto village attorney of the appellee had an office where the notice could be filed. It therefore did not find the facts upon every material issue involved in the trial court.

The judgment of the Appellate Court will be reversed, and the judgment of the circuit court will be affirmed.

Judgment of Appellate Court reversed.

(247 Ill. 445)

PEOPLE ex rel. REA, County Collector, v.
CHICAGO, I. & ST. L. SHORT
LINE R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

APPEAL AND ERROR (§ 549*)—BILL OF EXCEPTIONS—PRESERVING EXCEPTIONS.

The record not showing the preservation of any exception by the bill of exceptions, the overruling of objections and rendering judgment cannot be reviewed, though the abstract of the judgment order recites the taking of exception to the ruling in entering judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.*]

Appeal from Montgomery County Court; John L. Dryer, Judge.

Proceeding by the People, on the relation of John W. Rea, County Collector, against the Chicago, Indianapolis & St. Louis Short Line Railroad Company to enforce taxes. From an adverse judgment, defendant appeals. Affirmed.

George B. Gillespie, L. J. Hackney, Gillespie & Fitzgerald, and D. R. Kinder, for appellant. W. H. Stead, Atty. Gen., and Harry C. Stuttle, State's Atty., for appellee.

PER CURIAM. This is an appeal from a judgment of the county court of Montgomery county overruling objections to certain items of taxes levied for county purposes and rendering judgment against appellant therefor. The grounds of the objections are that the purposes for which the several items of taxes were levied were not sufficiently stated to comply with the statute.

It does not appear from the abstract that the correctness of the decision of the county court in overruling the objections and rendering judgment is preserved for our review by bill of exceptions. The abstract of the judgment order recites that appellant excepted to the ruling of the court in entering judgment, but no exception is shown to have been preserved by the bill of exceptions. The record in this respect is in the same condition as the record in *People v. Chicago, Indianapolis & St. Louis Short Line Railway Co.*, 243 Ill. 221, 90 N. E. 381.

The judgment is therefore affirmed.

Judgment affirmed.

(248 Ill. 92)

McINTURFF et al. v. INSURANCE CO. OF
NORTH AMERICA.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. EVIDENCE (§ 575*)—CRIMINAL LAW (§ 545*)
—EVIDENCE AT FORMER TRIAL—DEATH OF
WITNESS.

Evidence given at a former trial of the same action by a witness dying before a retrial is admissible on the subsequent trial, provided the person against whom the evidence is given therein had the opportunity to cross-examine the witness, and the issues were substantially the same in both actions, and the

proceeding, if civil, was between the same parties or their representatives in interest, or, in a criminal case, if the same person is charged upon the same state of facts; a mere nominal change of parties in the second action being immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2407-2409; Dec. Dig. § 575;* Criminal Law, Cent. Dig. § 1235; Dec. Dig. § 545.*]

2. APPEAL AND ERROR (§ 1094*)—REVIEW—APPEAL FROM APPELLATE COURT—QUESTIONS CONSIDERED—WEIGHT OF EVIDENCE.

On reviewing an affirmance by the Appellate Court, the Supreme Court cannot review the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

3. APPEAL AND ERROR (§ 1094*)—REVIEW—QUESTIONS REVIEWED—FACT QUESTIONS—APPEAL FROM APPELLATE COURT.

On review by the Supreme Court of a judgment of affirmance by the Appellate Court, in an action on a fire policy, the Supreme Court will not review the question whether defendant by its conduct waived proof of loss; that being a mixed question of law and fact, which was conclusively decided by the judgment of the Appellate Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4350; Dec. Dig. § 1094.*]

4. EVIDENCE (§ 577½*)—EVIDENCE IN OTHER PROCEEDINGS—IDENTITY OF ISSUES.

Evidence of a certain witness given in a criminal prosecution of plaintiffs for burning their property, which tended to incriminate them, was not admissible in a subsequent action by plaintiffs on the insurance policy, though the witness testifying in the criminal case was then dead; the fact that plaintiffs in the criminal case had an opportunity to examine such witness not making it admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2410; Dec. Dig. § 577½.*]

5. EVIDENCE (§ 596*)—SUFFICIENCY OF EVIDENCE—PROOF OF CRIMINAL OFFENSE.

Where the pleadings in a civil case allege facts showing a criminal offense, such offense must be proved beyond a reasonable doubt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2447; Dec. Dig. § 596.*]

6. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—INSTRUCTION.

Plaintiff in error cannot complain of instructions as to the quantity of proof required to prove certain facts, where it procured instructions to be given charging the same rule as to the quantity of proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

Error to Appellate Court, Fourth District, on Appeal from Circuit Court, Pulaski County; W. W. Duncan, Judge.

Action by John McInturff and another against the Insurance Company of North America. Judgment of the Appellate Court affirming the judgment for plaintiffs, and defendant brings error. Judgment affirmed.

W. A. Spann and George E. Martin, for plaintiff in error. W. E. Wall, for defendants in error.

VICKERS, C. J. Defendants in error recovered a judgment in the circuit court of

Pulaski county for \$3,952.23 for a loss by fire of property covered by insurance written by an agent of plaintiff in error, and that judgment has been affirmed by the Appellate Court for the Fourth district. The record has been transferred to this court for a review by certiorari.

The only questions which are not conclusively settled by the judgment of affirmance in the Appellate Court arise on the exceptions of plaintiff in error preserved to the rulings of the trial court in excluding certain evidence offered by plaintiff in error and to the giving of an instruction on behalf of the defendants in error.

The property insured was burned on March 13, 1908. At the April term, 1908, of the Pulaski county circuit court the grand jury returned an indictment against John McInturff and his wife, Sarah, charging them with feloniously and willfully setting fire to and burning the property covered by the insurance, with an intent to damage and defraud plaintiff in error. On the trial of the defendants in error on said charge Thomas Blay was called as a witness for the state and gave much damaging testimony, tending to prove that defendants in error were guilty of the criminal charge against them. Defendants in error were acquitted of the criminal offense. After the trial of the criminal case, and before the trial of the case at bar, defendant in error John McInturff shot and killed the witness Thomas Blay. In the present action defendants in error sued plaintiff in error in assumpsit, the declaration consisting of two special counts on the policies, to which are added the common counts. Plaintiff in error filed a plea of the general issue, accompanied with notice of special defenses as follows: (1) That defendants in error willfully burned the insured property with the intent to defraud plaintiff in error; (2) that defendants in error caused said house to be burned with intent to defraud, etc.; (3) that defendants in error made false and fraudulent representations, after the fire, as to property lost and damaged, with an intent to defraud; (4) that defendants in error failed and refused to furnish proofs of loss, as required by the said policies; and (5) that defendants in error furnished to the appraisers a list of property which they did not own, with intent to defraud. The case was finally tried upon a stipulation that all matter that would be competent under properly drawn pleas might be introduced in evidence under the general issue. Upon the trial of the issues thus formed, plaintiff in error, after making proof of the death of the witness Blay, offered to introduce his testimony given on the trial of the criminal case against the defendants in error. The court below sustained an objection to this testimony, and an exception to that ruling presents the first question for our consideration.

There is a general agreement of authorities that evidence given on a former trial of

the same action, or a former action involving the same issues between the same parties, is admissible if it be established that the witness is dead. 8 Greenleaf on Evidence, §§ 328, 341, 342; 1 Elliott on Evidence, § 499; *Ruch v. City of Rock Island*, 97 U. S. 693, 24 L. Ed. 1101; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Doyle v. Wiley*, 15 Ill. 576; *Wade v. King*, 19 Ill. 301; *Goodrich v. Hanson*, 33 Ill. 498; *Chicago & Eastern Illinois Railroad Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263.

Elliott, in his work on Evidence (volume 1, § 495), after stating the general rule as above, states the following limitations to its application: It is necessary, says this learned author, "(a) that the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; (b) that the questions in issue were substantially the same in the first as in the second proceeding; (c) that the proceeding, if civil, was between the same parties or their representatives in interest; (d) that in criminal cases the same person is accused upon the same facts." And he cites numerous authorities to support the text. An examination of the authorities will show that the only point of divergence concerns the requirement of the rule as stated by Mr. Elliott, that the parties to both actions should be identical.

Section 163a of the sixteenth edition of Greenleaf on Evidence, which was enlarged and annotated by Prof. Wigmore in 1899, reads, in part, as follows: "As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination. Consequently a change of parties which does not affect such a loss does not prevent the use of the testimony—as, for example, a change by which one of the opponents is omitted or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, are so privy in interest—as, where one was an executor or perhaps a grantor—that the same motive and need for cross-examination existed." This paragraph is not in the original text of Greenleaf, but is added by the annotator. If this paragraph is read as laying down the rule broadly that a fair opportunity for cross-examination by the party against whom the evidence is offered is all that is necessary to render it admissible, then the overwhelming weight of authority is against the accuracy of the rule as stated; but if it is read, as no doubt its author intended it should be, as stating the rule that a mere nominal change of parties is of no consequence provided the parties in the second action are so privy in interest with those on the former trial that the same motive and need for cross-examination existed, then the rule stated is in accord with the great weight of authority.

Plaintiff in error insists that the admissi-

bility of this class of evidence turns on the right of the party against whom it is offered to be present and cross-examine the witness, rather than on the identity of the parties. The test, it is said, is whether or not the party against whom the evidence is offered was a party on the former trial, and had the right to cross-examine the witness. In support of this contention, the plaintiff in error relies on *Charlesworth v. Tinker*, 18 Wis. 633, *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059, and other authorities. In the Wisconsin case the deceased witness had testified on a prosecution against a defendant for an assault, and the court permitted the testimony to be read upon the trial of a civil action against the same defendant for the same assault. The decision is based upon a statute of Wisconsin, which permits the complainant in a criminal prosecution for assault and battery to control the prosecution, and examine all witnesses that are sworn on the trial. This case is not an authority of any persuasive force except in states having a statute similar to the one upon which the court bases its decision. The Iowa case seems to lend some support to the contention of plaintiff in error. In that case the Iowa court holds that the testimony of a deceased witness given on the trial of an indictment for an assault is competent in a civil action based upon the same assault. The opinion in that case is very brief, and does not disclose whether a statute similar to the Wisconsin statute was in force in that state. The only authorities cited by the Iowa court is the Wisconsin case, which has already been considered, and section 164 of Greenleaf. The citation from Greenleaf does not support the proposition announced in the opinion. The other cases cited by plaintiff in error have been examined, and none of them appear to go to the extent of the two cases above referred to. The three Illinois cases cited (*Wade v. King*, 19 Ill. 301, *Goodrich v. Hanson*, 33 Ill. 498, and *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495) do not support plaintiff in error's contention, but in so far as the question is considered those cases are in harmony with the rule laid down by Mr. Elliott, to the effect that, in order to render the testimony of the deceased witness admissible on a second trial, it is necessary that there should be a substantial identity of parties, at least in interest, with the parties on the trial in which the testimony was given. The following cases support the rule that the parties must be substantially the same, or privies in blood, in law or in estate: *Goodlett v. Kelly*, 74 Ala. 220; *Smith v. Keyser*, 115 Ala. 455, 22 South. 149; *Wright v. Cumpsty*, 41 Pa. 102; *Orr v. Hadley*, 36 N. H. 575; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415; *Yale v. Comstock*, 112 Mass. 267; *Jackson v. Lawson*, 15 Johns. (N. Y.) 539; 1 *Phillips on Evidence* (10th Ed.) 306; 2 *Best on Evidence*, § 496.

A case very similar to the one at bar is

Harger v. Thomas, 44 Pa. 128, 84 Am. Dec. 422, which was an action on a note, and the record of the prosecution of the plaintiff in error, Harger, for the forgery of the same note, and the testimony of a number of witnesses given in the criminal prosecution, who were dead, was offered in evidence in the civil suit. The court refused to admit either the record or the evidence given on the former trial, and in disposing of that question said: "The rule on this point is thus stated by Mr. Justice Yeates in *Miles v. O'Hara*, 4 Bin. (Pa.) 108, where he says: 'It is a settled rule of law that what a witness has sworn on a former trial between the same parties for the same cause of action may be given in evidence in case of his death.' *Phillips on Evidence* (volume 1, p. 337 [3d Am. Ed.]) is to the same effect, but the rule is a little more exactly stated. It is thus: 'Where the witness has been examined on trial at a former action between the same parties, where the point in issue was the same in the second trial, there his testimony may be proved, if deceased.' * * * A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner. * * * The issue is between the government and the prisoner on a question of guilt or innocence of the latter. It is not a question of property. Very different is the issue, as also the parties, in a civil suit to recover on a forged instrument." The conclusion was reached that the court had erred in admitting the evidence in the criminal trial.

We do not deem it necessary to go further into the authorities upon this question. The testimony given by the deceased witness, Blay, on the trial of the indictment of defendants in error, was properly excluded by the court on the trial of the civil action on the policies of insurance. We think this rule is established by a very decided weight of authority, and is supported by good reason as well. If the rule contended for by plaintiff in error were good law, then in an action against a carrier by a passenger for a personal injury the testimony of a witness since deceased would be admissible against the same carrier for an injury sustained in the same accident by another passenger, an employé, a licensee, or a trespasser, simply because the carrier against whom the testimony was offered had on the former trial an opportunity to cross-examine the witness. This rule would carry us too far afield for proof, and we cannot sanction it.

The question as to the weight of the evidence, discussed by the plaintiff in error, is not open for review in this court. Neither is the question concerning the waiver of proofs of loss. Whether or not the conduct of the plaintiff in error amounted to a waiver of proofs of loss is a mixed question of law and fact, upon which the decision of the Appellate Court is final.

The court instructed the jury that plaintiff in error was required to prove, beyond a reasonable doubt, that defendants in error burner or caused the property to be burned before such defense could be regarded as established, and complaint is made of this ruling. In *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, this court, on page 612, 22 N. E. 489, on page 492, said: "Appellant not only interposed the defenses its policy was void because there was other insurance on the property and because the house was vacant and unoccupied, but made the further defense that appellee himself set fire to the building. Where, in a civil action, a criminal act is charged, the authorities are in conflict upon the question whether the rule applicable to a criminal prosecution or that applicable to a civil suit should prevail in respect to the degree of proof required. In this state it has been held that where, in civil cases, a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt. *Crandall v. Dawson*, 1 Gillman, 556; *McConnel v. Mutual Ins. Co.*, 18 Ill. 228; *Sprague v. Dodge*, 48 Ill. 142 [95 Am. Dec. 523]; *Harbison v. Shook*, 41 Ill. 141."

There is, however, another satisfactory answer to the contention of plaintiff in error in this regard. Plaintiff in error, by its eighth, ninth, fifteenth, and sixteenth instructions, procured the trial court to declare the same rule as to the quantity of proof required as that laid down in the instruction complained of. A party cannot complain of an error in instructions when the same error is found in the instructions offered by the complaining party. *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 597)

MIHALIK v. GLOS et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. RECORDS (§ 9*)—REGISTRATION—PLEADING—MATERIAL ALLEGATION.

In a proceeding to register a title to real estate, an allegation in the application that the applicant resided upon such real estate was material, and must be proved.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

2. RECORDS (§ 9*)—REGISTRATION—EVIDENCE—WEIGHT AND SUFFICIENCY.

In a proceeding to register title to real estate, evidence held insufficient to prove that applicant resided upon such real estate.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

3. RECORDS (§ 9*)—REGISTRATION—CONDITIONS PRECEDENT.

In a proceeding to register title to real estate, it was error for the court to register the title, and to set aside tax deeds as clouds upon the title, on the condition that such tax deeds should be discharged by payment within 30 days

after the decree, for that payment should have been made a condition precedent to securing the decree.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

4. STATUTES (§ 85*)—SPECIAL LEGISLATION—TORRENS LAW.

Torrens Law, § 18, which is the amendment of 1907 (Hurd's Rev. St. 1900, c. 30, § 61), and which authorizes the examiner to receive abstracts of title in evidence, is not unconstitutional, as being in violation of Const. art. 3, § 29, providing that all laws relating to courts shall be general and uniform.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. § 85.*]

5. CONSTITUTIONAL LAW (§ 311*)—DUE PROCESS OF LAW—RULES OF EVIDENCE.

Such statute is not unconstitutional, as making the abstract evidence without the sanction of an oath.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932; Dec. Dig. § 311.*]

6. STATUTES (§ 35½*)—SUBMISSION TO POPULAR VOTE.

Nor is such amendment invalid, because it was not submitted to a vote of the people.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.*]

Appeal from Circuit Court, Cook County; Adelor J. Petit, Judge.

Application by Daniel Mihalik to register title to real estate, to which Jacob Glos and others protested. From a decree for applicant, protestants appeal. Reversed and remanded.

John R. O'Connor, for appellants. Edward R. Litzinger, for appellee.

COOKE, J. This is an appeal from a decree of the circuit court of Cook county registering title to real estate. The premises described in the application are lots 38 and 39, in block 15, in Adam Smith's subdivision of the E. ½ of the N. W. ¼ of the S. W. ¼ and the S. W. ¼ of the S. W. ¼ of section 36, township 39 N., range 13 E. of the third principal meridian. It is alleged that the premises are occupied by the applicant, appellee here.

Appellants contend that the property described in the application was not identified as the property upon which the appellee resided. Appellee testified that he lives on the property at No. 3134 West Thirty-Ninth street, in the city of Chicago; that his property consists of two lots; that the house in which he resides is located upon one lot, No. 39; and that the two lots are fenced in as one inclosure. On his cross-examination he produced a plat, which he testified he had made himself from measurements made the day before. He testified that this plat contained a "picture" of the cottage in which he lived. On the plat were shown two lots on Thirty-Ninth street, bearing the numbers 38 and 39. The "picture" of the cottage referred to by the witness is drawn on two other lots, not located on Thirty-Ninth street, but which also bear the numbers 38 and 39.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

So far as the plat itself indicates, the lots 38 and 39 on Thirty-Ninth street are vacant. Nowhere in his examination does appellee testify that he resides upon the property described in the application. It was further sought to identify the premises at 3134 West Thirty-Ninth street as the real estate described in the application, by Joseph K. Kostka, an employé in the map department of the city of Chicago. He testified that, when given a house number, he could from that give the legal description of the property, and then stated that the legal description of the property at 3134 West Thirty-Ninth street would be that of one lot only, and would be either lot 38 or lot 39. This, in substance, is all that this witness testified to. He did not state in what addition or subdivision lot 38 or lot 39 at 3134 West Thirty-Ninth street was located, and his testimony did not serve in the least to identify the property at 3134 West Thirty-Ninth street, and upon which appellee testified he resides, as the property described in the application. The allegation that the premises described in the application were occupied by appellee is a material allegation, and must be proved as alleged. Appellee failed to make this proof, and the court erred in entering a decree registering the title as applied for.

Appellants also contend that the court erred in directing the immediate registration of the title in the appellee, without requiring the holders of the tax deeds to be reimbursed as a condition precedent. The decree provides that the tax deeds be set aside as clouds upon the title of appellee upon condition that appellee pay to the holders of the tax deeds the amounts found to be due for principal and interest, together with costs, at the date of the entry of the decree or within 30 days thereafter, and that in default thereof this application shall stand dismissed at the cost of appellee; that the title of ap-

pellee in fee simple to the premises be confirmed, subject as aforesaid; and that the registrar of titles do forthwith register such title. This was error. The decree should have provided, not only as a condition precedent to setting aside the tax deeds, but also as a condition precedent to registering the title, that appellee be required to pay the money due to appellants, or, in the event of their refusal to accept it, to an officer of the court, subject to their order. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418. This decree directs the registration of the title forthwith without any condition, and affords no protection whatever to appellants as to the payment of their money during the 30 days granted appellee to pay the same. Should appellee transfer the property before the expiration of the 30 days, and without making payment to the appellants, they would be compelled to resort to their legal remedy for redress.

Appellants also insist that the amendment to section 18 of the Torrens law, being the amendment of 1907 (Hurd's Rev. St. 1909, c. 30, § 61), which authorizes the examiner to receive abstracts of title in evidence, was not within the power of the Legislature, because such abstracts constitute evidence given without the sanction of an oath; that said amendment of 1907 violates section 29 of article 6 of the Constitution, which provides that all laws relating to courts shall be general and of uniform operation, and that said amendment to section 18 never became operative, because it was not submitted to a vote of the people. These questions were all decided adversely to the contentions of the appellants in *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974.

The decree of the circuit court is reversed, and the cause remanded for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

MEMORANDUM DECISIONS

(200 N. Y. 501)

AITKEN, Appellant, v. YOUNG et al., Respondents. (Court of Appeals of New York. Nov. 22, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (130 App. Div. 897, 115 N. Y. Supp. 1108), entered February 19, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover a surplus alleged to have remained from a sale on execution after satisfaction of judgment. John Aitken, in pro. per. Albert Ritchie, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

(199 N. Y. 597)

ALTMAN, Respondent, v. MERONI, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 931, 116 N. Y. Supp. 1130), entered April 21, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover for goods alleged to have been sold and delivered. See, also, 117 App. Div. 921, 102 N. Y. Supp. 1126. I. Henry Harris, for appellant. Solomon Hanford, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 574)

AMERICAN FERROFIX BRAZING CO., Respondent, v. POTTER et al., Appellants. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (133 App. Div. 938, 117 N. Y. Supp. 1128), entered June 7, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover upon a promissory note. See, also, 125 App. Div. 900, 109 N. Y. Supp. 1123. S. D. Bentley, for appellants. William W. Armstrong, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 564)

ANGERMILLER, Appellant, v. BWALD, Respondent. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 691, 118 N. Y. Supp. 195), entered July 15, 1909, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial in an action to impress a trust on the proceeds of certain real property. Oliver C. Carpenter, Charles P. Rogers, and Vincente K. Smith, for appellant. Oscar Lowenstein and Melville H. Cane, for respondent.

PER CURIAM. Plaintiff given permission to withdraw appeal on payment within 20 days

of costs of appeal to be taxed. On failure to make such payment within said time the order is affirmed, and judgment absolute ordered on the stipulation against appellant, with costs in all courts.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 592)

ANNESS, Respondent, v. ROCHESTER RY. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (129 App. Div. 933, 114 N. Y. Supp. 1118), entered January 13, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. W. A. Matson, for appellant. George A. Carnahan and Elbridge L. Adams, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 596)

ARNOLD, Respondent, v. CENTRAL NEW ENGLAND RY. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 913, 117 N. Y. Supp. 1128), entered June 11, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the killing of a horse through the alleged negligence of defendant. Charles M. Sheafe, Jr., for appellant. W. Farrington and George Card, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 577)

BARKER, Respondent, v. BARKER, Appellant (two cases). (Court of Appeals of New York. Oct. 25, 1910.) Appeal, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 889, 118 N. Y. Supp. 1093), entered June 7, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover an installment alleged to be due under a separation agreement between husband and wife. See, also, 131 App. Div. 934, 116 N. Y. Supp. 1130. Abram F. Servin and Rosslyn M. Cox, for appellant. Edwin A. Jones, for respondent.

PER CURIAM. Judgments affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 591)

BERLIN CONST. CO., Appellant, v. WATERVLIET FOUNDRY & MACHINE CO., Respondent. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (132 App.

Div. 937, 116 N. Y. Supp. 1131), entered May 25, 1909, affirming a judgment in favor of defendant entered upon the report of a referee in an action to foreclose a mechanic's lien. Andrew J. Nellis, for appellant. Samuel Foster and S. W. Russell, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 551)

BIEHL, Appellant, v. ERIE R. CO., Respondent. (Court of Appeals of New York. Oct. 4, 1910.) Motion for leave to withdraw appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (132 App. Div. 364, 116 N. Y. Supp. 621), entered May 14, 1909, reversing a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granting a new trial in an action to recover for personal injuries alleged to have been sustained through the defendant's negligence. The motion was made upon the ground that the appeal had been inadvertently taken. See, also, 130 App. Div. 884, 114 N. Y. Supp. 1119; 133 App. Div. 929, 118 N. Y. Supp. 1095. Rosslyn M. Cox, for the motion. Philip A. Rorty, opposed.

PER CURIAM. Motion granted, on payment within 20 days of the costs and disbursements of this appeal, including argument fee, and \$10 costs of this motion. On failure to make such payment, the motion is denied, with \$10 costs.

(199 N. Y. 576)

EBINGER, Respondent, v. SYRACUSE RAPID TRANSIT RY. Co., Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 947, 117 N. Y. Supp. 1133), entered May 24, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Charles E. Spencer, for appellant. W. B. Matteson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 580)

EMPIRE LESTONE CO., Appellant, v. CITY OF BUFFALO, Respondent. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 914, 112 N. Y. Supp. 1128), entered November 16, 1908, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial in an action to recover for damages to a vessel chartered by defendant, alleged to have been occasioned by said defendant's negligence. George L. Hager and Charles A. Pooley, for appellant. George E. Pierce and Clark H. Hammond, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 595)

GOLDENTHAL et al., Respondents, v. POPPER, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme

Court in the First Judicial Department (130 App. Div. 902, 115 N. Y. Supp. 1122), entered February 28, 1909, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for goods alleged to have been sold and delivered. Joel Krone, for appellant. Eugene I. Yuells, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 547)

GOODALE, Respondent, v. CAREY, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 920, 117 N. Y. Supp. 1136), entered June 12, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract of sale. Frederick N. Van Zandt and Harry W. Moore, for appellant. Ernest W. Tooker, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. GRAY, J., absent.

(199 N. Y. 597)

GREER v. FREYSTADT. (Court of Appeals of New York. Nov. 15, 1910.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 939, 118 N. Y. Supp. 1109), entered October 6, 1909, upon the submission of a controversy, under section 1279 of the Code of Civil Procedure, as to whether defendant as tenant was bound to reimburse the plaintiff as landlord for the cost of installing and operating certain ventilating apparatus required under the labor law. Plaintiff recovered the cost of operation only. Omri F. Hibbard, for plaintiff. Benjamin H. Stern, for defendant.

PER CURIAM. Judgment affirmed, without costs.

GRAY, HAIGHT, VANN, and WERNER, JJ., concur. CULLEN, C. J., and CHASE, J., dissent.

(199 N. Y. 536)

HAIGHT, Respondent, v. DE VERASTEGUI, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 932, 118 N. Y. Supp. 1110), entered June 23, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on contract. Allan C. Rowe, for appellant. John J. Hughes, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 556)

HECHT, Respondent, v. A. G. HYDE & SONS, Appellant. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (123 N. Y. Supp. 1120), entered June 21, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action on contract. The motion was made upon

the grounds that the affirmance by the Appellate Division was unanimous, that permission to appeal had not been obtained, and that the exceptions were frivolous. Morton Stein, for the motion. James J. Allen, opposed.

PER CURIAM. Motion denied, with \$10 costs.

(199 N. Y. 571)

HEMMERICH, Appellant, v. UNION DIME SAVINGS INST., Respondent. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 944, 118 N. Y. Supp. 1112), entered July 17, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to recover a sum of money theretofore deposited with defendant in trust for the plaintiff. Oscar Englander and Harry A. Gordon, for appellant. C. N. Bovee and Frederick G. Tanner, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 590)

HERRMANN & GRACE v. CITY OF NEW YORK et al. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (130 App. Div. 531, 114 N. Y. Supp. 1107), entered March 11, 1909, modifying, and affirming as modified, a judgment of Special Term in an action to determine the priority of certain mechanics' liens. See, also, 136 App. Div. 28, 120 N. Y. Supp. 146. George W. Wingate, for appellant Heine Safety Boiler Co. J. Power Donellan, for appellant Johnson Service Co. John P. Duff, for respondent American Radiator Co. Oliver C. Semple, for respondent receiver of Williams & Gerstle.

PER CURIAM. Judgment affirmed, with costs, on opinion of Scott, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and COLLIN, JJ., concur. HISCOCK, J., not voting.

(199 N. Y. 594)

HINE v. HUNTINGTON et al. (Court of Appeals of New York. Nov. 15, 1910.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 907, 118 N. Y. Supp. 1113), entered July 13, 1909, which affirmed a judgment of Special Term dismissing the plaintiff's complaint and the defendants' counterclaim in an action for an accounting as to certain assets of the estate of Allen Hine, deceased, and for services alleged to have been rendered such estate. A counterclaim for an accounting on the part of plaintiff of rents and profits from a parcel of real property belonging to said estate was interposed. Homer Weston and Waldo Weston, for plaintiff. Daniel A. Pierce and Charles C. Cook, for defendants.

PER CURIAM. Judgment affirmed, without costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 549)

HOWARD, Appellant, v. ALBRIGHT, Respondent. (Court of Appeals of New York. Oct. 4, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 947, 117 N. Y. Supp. 1137), entered June 14, 1909, affirming a judgment in favor of defend-

ant entered upon a verdict directed by the court in an action on contract. Frank Gibbons, for appellant. Louis L. Babcock, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

(199 N. Y. 550)

IRWIN, Respondent, v. WESTCHESTER FIRE INS. CO. OF NEW YORK, Appellant et al. (Court of Appeals of New York. Oct. 4, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 920, 118 N. Y. Supp. 1115), entered June 12, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of fire insurance. Leo Levy and Henry S. Dottenheim, for appellant. Robert H. Barnett, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. GRAY, J., absent.

(199 N. Y. 541)

LANCASTER TRUST CO., Appellant, v. SPRAGUE, Respondent. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 901, 115 N. Y. Supp. 1128), entered March 29, 1909, affirming a judgment in favor of defendant entered upon a verdict directed by the court in an action to recover upon a certain underwriting agreement. Romeyn Berry and Frank L. Crocker, for appellant. Russel S. Coutant and Lansing P. Reed, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

(199 N. Y. 599)

LEHIGH & H. R. RY. CO., Appellant, v. CENTRAL TRUST CO. OF NEW YORK, Respondent. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 304, 117 N. Y. Supp. 595), entered July 15, 1909, reversing in part a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granting a new trial in an action to compel the defendant as trustee under the general mortgage of the plaintiff corporation to deliver to it certain shares of stock and certain bonds. The judgment was reversed only in so far as it directed delivery of the bonds. John G. Milburn and John J. Beattie, for appellant. Arthur H. Van Brunt, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

(199 N. Y. 596)

LE ROY PLOW CO., Respondent, v. MILLER, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (123 App. Div. 910, 107 N. Y. Supp. 1132), entered

December 16, 1907, affirming a judgment in favor of plaintiff entered upon the report of referee in an action to restrain the defendant from using certain trade-marks. David N. Salisbury and John H. Agate, for appellant. Daniel M. Beach, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

(199 N. Y. 552)

LOEB, Appellant, v. SALOMON et al., Respondents. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 929, 117 N. Y. Supp. 1140), entered June 3, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover on an alleged contract of sale. Harold G. Aron and Daniel Burke, for appellant. John Frankenheimer, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD, BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 573)

LOUNSBURY et al., Respondents, v. KNIGHTS OF THE MACCABEES OF THE WORLD, Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 394, 112 N. Y. Supp. 921), entered November 11, 1908, which sustained plaintiffs' exceptions, ordered to be heard in the first instance by the Appellate Division, and granted a motion for a new trial in an action to recover upon a certificate of life insurance. James M. E. O'Grady, for appellant. Hiram R. Wood, for respondents.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and VANN, WERNER, WILLARD, BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 576)

LOZIER MOTOR CO. OF NEW YORK, Appellant, v. BALL et al., Respondents. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 944, 118 N. Y. Supp. 1121), entered July 20, 1909, affirming a judgment in favor of defendants entered upon the report of a referee in an action for an accounting. A. Delos Kneeland and William A. Keener, for appellant. Thomas F. Conway, Frank E. Smith, and T. B. Cotter, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD, BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 546)

LUSK, Respondent, v. PECK, Appellant, et al. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 426, 116 N. Y. Supp. 1051), entered May 8, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying

a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Charles P. Ryan, for appellant. Stewart F. Hancock, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, and CHASE, JJ., concur. VANN and WILLARD BARTLETT, JJ., dissent. HISCOCK, J., taking no part.

(199 N. Y. 563)

NINTH NAT. BANK OF CITY OF NEW YORK v. MOSES et al. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (124 N. Y. Supp. 1123), entered June 24, 1910, which affirmed an order of Special Term determining the priority of lien of various judgment creditors of Lesser Bros. Otto C. Wierum, Jr., and Nelson S. Spencer, for appellant. Stanleigh P. Friedman, Daniel P. Hays, and Edwin D. Hays, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 598)

OLSEN, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 445, 117 N. Y. Supp. 611), entered July 7, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. D. A. Marsh and George D. Yeomans, for appellant. Arthur J. Lewis and John M. Wellbrock, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

(199 N. Y. 567)

In re OPENING OF HAWKSTONE STREET IN CITY OF NEW YORK. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 630, 122 N. Y. Supp. 316), entered April 8, 1910, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment. Benjamin N. Cardozo and Harold Swain, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly, Joel J. Squier, and L. Howell La Motte, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 579)

PEOPLE, Respondent, v. BAUM, Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 924, 122 N. Y. Supp. 1140), entered March 24, 1910, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of the crime of petit larceny. Isidore Schneider, for appellant. Charles

S. Whitman, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 584)

PEOPLE, Respondent, v. BIDDISON, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 525, 121 N. Y. Supp. 129), entered February 4, 1910, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of forgery in the first degree. See, also, 122 N. Y. Supp. 1140. Alfred Ennis, for appellant. Charles S. Whitman, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 587)

PEOPLE, Respondent, v. CARLO, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 899, 120 N. Y. Supp. 1139), entered December 30, 1909, which affirmed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of knowingly having in his possession paraphernalia commonly used in the playing of policy, in violation of section 344a of the Penal Code. Joseph F. Conran, for appellant. John F. Clarke, Dist. Atty. (Peter P. Smith, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(199 N. Y. 547)

PEOPLE, Respondent, v. FAHEY, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (134 App. Div. 991, 119 N. Y. Supp. 1139), entered April 15, 1910, which affirmed a judgment of the Court of Special Sessions of the city of Albany convicting the defendant of the crime of disturbing a funeral in violation of section 315 of the Penal Code. Michael D. Reilly and William E. Woollard, for appellant. Rollin B. Sanford, Dist. Atty. (Harold D. Alexander, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(200 N. Y. 511)

PEOPLE ex rel. KEATING et al., Appellants, v. BINGHAM, Police Com'r, Respondent. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 736, 123 N. Y. Supp. 506), entered June 3, 1910, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in revoking the engineer's certificates of the relators. Edwin P. Kilroe, for appellants. Archibald R. Watson, Corp. Coun-

sel (Theodore Connolly and Harry Crone, of counsel), for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

(200 N. Y. 509)

PEOPLE ex rel. METROPOLITAN ST. RY. CO., Respondent, v. BARKER et al., Commissioners of Taxes and Assessments, Appellants. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (121 App. Div. 681, 108 N. Y. Supp. 336), entered October 29, 1907, which affirmed an order of Special Term vacating the assessment of the capital stock of the relator for the year 1897. Archibald R. Watson, Corp. Counsel (Curtis A. Peters, of counsel), for appellants. Joseph P. Cotton, Jr., and George Rublee, for respondent.

PER CURIAM. Order affirmed with costs, on opinion of Ingraham, J., below.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. GRAY, J., not sitting.

(199 N. Y. 548)

PETROLEUM PRODUCTS CO., Respondent, v. FELT, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (122 N. Y. Supp. 1142), entered March 23, 1910, which affirmed an order of Special Term continuing an injunction pendente lite. Willard G. Stanton, for appellant. John W. Weed, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

(199 N. Y. 552)

PIERCE, Respondent, v. WHITCOMB, Appellant, et al. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (123 N. Y. Supp. 1137), entered June 27, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a written instrument for the payment of money. The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous, that the exceptions were frivolous, and the appeal taken only for purposes of delay. Franklin Pierce, for the motion. Joseph M. Gazzam, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs of appeal, but without costs of motion.

(199 N. Y. 561)

In re POTTER'S ESTATE. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (124 N. Y. Supp. 1126), entered June 24, 1910, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax upon the estate of Martha Potter, deceased. George N. Whittlesey and Stanley W. Dexter, for appellants. George M. Judd and Edward H. Fallows, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

(247 Ill. 600.)

PEOPLE v. BURKHALTER.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 879*)—INHERITANCE TAX—PROPERTY SUBJECT.

Under Inheritance Tax Law (Laws 1895, p. 301) § 1, imposing a tax upon all property which shall be transferred in contemplation of the death of the grantor, or intended to take effect, in possession or enjoyment, after such death, if the actual intent of the parties to the deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer will be subject to the inheritance tax, even though such intent is not evidenced in writing, as will an absolute gift, though followed by possession and enjoyment of the property in the grantor's lifetime, if the gift be made by him in contemplation of his death, without any regard to any intent to evade payment of the tax: but an owner may give away or otherwise dispose of his property as he sees fit, and if such disposition takes place in possession and enjoyment during his lifetime it will not be subject to an inheritance tax, unless made in contemplation of his death.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

2. TAXATION (§ 879*)—INHERITANCE TAX—PROPERTY SUBJECT.

Evidence held to show that the property of an intestate was not transferred to another during his lifetime in contemplation of his death, but was transferred in consideration of a contract of the transferee to care for intestate's deaf and dumb daughter during her life, so that the property was not subject to an inheritance tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1702; Dec. Dig. § 879.*]

Appeal from Knox County Court; Henry E. Burgess, Judge.

Proceedings to fix the inheritance tax on the estate of Jonathan O. Garwood. From an order finding that the property transferred to Anna E. Burkhalter was not subject to the tax, the People appeal. Affirmed.

W. H. Stead, Atty. Gen. (R. D. Robinson and Wilfred Arnold, of counsel), for the People. Williams, Lawrence, Welsh & Green, and F. O. McFarland, for appellee.

DUNN, J. Jonathan C. Garwood died intestate on February 17, 1907. In his lifetime he had been the owner of real and personal property of the value of about \$125,000. A few years before his death he had conveyed, assigned, and transferred all of it to the appellee, Anna E. Burkhalter, who was not related to him either by blood or marriage. An appraiser appointed under the inheritance tax law made a report to the county judge, who ascertained and fixed an inheritance tax against the appellee on account of the property so transferred to her (which was appraised at \$126,750) of \$7,984, including interest. Upon an appeal by the appellee to the county court, an order was entered finding that the property was not subject to the provisions of the inheritance tax law, and the people appealed.

Section 1 of the inheritance tax law of 1895 (Laws 1895, p. 301), which was in force

at the time the several transfers were made and at the death of the grantor, imposes a tax upon all property which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor, or intended to take effect, in possession or enjoyment, after such death. If the actual intention of the parties to a deed is that possession or enjoyment of the land shall be postponed until after the grantor's death, the transfer will be subject to the inheritance tax, even though such intention is not evidenced in writing. *People v. Estate of Moir*, 207 Ill. 130, 69 N. E. 905, 99 Am. St. Rep. 205. So will an absolute gift, though followed by possession and enjoyment of the property in the grantor's lifetime, if the gift was made by him in contemplation of his death (*Estate of Merrifield v. People*, 212 Ill. 400, 72 N. E. 446); and this without regard to any intent to evade the payment of the tax (*Rosenthal v. People*, 211 Ill. 303, 71 N. E. 1121). An owner may give away or otherwise dispose of his property, or any part of it, in any manner he sees fit, and if such disposition takes effect, in possession and enjoyment, during his lifetime, it will not be subject to an inheritance tax, unless made in contemplation of his death. The questions presented by the record, therefore, are: Were the various deeds and transfers to the appellee made by the grantor in contemplation of his death? and were they intended to take effect in possession or enjoyment only after his death?

Jonathan C. Garwood's wife died in 1897. They had only one living child, a daughter, Manie, then about 35 years old, who from her birth had been unable to speak or hear. For a number of years Miss May Greenough had lived in the Garwood family as a companion of Miss Garwood, who by reason of her affliction needed a constant attendant. After Mrs. Garwood's death, Miss Greenough remained with Miss Garwood until October, 1901, when she quit that service and was married, declining Mr. Garwood's offer of \$40,000 if she would continue there and not get married. Thereupon, through the mediation of her brother, Mr. Garwood prevailed upon the appellee to undertake the task of attending and caring for his daughter. After remaining a time she returned to her own home, and Mr. Garwood again sought to help of the brother. The result was that the appellee again undertook the task, and an agreement was entered into whereby, in consideration of the appellee's continuing to act as companion of and caring for Miss Garwood as long as the latter lived, Mr. Garwood undertook to convey and transfer to the appellee all the property he possessed. The appellee faithfully performed her part of the contract, and until Miss Garwood's death, in 1904, devoted herself to that work. On the other hand, Mr. Garwood performed the contract on his part by conveying and assigning to the appel-

lee, from time to time, different portions of his property, until he had transferred it all to her; the last transaction being a few weeks before his daughter's death. The appellee at once took possession of the property so transferred to her, leased and controlled the real estate, and had the actual custody of the stocks, bonds, notes, and deeds. The appellee was confined closely to the house in the performance of her duties to Miss Garwood, and business in connection with the property was sometimes transacted by Mr. Garwood. It was, however, only for the appellee and as her agent; for it is manifest from the evidence that after the respective transfers to her she had exclusive dominion over the property.

When the appellee went to Garwood's home, he was 74 years old; but he was in good health, though not strong. Though he took medicine and required the attention of a physician during the last few years of his life, he had no serious illness, and was not confined to his bed until about a month before he died. After his wife's death, he had no family but the one helpless daughter, and his one object in life seems to have been the securing of her welfare throughout her life. He realized that he could live but a few years longer, and expected his daughter would outlive him. He might well expect her to survive him many years, and the care of her future would necessarily be an object of great solicitude to him. In this sense his act in transferring his property may be said to have been made in contemplation of his death. But he did not transfer his property to his daughter, or in trust for her. Instead, he sold it in consideration of a contract for her care, the performance of which began and was completed in his lifetime. The property itself was not devoted to the use of his daughter, except, indirectly, as it would enable the appellee to carry out her personal contract. It was not his impending death which was the impelling motive for making this disposition of his property, but his desire to provide for his daughter's future, whether he lived or died. The contemplation of death must be the impelling motive, without which the conveyance would not be made, in order to subject a transfer of property to the inheritance tax.

In the argument for the people the effect of the supposed fiduciary relation existing between the appellee and Jonathan C. Garwood is discussed, as well as the want of consideration for the conveyances of real estate in December, 1901. But these matters have nothing to do with the right of the people to an inheritance tax. The claim of the people is based upon the proposition that by the conveyances the appellee acquired title to the property. Unless she did acquire title, there has been no transfer to which any tax can apply. The existence of any

consideration for the deeds of December, 1901, is only important as bearing upon the credibility of the appellee as a witness. There is, however, no substantial conflict in the evidence. The statements of Mr. Garwood which are thought to be at variance with the appellee's version of the matter do not seem to us to be substantially in conflict with it. Whether the contract was wise or greatly beneficial to either party is not material, and we have not discussed it; but it is plainly to be seen that, if the services required of appellee had continued for 30 or 40 years, instead of 3, it might well be doubted whether the property received would compensate her for the sacrifices made.

The judgment of the county court was right, and it will be affirmed.

Judgment affirmed.

(247 Ill. 430)

REAGAN v. HOOLEY et al.

(Supreme Court of Illinois. Dec. 21, 1910.)
COURTS (§ 219*)—ILLINOIS—APPELLATE COURT
—SUPREME COURT—JURISDICTION.

An appeal or writ of error in a suit to have a deed absolute on its face declared a mortgage lies to the Appellate Court, and not to the Supreme Court, since no freehold is involved; nor will allegations of the bill as to foreclosure and an accounting be effectual to change the rule.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 219.*]

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Action by Ellen Reagan against Elizabeth Hooley (now Elizabeth Morris) and others. Judgment for defendants, and plaintiff appeals. Cause transferred to the Appellate Court for the First District.

John M. Duffy, for appellant. Rogers & Mahoney, for appellees.

CARTER, J. The original bill filed in this case in the circuit court alleged a trust in favor of the heirs or legatees of one Mary Whouley. Thereafter the bill was amended, praying that a certain warranty deed be declared a mortgage. On a hearing this amended bill was dismissed for want of equity, and the case has been appealed to this court.

Mary Whouley, an unmarried woman, died on June 28, 1896. On May 12, 1896, she gave a warranty deed to Elizabeth Hooley for the express consideration of \$1, transferring certain real estate in the city of Chicago. The amended bill prays that this deed be declared a mortgage to secure certain advances made by Elizabeth Hooley to said Mary Whouley, and that said Elizabeth Hooley either be required to foreclose the same, or that the property be sold under an order of court, and said Elizabeth Hooley, after an accounting, be required to pay over the bal-

ance of the proceeds of said sale to the heirs or legatees of said Mary Whouley.

Under a long line of decisions this court has held that in a suit to have a deed absolute on its face declared a mortgage no freehold is involved, and the appeal or writ of error lies to the Appellate Court, and not to this court. *Adamski v. Wieczorek*, 181 Ill. 361, 54 N. E. 1034; *Kirchoff v. Union Mutual Life Ins. Co.*, 128 Ill. 199, 20 N. E. 808; *Schoendubee v. International Building Loan & Investment Union*, 183 Ill. 139, 55 N. E. 710; *Eddleman v. Fasig*, 218 Ill. 340, 75 N. E. 977; *Burroughs v. Kotz*, 226 Ill. 40, 80 N. E. 728; *Halbert v. Turner*, 233 Ill. 531, 84 N. E. 704. The allegations of the bill with reference to the foreclosure and for an accounting are all collateral and incidental to the main allegations of the bill, which prays that the deed be declared a mortgage. Even if they were the principal averments in the bill, that would not give this court jurisdiction, as a bill to foreclose a mortgage does not involve a freehold. *Pinneo v. Knox*, 100 Ill. 471; *McIntyre v. Yates*, 100 Ill. 475; *Akin v. Cassidy*, 105 Ill. 22; *MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209; *Kronenberger v. Heinemann*, 190 Ill. 17, 60 N. E. 64. Neither would a freehold be involved in a bill of this nature for an accounting. *Nevitt v. Woodburn*, 175 Ill. 376, 51 N. E. 593; *Klein v. Independent Brewing Ass'n*, 231 Ill. 504, 83 N. E. 434; *Adamski v. Wieczorek*, *supra*.

We have considered the only allegations in the bill that could possibly give this court jurisdiction and allow the case to be brought directly here from the trial court. This court being without jurisdiction, the cause will be transferred to the Appellate Court for the First District, and the clerk of this court will transmit to the clerk of the Appellate Court all the files in this case, together with the order transferring the case.

Cause transferred.

(247 Ill. 614)

MURPHY et al. v. CHICAGO, R. I. & P. RY. CO. et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. RAILROADS (§ 86*)—STREETS—USE BY RAILROAD—VACATION—POLICE POWER.

Where a city granted a railroad company the right to lay its tracks in a street, and such tracks had been used until, by the growth of business and travel, the railroad was an impediment to traffic and a menace to life, the city council, in the exercise of its police power, could pass a reasonable ordinance requiring the elevation of the tracks and vacating a part of the street for that purpose.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 229; Dec. Dig. § 86.*]

2. MUNICIPAL CORPORATIONS (§ 111*)—CITY COUNCIL—LEGISLATIVE POWER.

Where power is given to a city council to legislate on any subject, and the details of the

legislation are left to the council's discretion, such discretion must be reasonably exercised, and, if unreasonable, will be declared void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 245-256; Dec. Dig. § 111.*]

3. MUNICIPAL CORPORATIONS (§ 63*)—ORDINANCES—REASONABLENESS.

Where a city ordinance is passed on a subject within the council's jurisdiction, whether the ordinance is reasonable or unreasonable is a question for the court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 153, 1378, 1379; Dec. Dig. § 63.*]

4. MUNICIPAL CORPORATIONS (§ 661*)—USE OF STREETS—REGULATION—GOVERNMENTAL FUNCTION.

A city, in regulating the use of streets and alleys within its limits and the maintenance and operation of railroads on and over them, exercises a governmental function.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 661.*]

5. MUNICIPAL CORPORATIONS (§ 63*)—STREETS—CONTINUATION OF USE.—REVIEW BY COURT.

A court of equity has no jurisdiction to interfere with a city's regulation of the use of its streets, unless the power or discretion vested in the city is being manifestly abused, to the oppression of the citizens; that is, is being unreasonably exercised.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1379; Dec. Dig. § 63.*]

6. PLEADING (§ 8*)—CONCLUSIONS.

An allegation that an ordinance was an abuse of power, for the reason that there was no necessity for the vacation of the street, was a mere conclusion.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

7. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—VACATION—ORDINANCE—REASONABLENESS—ALLEGATIONS OF BILL.

Allegations, in a bill to restrain the vacation of a portion of a street, that inconvenience will result to complainants and their tenants, and their business will be much diminished, and their property greatly depreciated in value, did not tend to show that the ordinance was unreasonable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1429; Dec. Dig. § 657.*]

8. MUNICIPAL CORPORATIONS (§§ 386, 657*)—VACATION OF STREET—DAMAGES—DUTY TO PROPERTY OWNER.

Where damages result to a property owner from the vacation of a portion of a street, he may recover compensation as damages, but cannot restrain the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 929, 1429; Dec. Dig. §§ 386, 657.*]

9. RAILROADS (§ 86*)—STREETS—PARTIAL VACATION—RAILROAD TRACK—ELEVATION.

It was not essential to the validity of an ordinance providing a plan for elevating railroad tracks located in a street, contemplating the vacation of a part of the street, that the plan was the best that could have been devised; it being sufficient that it was not unreasonable.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 86.*]

10. MUNICIPAL CORPORATIONS (§ 63*)—CITY COUNCIL—NOTICE.

Where a city ordinance was within the legislative power of a city council, it could not be

impeached in the court because its passage was controlled by a corrupt motive.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 63.*]

Appeal from Circuit Court, Will County; Frank L. Hooper, Judge.

Bill by David G. Murphy and others against the Chicago, Rock Island & Pacific Railway Company and another. From a decree dismissing the bill, complainants appeal. Affirmed.

Eddy, Haley & Wetten (P. C. Haley, of counsel), for appellants. Snapp & Helse and O'Donnell, Donovan & Bray (M. L. Bell, of counsel), for appellees.

DUNN, J. The appellants filed their bill in the circuit court of Will county, the object of which was to enjoin the appellees, the Chicago, Rock Island & Pacific Railway Company and the Michigan Central Railroad Company, from obstructing Joliet street, in the city of Joliet, or interfering with the public use of and free right of passage over such street, except to the extent of the maintenance of a grade crossing of the street with the main tracks of the Chicago, Rock Island & Pacific Railway Company. A demurrer to the bill was sustained, and the bill was dismissed for want of equity. The complainants appealed; the validity of a municipal ordinance being involved, and the trial judge having certified that in his opinion the public interest required an appeal to be taken directly to this court.

It appears from the bill that the city council of the city of Joliet passed an ordinance requiring the elevation of the tracks of six railroad companies, including those of the appellees, through that city. The appellants, severally, are the owners of property fronting on Joliet street a short distance north of the crossing of the Chicago, Rock Island & Pacific railroad. The ordinance vacates a part of Joliet street, extending south about 210 feet from a point a short distance south of the appellants' properties. The bill contains a description of the topography of the city of Joliet, its thoroughfares and lines of public travel, its business and residence districts, the situation of its churches and schools, all with reference to the appellants' property, showing the inconvenience and loss of business to which they will be subjected and the deterioration in value of their property by reason of the closing of Joliet street in the manner authorized by the ordinance. It is alleged that the passage of the ordinance was an abuse of power on the part of the council, and that there was no necessity for the vacation of Joliet street; that the ordinance is, in fact, not a legislative act of the council, but a contract with the railroad companies.

In regard to the passage of the ordinance

it is alleged that the "Chicago, Rock Island & Pacific Railway Company, one of the parties defendant hereto, conspired with other railway companies and corporations of the city of Joliet to be benefited by said ordinance, in order to influence favorable action to the said corporation aforesaid and to secure the passage of the said so-called ordinance, and thereby obtain great benefit and advantage to themselves at the expense of the general public of Joliet, and particularly to the expense and great loss and injury of your orators and oratrices, then and there entered into an agreement with the members of the said city council, and each of them, to furnish them free transportation through the state of Illinois upon the line of the said Chicago, Rock Island & Pacific Railway Company's road, and free transportation by way of what is known as monthly commutation tickets good between the city of Joliet and city of Chicago, said tickets having numbers upon them from 1 to 60, representing 60 rides and good for the month in which they were issued, which said tickets have a standard value to the general public of \$10 per month, and that said tickets were supplied, from time to time, for a long period of time thereafter; that the said free transportation and the said commutation tickets were things of great value, commercially and otherwise, and that the said tickets and the said transportation did, in fact, as evidenced by the results of the subsequent vote upon the passage of the said unlawful supposed Ordinance No. 2219, or contract, such as it is, effect its consummation and its passage."

The appellants' contention is that the ordinance is absolutely void. The terms of the track elevation ordinance in question do not differ in essential respects from those involved in the cases of *Weage v. Chicago & Western Indiana Railroad Co.*, 227 Ill. 421, 81 N. E. 424, 11 L. R. A. (N. S.) 589, *People v. Grand Trunk Railway Co.*, 232 Ill. 292, 83 N. E. 839, *City of Chicago v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Co.*, 244 Ill. 220, 91 N. E. 422, and *People v. Atchison, Topeka & Santa Fé Railway Co.*, 217 Ill. 594, 75 N. E. 573. The power of the council to pass such an ordinance is not an open question, nor is the source of its authority doubtful. It is from the police power that the council gets its right. Having the power, the council is limited in its exercise only by the requirement that the ordinance shall be reasonable. Where power is given to the city council to legislate on any subject, though the details of legislation may be left to the discretion of the council, such discretion must be reasonably exercised. If an ordinance passed by the council is unreasonable, it will be declared invalid, and whether or not it is unreasonable is a question for the court. *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 1 L. R. A. 268; *City of Chi-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cago v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., *supra*.

In regulating and controlling the use of the streets and alleys within its limits, and the maintenance and operation of railroads upon and over them, the city is in the exercise of a governmental function. An ordinance granting authority for such purpose and fixing the rights and liabilities of the railroad companies is a legislative act, even though it may be by the act of the companies become also a contract. *People v. Chicago Telephone Co.*, 245 Ill. 121, 91 N. E. 1085; *Roby v. City of Chicago*, 215 Ill. 804, 74 N. E. 768. A city may do anything with its streets not incompatible with the end for which streets are established, and, where exercising its discretionary power in regard to them, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the oppression of the citizen—that is, is being unreasonably exercised. *City of Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311.

The bill states that the passage of the ordinance was an abuse of power, for the reason that there was no necessity for the vacation of Joliet street. This is only the statement of the pleaders' conclusion. The facts stated show that inconvenience will result to the appellants and their tenants; that probably their business will be much diminished and their property will greatly depreciate in value. These circumstances, alone, do not even tend to show that the ordinance is unreasonable. Such consequences not infrequently result to some property from the elevation of railroad tracks, the building of viaducts, and the making of other public improvements; but the improvements are not to be suspended on that account at the instance of the owner of the property affected. If damages result of such a character that he is entitled to compensation, he may recover such damages; but he cannot call upon a court of equity to stop the improvement. It is not essential to the validity of the ordinance that the plan of elevating the tracks, making subways, and securing, protecting, and preserving the public safety, is the best that could have been devised. It is sufficient if it is not unreasonable, though some other plan might be thought to be a better one.

It is said that the members of the council, in the passage of the ordinance, were controlled by a corrupt motive. An ordinance passed by a city council, in the exercise of the legislative powers conferred upon it, for the purposes of police regulation or municipal government, cannot be impeached by an inquiry into the motives of the members of the council who voted for it. If within the legislative power granted to the council, a court cannot declare an ordinance invalid on account of the improper motives which in-

duced its passage. It is a well-known rule of law that the knowledge and good faith of a Legislature are not open to question and its motives cannot be inquired into. Courts must always assume that the legislative discretion has been properly exercised. *People v. Carlock*, 198 Ill. 150, 65 N. E. 109; *People v. Thompson*, 155 Ill. 451, 40 N. E. 307; *United States v. Des Moines Navigation & Railway Co.*, 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162; *Cooley's Const. Law* (7th Ed.) p. 257. We know of no reason why the same rule should not govern in the case of the exercise of legislative power granted to a city council. *People v. Wieboldt*, 233 Ill. 572, 84 N. E. 646; *City of Amboy v. Illinois Central Railroad Co.*, 236 Ill. 236, 86 N. E. 238; *People v. Gardner*, 143 Mich. 104, 106 N. W. 541. The ordinance was a valid exercise of the power of the city council. The motives for its passage cannot be inquired into.

No facts are shown which would authorize a court of equity to interfere with its enforcement. The decree of the circuit court is affirmed.

Decree affirmed.

(247 Ill. 350)

CHICAGO, B. & Q. R. CO. v. F. REISCH & BROS. et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. EMINENT DOMAIN (§ 223*)—AWARD OF COMPENSATION—VERDICT.

In a proceeding to condemn land in possession of tenants, it is proper for the jury to fix by the verdict the value of the entire property and then apportion the value among the several parties interested.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 570; Dec. Dig. § 223.*]

2. EMINENT DOMAIN (§ 200*)—EVIDENCE—BURDEN OF PROOF.

A railroad company seeking to condemn land in the possession of tenants has the burden of proving in the first instance the value of the land by showing its fair cash value, and the value of the leasehold interests, which must be reduced from the total value to determine the compensation to be awarded to the owner.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 540; Dec. Dig. § 200.*]

3. EMINENT DOMAIN (§ 202*)—VALUE—EVIDENCE—ADMISSIBILITY.

In a proceeding to condemn land in possession of tenants, evidence of the amounts paid by the petitioner for the leasehold interests is inadmissible to show the value thereof, and thus show the amount which must be deducted from the total value of the land to award the proper compensation to the owner, who had not consented to the settlements made with the tenants.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 541; Dec. Dig. § 202.*]

4. EMINENT DOMAIN (§ 205*)—COMPENSATION—EVIDENCE.

Where, in a proceeding to condemn land in the possession of a tenant, a witness fixed the value of the leasehold interest and his testimony is uncontradicted, a verdict failing to award anything to the tenant was unau-

thorized, though the value fixed by the witness was inflated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. § 205.*]

5. EMINENT DOMAIN (§ 134*) — VALUE—EVIDENCE.

Where in a proceeding to condemn land it appeared that at the filing of the petition no plans for a brewery on the land had been proposed, evidence that the premises had a special value for brewery purposes was too remote as an element of value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.*]

6. EMINENT DOMAIN (§ 202*) — VALUE—EVIDENCE.

Where, in a proceeding to condemn land, evidence of the value thereof for brewery purposes was inadmissible, evidence of the location of other breweries to show that if a brewery was located on the land, it would have a large unoccupied territory in which to sell its beer, and evidence of numerous railroads near the premises making them more valuable for the location of a brewery than for the location of any other manufacturing business requiring shipping facilities in car load lots, was properly excluded.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 202.*]

7. APPEAL AND ERROR (§ 688*) — QUESTIONS REVIEWABLE — IMPROPER ARGUMENT OF COUNSEL—BILL OF EXCEPTIONS.

Where a party desires to raise for review the propriety of remarks of counsel in argument to the jury, the court must certify by bill of exceptions what the remarks were, and not incorporate in lieu thereof in the bill of exceptions an affidavit of opposing counsel as to what they were and it must appear from the bill of exceptions that objections to the remarks were interposed at the time they were made, and that the court overruled the objections or refused to rule thereon, and that an exception was preserved to the ruling, or the refusal to rule.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2896; Dec. Dig. § 688.*]

Appeal from Circuit Court, Marion County;
A. M. Rose, Judge.

Proceedings by the Chicago, Burlington & Quincy Railroad Company to condemn the land owned by George Reisch and others, doing business as F. Reisch & Bros., in possession of the Reisch Brewing Company and others, as tenants. From a judgment awarding damages, certain of the defendants appeal. Reversed and remanded.

Samuel L. Dwight, Charles H. Holt, Rufus M. Potts, W. H. Nelms, and Alfred Adams, for appellants. W. F. Bundy, Noleman & Smith, and J. J. Bundy (J. A. Connell, of counsel), for appellee.

HAND, J. This was a proceeding commenced in the circuit court of Marion county by the Chicago, Burlington & Quincy Railroad Company against George Reisch, Joseph Reisch, and Annie Reisch, doing business as F. Reisch & Bros. (hereinafter referred to as F. Reisch & Bros.), and the Reisch Brewing Company and certain tenants in possession, to condemn for depot, trackage, and other purposes incident to the conduct of the busi-

ness of said railroad company in the city of Centralia, lots 7, 8, 9, and 10, in block 12, in the original town of Centralia. A trial was had and the jury by their verdict fixed the total value of said lots at \$19,000, and the court, after overruling motions for a new trial and in arrest of judgment, rendered judgment on the verdict, from which judgment F. Reisch & Bros. and the Reisch Brewing Company have prosecuted an appeal.

Appellants urge in this court as grounds of reversal (1) that the court erred in permitting the petitioner to make proof, upon the trial, of the amounts it had agreed to pay three of the tenants in possession of portions of said premises in satisfaction of their damages; (2) that the court misdirected the jury as to the law; (3) that the jury failed to allow the Reisch Brewing Company any amount for its damages; (4) that the court improperly excluded evidence offered on behalf of the defendants; and (5) that the remarks of the petitioner's counsel in his address to the jury constituted reversible error. The first and second propositions will be considered together.

The record shows that block 12 of the original town of Centralia was in part occupied by the petitioner as station grounds and switchyards in said city; that in order to enlarge its railroad facilities in said city it was necessary to procure title to lots 7, 8, 9, and 10, in said block 12, from F. Reisch & Bros., who were the owners thereof; that said premises were in the possession of certain tenants of said F. Reisch & Bros., and that the petitioner had settled with three of said tenants by agreeing to pay said tenants the following sums, viz.: To Woolner & Co. \$250, to George Mathis \$500, and to James Reid \$250. It also appears that upon the trial, in proof of the value of said leasehold interests, which it was claimed should be deducted from the total value of the premises, the court permitted the petitioner, over the objection of F. Reisch & Bros., to make proof of the amounts which it had agreed to pay said Woolner & Co., Mathis, and Reid, and that the court gave to the jury, to assist them in reaching a conclusion as to the amount which they should award F. Reisch & Bros. by their verdict, the following instructions:

"No. 6. The court instructs the jury that whatever amount you allow to the holders of the respective leasehold interests, as proven by the evidence in this case, by way of compensation for the taking of such leasehold interests, should be deducted from the total compensation which the evidence proves is a just compensation for the taking of the respective lots or parcels of ground covered by such leases."

"No. 14. The court instructs the jury that you should first fix the fair cash market value of the lots in question which are sought to be taken in this proceeding, as compensa-

tion to the owners, F. Reisch & Bros., and then fix the amount of the fair cash value of the leasehold interests of the several tenants, Reisch Brewing Company, George Mathis, James Reid, and Woolner & Co.; but you must then deduct from the amount found as the fair cash value of the lots the amount you find for the several tenants, and give to the owners, F. Reisch & Bros., the remainder, after making the deduction.

"No. 15. The court instructs the jury that there can be but one recovery for the same property; therefore if you believe, from the evidence, that the rights or interests of the lessees, viz., Reisch Brewing Company, James Reid, George Mathis, or Woolner & Co., in the lots sought to be taken, has any value, and the same is awarded to either of the said defendants, then such amount so awarded must be carved out of and deducted from the amount fixed as the total fair cash market value of said lots."

It was undoubtedly a proper practice for the jury to first fix the value of the entire property by their verdict and then to apportion the total value of the property as found by them among the several parties who were interested therein. If, however, the petitioner had agreed with certain defendants as to the amounts which they were to receive for their damages, clearly such an agreement would not bind those defendants who were not parties to such agreements, and the petitioner, for the purpose of having the jury apportion the total value of the property among the several claimants, would not have the right to put in proof such agreements, and thereby force F. Reisch & Bros., who had not agreed to the amounts which petitioner had agreed to pay Woolner & Co., Mathis, and Reid as their damages, to agree that the amounts agreed to be paid said tenants should be deducted from the total value of the property as found by the jury, and that they would be content with what remained after such deductions had been made, as their compensation and damages for the property taken. The burden of proof was upon the petitioner, and it was required, in the first instance, to show the value of the property of F. Reisch & Bros. which it sought to condemn, which was its fair cash value, the total value of which would be reduced by the values of the three leasehold interests of Woolner & Co., Mathis, and Reid. We think, therefore, as F. Reisch & Bros. did not agree that the amounts agreed to be paid for said leasehold interests by the petitioner was the value of such leasehold interests, that the petitioner should, as a part of its case in chief, have put in original evidence showing the value of such leasehold interests, and that it was reversible error to have permitted proof before the jury of the amounts which the petitioner had agreed to pay Woolner & Co., Mathis, and Reid in settlement of the value of the leasehold interests which they had in the property sought to be condemned, and that in

view of the fact that the only proof of the value of said leasehold interests offered in evidence was the proof of the several amounts which the petitioner had agreed to pay for said leasehold interests, there was no legitimate evidence in the record upon which to base petitioner's instructions 6, 14, and 15, and that they should not have been given.

There was evidence in the record showing that the Reisch Brewing Company had a valid lease upon a portion of the premises sought to be condemned, but the jury, in their verdict, wholly ignored the rights of the Reisch Brewing Company and made no finding as to the value of the leasehold interest of said company in the premises sought to be condemned. The court submitted to the jury the form of a verdict, in which they were required to find _____ dollars as the just compensation of the leasehold interest of the Reisch Brewing Company. This blank the jury failed to fill with any amount, but returned the verdict with all other blanks filled. If the jury inadvertently failed to fill said blank, the verdict was wrong, and if they purposely failed and refused to allow the Reisch Brewing Company anything for their leasehold interest in the property, the verdict was wrong, as the evidence showed such leasehold interest had some value. One witness, whose evidence was uncontradicted, testified that such leasehold interest was of the value of \$5,000. While the value fixed by that witness was undoubtedly inflated, still it cannot be said that the leasehold interest of the Reisch Brewing Company in the property sought to be condemned was without value.

The defendants sought to show that the property sought to be condemned had a special value as a site for a brewery. There was no brewery on the premises, and at the time the petition was filed no plans for a brewery to be erected on the premises sought to be taken had been proposed. The view that said premises had a special value for brewery purposes seems to have originated after the petition was filed, and for the purpose of inflating the value of the premises. The element of value thus sought to be injected into the case was, we think, too remote and was purely speculative. We do not think, therefore, the court erred in declining to permit George Reisch to state where other breweries were located, with a view to show that if a brewery was located on said premises, it would have a large unoccupied territory in which to sell beer. Nor do we think the fact that there were numerous railroads centering in Centralia near the premises sought to be taken would make the premises any more valuable for the location of a brewery than it would for the location of any other manufacturing business which required shipping facilities in car load lots, and that was the view taken by the witnesses who were interrogated up-

on the subject, with one or two exceptions. The court did not err in its ruling upon the evidence offered for the purpose of showing that the premises sought to be taken had a special value as a location for a brewery.

In the argument of the case, the counsel for the petitioner stated to the jury, as appears from an affidavit incorporated in the bill of exceptions, that the petitioner had 24 witnesses upon the question of value, while the defendants had only 16, and that by reason of that fact the testimony of the witnesses of the petitioner should be taken in preference to that of the defendants. No exception was taken to any ruling of the court, or its refusal to rule, upon the fairness of such argument to the jury, and the incorporation of the affidavit into the bill of exceptions does not preserve the remarks of counsel for review in this court. If it is desired to raise for review the question of the propriety of the remarks of counsel made in the argument of a case before the jury, the court must certify, by bill of exceptions, what the remarks of counsel were, and not incorporate in lieu thereof in the bill of exceptions an affidavit of opposing counsel as to what they were; and, furthermore, it must appear from the bill of exceptions that objections to the propriety of the remarks of counsel were interposed at the time they were made and that the court ruled or refused to rule upon the objections, and that a proper exception was preserved to the ruling of the court or its refusal to rule. The question sought to be raised is not preserved for review upon this record. If, however, the question were properly preserved for review, we do not think the remarks of counsel complained of constitute reversible error.

For the error in admitting proof of the amount agreed to be paid to the tenants, Woolner & Co., Mathis, and Reid, and in giving petitioner's sixth, fourteenth, and fifteenth instructions without any legitimate evidence upon which to base them, and for the failure of the jury to fix in their verdict the value of the leasehold interest of the Reisch Brewing Company in the premises sought to be condemned, the judgment of the circuit court will be reversed, and the cause remanded to that court for a new trial.

Reversed and remanded.

(248 Ill. 76)

CITY OF ALTON v. HEIDRICK et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 508*)—ASSESSMENTS FOR PUBLIC IMPROVEMENTS—CONFIRMATION—APPEAL—RECORD.

Local Improvement Act 1872 (Laws 1871-72, p. 253) art. 9, § 32, continued in force by Local Improvement Act 1897 (Acts 1897, p. 135) § 99, as to all proceedings for due assessments made in lieu of others annulled before the act took effect, provides that the hearing of

all cases under said act may be had at either a law or probate term of the county court. A record, on writ of error from the county court in proceeding for a new assessment after annulment of an assessment made under the former law, recited the presentation of a petition for confirmation to a named judge in vacation on September 20, 1907, and the appointment of commissioner, and that the matter was set for hearing May 29, 1908, and that on the same day a motion to dismiss was filed, directed to the May term, 1908, on which argument was heard, and the motion taken under advisement. The record then recited the final order or judgment in the following words: "December 7, 1908. The court, now being fully advised in the premises, sustains said motion to dismiss." To this was appended a certificate of the clerk that the foregoing contained a true transcript of the record. *Held*, that the appeal must be dismissed, since the record contains no placita showing that the court was regularly convened and organized, either for the May or the December term, and failed to show that the entry of December 7th was made by the same judge who heard the arguments and took the motion to dismiss under advisement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

2. MUNICIPAL CORPORATIONS (§ 508*)—IMPROVEMENT ASSESSMENT—CONFIRMATION—APPEAL—RECORD.

It cannot be assumed, in favor of such record, that because the statute provides for a probate term in each county in the state commencing on the first Monday of each month, and that in the county in which the proceeding was had law terms are provided to commence on the second Monday in February and August, that terms of court were in fact held at such times.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

3. MUNICIPAL CORPORATIONS (§ 508*)—IMPROVEMENT ASSESSMENT—CONFIRMATION—APPEAL—RECORD.

Such record fails to show a sufficient judgment to support the appeal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1181, 1182; Dec. Dig. § 508.*]

4. JUDGMENT (§ 218*)—REQUISITES.

While a judgment is not required to be in any particular form, it is necessary that the entry should contain the essential elements of the judgment, and that it should show that the court finally disposed of the cause.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 395; Dec. Dig. § 218.*]

Error to Madison County Court; John E. Hillskotter, Judge.

Special assessment proceeding by the City of Alton against Charles Heldrick and others. Judgment for defendants, and plaintiff brings error. Appeal dismissed.

John F. McGinnis, Corp. Counsel, and Levi Davis, for plaintiff in error. James A. Lynn and Alex W. Hope, for defendants in error.

VICKERS, C. J. This writ of error is sued out by the city of Alton for the purpose of bringing into review a special assessment proceeding instituted for the purpose of paying for an underground pipe sewer in Second street, connecting with street sewers

in Plaza street at the west end and Ridge street at the east. On the 15th of February, 1892, plaintiff in error passed an ordinance for the construction of a sewer in Second street between the points named, and in pursuance of said ordinance a special assessment was levied upon the property fronting on Second street between the points named. Objections to the confirmation of the assessment were sustained by the county court of Madison county in October, 1892, and the petition was dismissed as to the property of the objectors. The city of Alton brought the record of that proceeding to this court by appeal, and the judgment of the county court was affirmed October 16, 1895. *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926. No further steps were taken by the city of Alton until November 15, 1906, when the ordinance which is the foundation of the present proceeding was passed. It appears from the recitals in the present proceeding that an underground sewer was constructed under the first ordinance at a cost of \$2,890.65, of which \$1,645 has been paid, leaving a balance of \$1,245.65 still due and unpaid. The purpose for which the present proceeding was instituted was to raise money by special assessment to pay the balance remaining due, with the necessary costs and expenses attending the levying and collecting of such assessment.

Under section 99 of the local improvement act of 1897 (Laws 1897, p. 135), continuing the old law in force for the purpose of "all proceedings for new assessments made in lieu of others annulled before the act concerning local improvements of June 14, 1897, took effect, by order of some court," the present proceeding is controlled by article 9 of the cities and villages act of 1872 (Laws 1871-72, p. 247). Upon the hearing of the application for confirmation the record before us shows that numerous property owners filed objections. There is no bill of exceptions in the record, nor is there anything in the record, by recital or otherwise, showing that any evidence was in fact heard by the court; but, aside from this, the record before us is so informal in another respect that the merits of this controversy cannot be considered. The record recites that the petition for the confirmation of this assessment was presented in vacation to Hon. J. E. Hills-kotter, county judge, on the 20th day of September, 1907. After reciting at large the petition and the ordinance, with proof of its passage, the record recites that "the court appoints as commissioners to make said assessment August Neerman, David Ryan, and John D. McAdams, and set for hearing May 29, 1908, at 9:30 a. m." On the same day the record recites the following: "Motion to dismiss filed; arguments heard, and taken under advisement." Following the assessment roll is a copy of the objections of defendants in error, which purport to have been addressed to the May term, 1908, of the county

court of Madison county. The record then contains copies of notices to property owners, with an affidavit attached of service of the same. The final order or judgment, if it may be called such, is in the following words: "December 7th, 1908. The court, now being fully advised in the premises, sustains said motion to dismiss. Appeal prayed to Supreme Court; bill of exceptions; thirty days, no bond"—to which is appended a certificate of Edward Feutz, clerk of the county court of Madison county, that the above and foregoing constitutes a full, true, and perfect transcript of the record in the above-entitled cause.

Section 32 of article 9 of the law of 1872 provides that the hearing of all cases under said act may be had at either a law or a probate term of the county court, and that such cases shall have precedence over all other cases in such court, except criminal cases. Whether the hearing be had at a law term or a probate term of the county court, it is indispensable that the record should show that the term of court at which the hearing is had was regularly convened and organized. There is no placita in the record for either the May or December term, 1908. Without a placita showing the regular organization of the December term, 1908, of the county court of Madison county, if such term was held, it is impossible for this court to know whether the entry of December 7, 1908, was entered by the same judge who heard the argument and took the motion to dismiss under advisement in May, or some other judge. In fact, there is nothing to show that either the hearing on May 29, 1908, on the motion to dismiss, or the order sustaining the same in December, 1908, was before any judge or court, since there is an entire absence of the placita showing that a term of court was in session at either of those dates. It cannot be inferred that because the statute provides for a probate term of court in each county in the state, commencing on the first Monday of each month, and that in Madison county law terms are provided to commence on the second Monday of February and August, terms of court were in fact held at such times. It is surprising that notwithstanding this court, as far back as the September term, 1870, reversed 53 cases for want of a placita or convening order (*Planing Mill Lumber Co. v. City of Chicago*, 56 Ill. 304), and has from time to time since that date occasionally pointed out the necessity of such convening order, records should be presented thus so obviously defective that the merits of the controversy cannot be considered and disposed of.

The entry which we have quoted above is not a judgment at all. It is apparently a mere memorandum of the judge, probably entered in his docket as a memorandum from which a formal judgment might be written up. While it is true, as this court held in

Wells v. Hogan, Breese, 337, that no particular form is required in proceedings of a court in order to constitute them a judgment, still it is necessary that there should be an entry containing the essential elements of a judgment, showing that the court finally disposed of the cause. In *Martin v. Barnhardt*, 39 Ill. 9, the entry was: "Judgment on verdict for \$3,000 and costs." In *Faulk v. Kellums*, 54 Ill. 188, the entry was: "Whereupon the court enters judgment upon the verdict; and now come the said defendants, by their attorneys, and pray an appeal, which is granted." And in *Metzger v. Wooldridge*, 183 Ill. 174, 55 N. E. 694, 75 Am. St. Rep. 100, the entry was: "And the court having heard the motion, court overruled same, and judgment on the verdict for \$1,521.09; and now comes the defendant and prays an appeal. An appeal allowed on his giving bond in the sum of \$3,000 in 20 days, to be approved by the clerk by agreement, and bill of exceptions to be filed in 120 days."

There being no final judgment, there was nothing to appeal from. The appeal will therefore be dismissed.

Appeal dismissed.

(247 Ill. 547)

PEOPLE v. EVANS.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MINES AND MINERALS (§ 87*)—REGULATIONS—STATUTES—EXAMINING BOARD.

The members of miners' examining boards, created by Hurd's Rev. St. 1909, c. 93, are appointed for and perform their duties in the counties wherein they are appointed, and have no jurisdiction to act outside of that county.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 87.*]

2. STATES (§ 44*)—"STATE OFFICERS"—DISTINGUISHED FROM "COUNTY OFFICERS."

In general, a "state officer" is one whose duties and powers are coextensive with the state, while a "county officer" is one whose duties and powers are coextensive only with the county, and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the state does not make the officer who performs such acts necessarily a state officer.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 49; Dec. Dig. § 44.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1663-1666; vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

3. MINES AND MINERALS (§ 87*)—REGULATION—EXAMINING BOARD ACT—VALIDITY—APPOINTMENT OF EXAMINERS.

Hurd's Rev. St. 1909, c. 93, providing for the creation of examining boards in counties containing mines, the members to be appointed by the county judges of the respective counties, etc., is not in violation of Const. art. 3, § 10, providing that the Governor shall nominate, and by and with the advice and consent of the Senate appoint, all officers whose offices are established by the Constitution, or which may be created by law, and whose appointment, or election is not otherwise provided for, since even if the members of such boards are state officers, the Constitution did not apply to them,

their appointment having been otherwise provided for by law.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 87.*]

4. CONSTITUTIONAL LAW (§ 74*)—POWER OF JUDICIAL DEPARTMENT—INFINGEMENT ON EXECUTIVE.

Hurd's Rev. St. 1909, c. 93, creating examining boards in various counties for the examination of miners, members of which are to be appointed by the county judges, was not unconstitutional as imposing nonjudicial duties on such judges; the Legislature being authorized to require courts or the judges thereof to appoint various officers not belonging to the judicial department of the government.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 124; Dec. Dig. § 74.*]

5. MINES AND MINERALS (§ 87*)—REGULATION—POLICE POWER.

The Legislature has power to provide for the examination and licensing of miners, under the rule that in the exercise of police power, it may prescribe regulations for securing the admission of qualified persons to all callings which demand special knowledge, experience, and skill.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 87.*]

6. LICENSES (§ 7*)—EXAMINATION OF MINERS—STATUTES—DISCRIMINATION.

Hurd's Rev. St. 1909, c. 93, creating miners' examining boards in various counties, provides that no person shall receive a certificate permitting him to work in a coal mine within the state unless he shall have had two years' practical experience as a miner, or with a miner, and provides that the examination required by the statute shall be taken by a miner unless he has been employed for two years in practical mining, and was actually employed in mining within the state at the time the statute took effect. *Held*, that the statute was not objectionable as discriminating in favor of the class of miners who were employed as such when the act took effect, or as discriminating against the class of miners who were not so employed.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

7. OFFICERS (§ 27*)—RIGHT TO APPOINTMENT OR ELECTION—PROPERTY RIGHTS.

The right to be appointed or elected to an office not being a property right, but a mere privilege, when an office is created by the Legislature, it may provide the qualifications required to hold the same, and it is immaterial that all the citizens of the state do not possess all the qualifications or requirements.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 34, 46; Dec. Dig. § 27.*]

8. LICENSES (§ 7*)—MINERS—EXAMINING BOARDS—STATUTES—ELECTION—"RESIDENCE."

Hurd's Rev. St. 1909, c. 93, provides for the creation of miners' examining boards in counties where mines are operated, and declares that such boards shall meet monthly and examine under oath all persons residing in the county in which the boards reside who apply for certificates, and that the members of the boards shall be actually engaged in mining coal in the county for which they are appointed. *Held*, that the "residence" of the board referred to in the statute meant the place for which the members of the board might be appointed, and that the statute should be so construed as to entitle every miner, whether a resident or non-resident of the state or of the county where he makes his application for examination, who has had two years' actual experience in coal mining and desires to engage in mining in the county where he applies for examination, to take the

examination and be granted a certificate to engage in coal mining in Illinois, and, when so construed, is not unconstitutional as providing for the examination of miners only that reside in the county where the examining board is appointed.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7783.]

9. LICENSES (§ 7*)—EXAMINATION AND CERTIFICATION OF MINERS—UNCERTIFICATED PERSONS.

Hurd's Rev. St. 1909, c. 93, providing for the examination and certification of miners (section 1), declares that any certificated miner may have one uncertificated person working with him and under his direction to learn the business of mining and become qualified to obtain a miner's certificate. *Held*, that such uncertificated persons were to be selected by the mine operators and not by the certificated miners, and the statute was therefore not objectionable as prohibiting persons from entering coal mines unless selected or designated by miners, and so creating a discrimination in the selection of helpers or apprentices.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-19; Dec. Dig. § 7.*]

10. STATES (§ 137*)—WARRANTS—AUTHORITY TO DRAW.

Hurd's Rev. St. 1909, c. 93, in so far as it authorizes payment out of the state treasury of funds paid into the treasury, as receipts of the operation of the act relating to the certification and examination of miners on warrants drawn by county judges, is unconstitutional.

[Ed. Note.—For other cases, see States, Cent. Dig. § 134; Dec. Dig. § 137.*]

11. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

Hurd's Rev. St. 1909, c. 93, providing for the examination and certification of miners, was not rendered wholly invalid because of the unconstitutionality of the part authorizing payment out of the state treasury of moneys derived from the operation of the act on warrants drawn by county judges.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Error to Saline County Court; G. H. Dorris, Judge.

Harry Evans was convicted of violating the miners' examining board act (Hurd's Rev. St. 1909, c. 93), and he brings error. *Affirmed*.

At the May term, 1910, of the county court of Saline county an information was filed against the plaintiff in error, Harry Evans. This information charged him with having violated the statute known as the "Miners' Examining Board Statute." The information alleged, in substance, that the plaintiff in error was the mine manager and foreman of the Wasson Coal Company, operating a coal mine in Saline county, and that as such he suffered and permitted one Mason Dunning to be employed and to work in said mine as a miner, and that said Mason Dunning did not have a certificate of competency and qualification from the miners' examining board of some county in Illinois, and was not working under the direction of a certi-

cated miner. The plaintiff in error moved to quash the information for insufficiency, which motion was overruled. A plea of not guilty was entered, and thereupon a trial was had, which resulted in the plaintiff in error being found guilty, and a fine of \$100 was assessed against him by the judgment of the court. Motions for a new trial and in arrest of judgment were made and overruled, and this writ of error is prosecuted to reverse that judgment. The only question raised in this court is the constitutionality of the statute under which the plaintiff in error was found guilty and fined.

The uncontradicted evidence is that the plaintiff in error was the mine manager and foreman of the mine of the Wasson Coal Company, situated in Saline county; that he had the complete management of the mine, including the employment and discharge of miners; that at the time complained of one Mason Dunning was employed in the mine; that Mason Dunning did not have a certificate or license from the miners' examining board of Saline county or of any other county; that he was a citizen of the United States and of the state of Illinois and a resident of Saline county; that he had been working in the mine of the Wasson Coal Company as an assistant of his father, who was a certificated miner; that some days prior to the filing of the information the father of Mason Dunning ceased to work in the mine. Mason Dunning, however, continued to work in the mine notwithstanding his father's departure and without being under the direction of or working with any other certificated miner. This fact was communicated to plaintiff in error and known by him, but he permitted Mason Dunning to continue to work.

The miners' examining board statute (Hurd's Rev. St. 1909, p. 1515) reads as follows:

"An act to amend an act entitled 'An act to provide for the safety of persons employed in and about coal mines, and to provide for the examination of persons seeking employment as coal miners, and to prevent the employment of incompetent persons as miners, and providing penalties for the violation of the same,' approved June 1, 1908, in force July 1, 1908. (Approved June 5, 1909. In force July 1, 1909.)

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: That an act entitled 'An act to provide for the safety of persons employed in and about coal mines, and to provide for the examination of persons seeking employment as coal miners, and to prevent the employment of incompetent persons as miners, and provide penalties for the violation of the same,' approved June 1, 1908, and in

force July 1, 1908, be and the same is hereby amended to read as follows:

"Sec. 1. That hereafter no person whosoever shall be employed or engaged as a miner in any coal mine in this state without having first obtained a certificate of competency and qualification so to do from a miners' examining board of some county in this state: Provided, that any miner actually employed in this state when this act becomes effective, who has been employed as a miner at least two years in coal mines, shall be entitled to a certificate permitting him to work in the mines of this state as a practical miner: And provided further, that any such certificated miner may have one uncertificated person working with him and under his direction for the purpose of learning said business of mining and becoming qualified to obtain a certificate in conformity with the provisions of this act.

"Sec. 2. In each county of this state where the business of coal mining is carried on, there shall be created a board to be styled 'The Miners' Examining Board,' to consist of three practical, experienced, and skillful miners of at least five years' continuous experience, who are then actually engaged in mining coal in the county for which they are appointed. Such appointments shall be made by the county judges in their respective counties immediately after this act shall be in effect, and on or before the 10th day of January in each year thereafter, and all vacancies in said board shall be at once filled by the county judge of the county in which such vacancy occurs. Each of said boards shall organize by electing one of the members president, and one member secretary; and every member of said board shall, within ten days after his appointment, take and subscribe an oath or affirmation before a properly qualified officer of the county in which he resides, that he will honestly and impartially discharge his official duties; each of said boards shall provide itself with an impression seal, having engraved thereon the name of said board and the county for which it is appointed. Members of said board shall receive, as compensation for their services, three and fifty one-hundredths dollars (\$3.50) per day for each day actually engaged in their official duties, and all legitimate and necessary expenses incurred in attending the meetings of said board, under the provisions of this act, and no part of the salary of the members of said board, or the expenses thereof, shall be paid out of the state treasury except as herein provided.

"Sec. 3. Each of said examining boards shall designate some convenient meeting place in their respective counties, of which due notice shall be given by advertisement in two or more newspapers of the proper county. At such meeting a book of registration shall be open in which shall be registered the name and address of each and every person

to whom said board shall issue a certificate of competency under this act.

"Sec. 4. Each applicant for examination for the certificate herein provided, shall pay a fee of one dollar, and the amount derived from this source shall be held by said boards respectively and applied to the expense and salaries herein provided, and such as may arise under the provisions of this act. The said boards shall report in writing quarterly to the court appointing them, all moneys received and disbursed under the provisions of this act, together with the number of miners examined under this act and the number failing to pass the required examination. All moneys over and above the amount required to pay the salaries of the members of said board in their respective counties, and their necessary actual expenses while in the performance of their duty as such board, shall be paid to the State Treasurer on the second Wednesday of each and every month, and the same shall be paid out by said State Treasurer only upon warrants issued by the county judge of the county for which such board was appointed. Said warrants shall show on their face that they are for the payment of the salary and necessary actual expenses of the members of said board in such county.

"Sec. 5. It shall be the duty of said boards respectively to meet on the first Wednesday of each month and to remain in session for a period of two days, and no longer, and said meeting shall be public. The said board shall examine under oath all persons residing in the county in which said board resides who apply for certificates as provided in this act, and said board shall grant such certificates of competency or qualifications to such applicants as are qualified, which certificates shall entitle the holders thereof to be employed as, and to do the work of miners in any county in this state, without other or further examination. No certificate of competency shall issue or be given to any person under this act unless he shall produce evidence of having had not less than two years of practical experience as a miner or with a miner, and in no case shall an applicant be deemed competent unless he appear in person before the said board and orally answer intelligently and correctly at least twelve practical questions propounded to him by the board pertaining to the requirements and qualifications of a practical miner. The said board shall keep an accurate record of the proceedings of their meetings and in said record shall show a correct detailed account of the examination of each applicant with questions asked and their answers, and at each of these meetings the board shall keep said record open for public inspection. Any miner's certificate granted under the provisions of this act shall not be transferable and any transfer of the same shall be deemed a violation of this act. Such

certificates shall be issued only at meetings of said boards, and said certificates shall not be legal unless then and there signed by at least two members of said board, and sealed with the seal of the board issuing the certificate.

"Sec. 6. That no person shall hereafter engage as a miner in any coal mine without having obtained such certificate as aforesaid. And no person shall employ any person as a miner who does not hold such certificate as aforesaid, and no mine foreman or superintendent shall permit or suffer any person to be employed under him, or in the mines under his charge and supervision as a miner except as herein provided, who does not hold such certificate. Any person or persons who shall violate or fail to comply with the provisions of this act shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine of not less than \$100 and not more than \$500, or shall undergo imprisonment in the county jail for a term of not less than thirty days and not to exceed six months, or both, at the discretion of the court.

"Sec. 7. It shall be the duty of the several miners' examining boards to investigate all complaints or charges of non-compliance or violation of the provisions of this act, and to prosecute all persons so offending; and it shall be the duty of the prosecuting attorney of the county wherein the complaints or charges are made to investigate the same and prosecute all persons so offending, and it shall at all times be the duty of such prosecuting attorney to prosecute such members of the miners' examining board as have failed to perform their duty under the provisions of this act. Upon conviction of any member of the miners' examining board for any violation of this act, in addition to the penalties herein provided, his office shall be declared vacant, and he shall be deemed ineligible to act as a member of the said board.

"Sec. 8. For the purposes of this act, the members of the said miners' examining board shall have the power to administer oaths."

Defrees, Buckingham, Ritter & Campbell (M. S. Whitley, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., W. C. Kane, State's Atty., and June C. Smith (George B. Gillespie and A. M. Fitzgerald, of counsel), for the People.

HAND, J. (after stating the facts as above). It is contended that the miners' examining board statute is unconstitutional by reason of the fact that the county judges of the state cannot be constitutionally invested with the power to appoint the members of the miners' examining boards provided for by that statute, it being the view of the plaintiff in error that the members of said boards are state officers, and that a state officer can only be appointed by the Gov-

ernor. We cannot accede to the view of plaintiff in error. The members of such miners' examining boards are appointed for and perform their duties in the counties wherein they are appointed, and have no jurisdiction to act outside of the county in which they are appointed. In general it may be said that a state officer is one whose duties and powers are coextensive with the state, while a county officer is one whose duties and powers are coextensive with the county (State v. Burns, 38 Fla. 367, 21 South. 290), and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the state does not make the officer who performs such acts necessarily a state officer.

If, however, it were conceded that the members of the miners' examining boards were state officers, still it would not certainly follow that the members of such boards must be appointed by the Governor. Section 10 of article 5 of the Constitution, under which the Governor obtains his appointing powers, reads as follows: "The Governor shall nominate, and by and with the advice and consent of the Senate (a majority of all the senators selected concurring, by yeas and nays), appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the General Assembly." It was clearly the intention of the framers of this constitutional provision that the appointing power, in cases of all offices established by the Constitution or created by law, should be vested in the Governor, unless the appointment or election to such offices is otherwise provided for by the Constitution or by statutory enactment. The language found in said section of the Constitution, "and whose appointment or election is not otherwise provided for," is plain and unambiguous, and clearly indicates that if by the Constitution an office is established and the method pointed out in the Constitution for filling such office is otherwise than by appointment by the Governor, the portion of the section which provides that "the Governor shall nominate and by and with the advice and consent of the senate" shall appoint all officers, etc., would not apply as to such constitutional office; and if this be true, it is, we think, equally true that if an office be created by the Legislature and a method otherwise than by nomination and appointment by the Governor to fill such an office is provided for by law, such law would not be subject to constitutional objection on the ground that the Legislature had deprived the Governor of a part of his appointing power.

The question then arises, Has the Legislature the right to vest such appointing power in county judges, each judge making the appointment in the county wherein the board

is to be appointed? In *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793, it was held that the Legislature might properly invest the county courts of the state with the power to appoint election commissioners under the city election law, and in *People v. Board of Supervisors*, 223 Ill. 187, 79 N. E. 123, that the Legislature might properly invest county boards of the state with power to appoint election judges. If the power can be properly conferred upon the courts to appoint election commissioners and upon county boards to appoint judges of election, we can see no reason why the Legislature may not confer the power upon the county judges of the state to appoint miners' examining boards for their respective counties. The power of the Legislature to authorize county and circuit courts, or the judges thereof, to appoint various kinds of officers not belonging to the judicial department of the government has been recognized in the following cases: *People v. Morgan*, 90 Ill. 553; *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *People v. Raymond*, 186 Ill. 407, 57 N. E. 1066; *Sherman v. People*, 210 Ill. 552, 71 N. E. 618; *People v. Chetlain*, 219 Ill. 243, 76 N. E. 364. Our conclusion is that the statute in question is not unconstitutional for the reason that the county judges of the state cannot be invested with the power to appoint the miners' examining boards.

It is next contended that the statute is unconstitutional by reason of the fact that it discriminates against such miners as were not actually employed in mining in this state on the date said statute became effective, and discriminates in favor of such miners as were actually employed in mining in this state on the date said statute became effective. The statute provides that no person shall receive a certificate permitting him to work in a coal mine in this state unless he shall have had two years' practical experience as a miner or with a miner, and provides that the examination required by the statute shall be taken by a miner unless the miner has been employed two years in practical mining, and was actually employed in mining in this state at the time the statute went into effect. The question therefore is, Has the Legislature the right to exempt a miner from taking the examination who was actually employed in mining in this state on the date the statute became effective, as a prerequisite to issuing him a certificate, while if he were not so employed on the date the statute went into effect, to require him to take an examination? In other words, could the Legislature make an exception in favor of the miner who was actually employed in mining coal in this state on the day the statute went into effect without making the statute unconstitutional on the ground that it was discriminatory legislation?

The Legislature, in the exercise of the po-

lice power of the state, may undoubtedly prescribe regulations for securing the admission of qualified persons to all callings which demand special knowledge, experience, and skill, and in no calling is there more imperative demand for experience, knowledge, and skill than there is in that of mining coal. The miner works beneath the surface of the earth by the aid of artificial light, and is surrounded, while at work, by many dangers, and unless great precaution is observed to protect him from the negligence of the mine operator and the unskillfulness of his fellow miners, a disaster may take place in the mine and without a moment's warning the mine be destroyed, together with all persons working therein; hence there has been placed upon the statute books of this state and of many other states, within a comparatively few years, legislation, the object of which is to protect the miners from the negligent acts of the mine operator and mine owner, and obviously the object of the statute in question was to go a step further and protect the skilled workmen in coal mines, as far as possible, from the unskillfulness of unskilled labor in the mine. It is therefore clear this legislation was provided with a view to make safe, so far as possible, the mining of coal, and concerns the preservation of the health and the lives of all that class of men who are engaged in mining coal in this state, and the statute, according to the canons of constitutional construction, should be sustained unless it is clearly and palpably in violation of some provision of the Constitution, state or national.

As we view the provision of the statute which exempts the miner from an examination if he was employed in mining in this state at the time the statute went into effect, as a prerequisite to issuing him a certificate, it does not confer upon such miner any privilege, right, or immunity, and does not discriminate in his favor as against the miner who was not so employed at the time the statute became effective. The most that can be said is that the statute leaves the miner who has had two years' experience in mining coal and was employed in mining coal in this state at the time the statute went into effect, in the precise situation that he was in before the statute was passed—that is, it permits him to continue his employment upon his satisfying the miners' examining board that he had been for two years engaged in mining coal, and was engaged in mining coal in this state at the time the statute went into effect. Neither does it take from the miner who resides in this state or resides out of this state, and who has had two years' experience in mining, any privilege, right, or immunity, but leaves such miner where it found him when the statute was passed—that is, without employment in a coal mine—and if he desires to again engage in mining, then the statute provides that he may do so by passing an examination and otherwise

complying with the statute. In the one instance the law is just to the miner who was employed when the law went into effect, as it permits him to continue his employment, while it does not in any way work an injustice to the miner who has for years, or even temporarily, abandoned the mining of coal and again desires to be employed in that calling. We are therefore constrained to hold that the statute does not discriminate in favor of the class of miners who were employed as miners when the act became effective or discriminate against the class of miners who were not so employed when the act became effective.

In *Williams v. People*, 121 Ill. 84, 11 N. E. 881, the defendant was prosecuted for a violation of an act regulating the practice of medicine in the state of Illinois. The statute under which he was prosecuted, among other things, provided "that the provisions of this act shall not apply to those that have practiced medicine within this state for ten years," and the constitutionality of the statute was attacked on the ground that the statute, by reason of that provision, amounted to discriminatory legislation and was void. The court held otherwise, and on page 88, 121 Ill., 11 N. E. 881, of the opinion said: "This proviso does not confer upon the ten years' practitioners any special privilege, immunity, or franchise. It does not confer upon them anything. It leaves them as they are." The case of *Kettles v. People*, 221 Ill. 221, 77 N. E. 472, is also in point.

It is further contended that the statute is discriminatory in this: That the qualifications required of the members of the miners' examining boards exclude from such boards all persons who are not practical, experienced, and skillful miners of at least five years' continuous experience, and who are not, at the time of their appointment, actually engaged in mining coal in the county for which they are appointed. The right to be appointed or elected to an office is not a property right which is conferred upon the citizen by the Constitution, but it is a privilege, and when an office is created by the Legislature we think it may provide the qualifications which shall be required of the citizen to hold such office, and the fact that all of the citizens of the state do not possess all of the qualifications or requirements which may be necessary to hold such office does not make the statute creating such office and fixing the qualifications of the persons who may hold such office unconstitutional. The Legislature had the power to provide, if it saw fit, that only practical, experienced, and skilled miners of at least five years' continuous experience, who were then actually engaged in mining coal in the county for which they were appointed, should be qualified to act as members of the miners' examining boards, and by so doing no inhabitant of the state was discriminated against. The courts have nothing to do with the wisdom of a statute, and

cannot declare a statute unconstitutional by reason of the fact that it may be impolitic or unwise.

The further contention is made that the statute provides only for the appointment of miners' examining boards in counties where coal is mined, and that it also provides only for the examination of miners who reside in a county in which a miners' examining board is appointed, the result of which, it is urged, is to exclude from examination and certification all miners who reside outside of the state of Illinois, or who reside outside of a county in which coal is mined and in which a miners' examining board is appointed. This contention is based upon the language, "that the said board shall examine under oath all persons residing in the county in which said board resides who apply for certificates." A statute must have a reasonable construction. It need not, however, have a literal construction. This statute does not require members of the board to be appointed in the county in which they reside, but they must be "actually engaged in mining coal in the county for which they are appointed." It is apparent, therefore, that the "residence" of the board, referred to in the statute, means the place for which the members of the board may be appointed, that is, in a county in which they are actually engaged in mining coal. It is usually true that the Legislature will be deemed to have used a word in a statute, where it is used more than once, in the same sense, unless the context shows the word to have been used in the statute at different times in a different sense, and it is a rule of statutory construction that a court will not so construe a statute as to render it abortive or annul it, if such construction can be avoided. If the clause found in the statute, "shall examine under oath all persons residing in the county," is used in the same sense that the word "residence" is used in defining the qualification of the members of the miners' examining boards, the statute, if given a literal construction, would read, "shall examine under oath all persons who are actually engaged in mining coal in the county where a miners' examining board has been appointed." If, however, the entire statute is given a liberal construction and with a view of not rendering it unconstitutional, but with a view of rendering it valid, it should be so construed as to authorize the miners' examining board of any county in the state to examine all miners who reside in a county where no miners' examining board has been appointed, or who reside outside of the state and desire to be examined with the view of becoming employed in coal mining in this state and in the county in which the board to which application for examination was made had been appointed and was then in session, which construction would make the statute constitutional. In *People v. Harrison*, 191 Ill. 257, 61 N. E. 99, will be found a full discussion of the rules of statutory

construction. If the rules of statutory construction announced in that case are applied to the miners' examining board statute, then every miner, be he a resident or nonresident of the state or of the county where he makes his application for examination, who has had two years' experience in mining coal and desires to engage in mining in the county where he applies for examination, can take the examination and be granted a certificate and engage in mining coal in this state. We think the statute should be so construed, and when so construed it is not subject to constitutional objection.

It is also urged that the statute is unconstitutional by reason of the fact that it prohibits any person from entering a coal mine in this state unless he is selected, appointed or designated by some duly certificated miner, and it is said this will prohibit all persons in the state except those favored few who may be selected by certificated miners from becoming practical coal miners, and that such arbitrary discrimination in the selection of helpers or apprentices renders the act void. The portion of the statute upon which this contention is based is found in section 1, and reads as follows: "That any such certificated miner may have one uncertificated person working with him and under his direction for the purpose of learning said business of mining and becoming qualified to obtain a certificate in conformity with the provisions of this act." We think the plaintiff in error misinterprets this section of the statute. Clearly the class of persons referred to as "uncertificated persons" are not to be selected and appointed by the certificated persons with whom they are to work and under whose direction they are to work, but such uncertificated persons must necessarily be employed by the persons who own and operate the mine and who are to pay them for their work. If the statute be thus construed the argument of the plaintiff in error upon this branch of the case is without force. We do not think the provision of the statute which provides for the employment of uncertificated persons in coal mines renders the statute unconstitutional.

It is finally contended that that portion of the statute which provides that money paid into the state treasury by the miners' examining board shall be paid out again upon warrants issued by the several county judges of the state is invalid. That this provision of the statute is unconstitutional is conceded by the defendant in error, and it is too plain for argument that the portion of the statute which authorizes a county judge to draw warrants against money in the state treasury must be held to be unconstitutional. The other provisions of the statute, however, are not dependent upon this provision, and, eliminating from the statute the portion admittedly unconstitutional, the remaining part of the statute is valid and constitutional.

Finding no reversible error in this record the judgment of the county court will be affirmed.

Judgment affirmed.

(247 Ill. 502)

CARRIER v. HOOPER.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. EVIDENCE (§ 461*)—CONTRACTS.

A purchaser, suing for specific performance of a contract for the sale of real estate, may testify that the vendor was to pay the taxes on the land for a designated year, to show that his offer to pay the amount called for in the contract, less such taxes, was made in accordance with his understanding of the contract, there being an apparent ground for such understanding.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 461.*]

2. VENDOR AND PURCHASER (§ 198*)—CONTRACTS—CONSTRUCTION.

A contract for sale and purchase of real estate, executed November 1, 1909, to be performed within 60 days, which stipulated that the deed was to be subject to taxes and tax deeds, and if the taxes to be paid by the vendor should not be paid at the time of closing of contract he should pay on or before May 1st following, required the vendor to pay the taxes of 1909.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 408-412; Dec. Dig. § 198.*]

Appeal from Superior Court, Cook County; Arthur H. Chetlain, Judge.

Suit by Joseph C. Carrier against James H. Hooper. From a decree for plaintiff, defendant appeals. Affirmed.

A. D. Gash, for appellant. Horton, Wickett, Miller & Meler, for appellee.

CARTWRIGHT, J. The appellee, Joseph C. Carrier, filed his bill in equity in the superior court of Cook county against the appellant, James H. Hooper, asking the court to compel the specific performance by Hooper of a contract for the execution of a quitclaim or special warranty deed to Carrier of two lots in Austin Heights, in said county. Hooper by his answer denied that Carrier had offered to perform the contract on his part by tendering the full amount due thereon within the time limited thereby. The issues were referred to a master in chancery, who reported that the contract was made; that there was an honest difference of opinion between the parties on the construction of the terms of the contract as to who should bear the burden of certain taxes; that an offer was made by Carrier, under the advice of counsel, of the amount which he claimed was due; and that there was a sufficient effort made to comply with the terms of the contract and a sufficient offer by Carrier; and he recommended a decree that Hooper specifically perform the contract upon payment to him of \$1,975. The chancellor reviewed the report of the master on exceptions there-

to, overruled the exceptions, and entered a decree in accordance with the report, requiring Hooper to deliver a proper deed of the premises, and ordering Carrier, on the tender of such deed, to pay Hooper \$1,975, with interest at 5 per cent. from January 1, 1910, and to pay Hooper's costs. This appeal was prosecuted from the decree.

The facts of the case are peculiar, and the relations of the parties and the purpose of the contract are somewhat unusual. On December 27, 1892, Carrier, who was the owner of two vacant lots, entered into a contract with F. M. Chandler for the erection thereon of a residence and barn. Chandler purchased from the Carey-Lombard Lumber Company materials therefor, but did not complete his contract, nor pay the lumber company, and the company filed a petition for mechanic's lien in May, 1893. The petition for mechanic's lien was pending in the superior court until September 19, 1899, when it was heard and dismissed for want of equity. The lumber company appealed to the Appellate Court for the First District, and there was no appearance for Carrier in that court. The Appellate Court reversed the decree on January 4, 1901, and remanded the cause to the superior court. The case was redocketed that month in the superior court, and was reached for hearing on March 1, 1902, when there was no appearance for Carrier, and a decree was entered for \$659.25, and the lots were ordered sold in default of payment. They were sold to C. Demick, and a certificate of sale was delivered to him, which was afterward assigned to Hooper, the solicitor for the lumber company. When the period of redemption expired, Hooper obtained a deed of the premises; but he made no move to obtain possession, and rested quietly, with no notice to Carrier, so far as appears, until more than five years had elapsed after the decree. The time in which Carrier might have obtained a review of the decree by the writ of error having expired, Hooper brought an ejectment suit to obtain possession of the premises. A plea of the general issue was filed, but when the case was reached for trial there was no appearance for Carrier, and he had no knowledge when the case was to be tried. Judgment was entered, and a writ of possession was issued on September 27, 1909, under which Carrier was evicted from the premises.

Carrier filed a bill to set aside the title acquired by Hooper, and on November 1, 1909, the contract which is the basis of this suit was entered into between the parties. The contract consisted of two documents—one a lease to Carrier at \$40 per month, and the other a contract by which Hooper was to give a quitclaim or special warranty deed upon payment of \$2,000 within 60 days, and the rent was to be deducted from the purchase price. Carrier was to furnish his own abstract of title, and the deed was to be subject to all taxes and assessments levied af-

ter the year 1901, and also to four tax deeds, and if the taxes to be paid by Hooper could not be paid at the time the contract was to be closed, he agreed to pay them on or before May 1st next ensuing. Carrier paid \$25 and re-entered the premises. The contract was quite evidently made as a compromise and settlement of the controversy between the parties. Hooper was to give a quitclaim or special warranty deed, subject to four tax deeds on the property and all taxes after 1901, covering a period when he claimed to own the property. The contract was made to get rid of the claim which he had established against the property. It was necessary for Carrier to clear up the title to get the quitclaim deed which would release the property from the claim of Hooper, and he made an arrangement with a bank to obtain the money to pay Hooper. The bank found objections to the title, and Carrier procured releases, and removed many objections, and paid out considerable money in doing so. Before the expiration of the time limited by the contract he offered to pay Hooper \$1,923, claiming that Hooper was to pay the taxes of 1909, which Hooper disputed, and it was because of this claim that it is insisted Carrier did not offer to perform.

Counsel for Hooper contends that the master in chancery erred in permitting Carrier to testify that his understanding was that Hooper was to pay the taxes of the year 1909, and that if this evidence is disregarded there is nothing upon which the court can find that there was a sufficient offer within the life of the contract. The evidence was competent for the purpose of showing the offer of Carrier to perform the contract as he understood it, and there was apparent ground for such understanding. It is true that the written contract controlled; but it contained a provision relating to some taxes to be paid by Hooper which it was contemplated could not be paid at the time when the contract would be closed, but which he was to pay by the following May. That provision referred to taxes which would not be payable in the 60 days between November 1 and December 31, 1909, and could refer to nothing but the taxes of 1909. The contract could be fairly interpreted as requiring Hooper to pay the taxes of 1909, since there were no other taxes which could have been referred to. Even if that provision could be regarded as ambiguous, Carrier had a right to his conclusion as to its meaning.

It is further contended that Carrier did not, in fact, make a sufficient offer to perform within the life of the contract; but we are of the opinion that the master was right in his conclusion on that subject. The substantial objections to the title pointed out by the bank were removed, and there is no good reason shown in the record for saying that Carrier could not obtain the requisite amount of money to pay Hooper whenever Hooper should make his deed. There was no equity

in Hooper's claim, and to deny the relief asked for by the bill would be to give Hooper the benefit of the efforts and expenditures of Carrier in clearing up the title, to which he had no just claim.

The decree is affirmed.

Decree affirmed.

(248 Ill. 36)

PEOPLE ex rel. BAIRD, County Collector, v. CAIRO, V. & C. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HIGHWAYS (§ 127*)—TAXATION—CERTIFICATE OF COMMISSIONERS OF HIGHWAYS.

Under Hurd's Rev. St. 1909, c. 121, § 18, requiring the commissioners of highways to make a certificate of the tax rate for road and bridge purposes and deliver the same to the clerk, who must certify the levy to the county clerk, who must extend the same on the collector's book of the town, a county clerk has no authority to extend a road and bridge tax, unless the tax levy of the commissioners is certified to him by the town clerk.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

2. HIGHWAYS (§ 127*)—TAXATION—CERTIFICATE OF COMMISSIONERS OF HIGHWAYS.

Under Revenue Act (Hurd's Rev. St. 1909, c. 120) § 191, providing that no error or informality in the proceedings of any of the officers connected with the assessment, etc., of taxes, not affecting the substantial justice of the tax, shall invalidate it, any mere error or omission of a town clerk in certifying a tax levy for roads and bridges to the county clerk may be corrected by amendment; but where there is no certificate of the town clerk, or copy of the certificate of the commissioners of highways fixing the tax for roads and bridges, filed with the county clerk, there is an entire omission of a necessary step to the validity of a tax, and the defect cannot be supplied.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

3. HIGHWAYS (§ 127*)—TAXES—CERTIFICATE OF COMMISSIONERS OF HIGHWAYS.

The clerk of a town made a copy of the body of a certificate of the commissioners of highways fixing the tax rate, and the commissioners and town auditors signed the same, and the clerk transmitted it to the county clerk. The paper had no file mark. *Held*, that the paper was not a certificate of the town clerk, and the defect therein could not be avoided by amendment under Revenue Act (Hurd's Rev. St. 1909, c. 120) § 191, providing that informalities in the proceedings of the officers connected with the assessment, levying, or collection of taxes shall not invalidate the tax.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

4. HIGHWAYS (§ 127*)—VOID TAX—PAYMENT—REDUCTION.

Where a city tax was void, and could not be properly included in the town tax of a township, the fact that a taxpayer elected to pay the void city tax did not give it the right to insist that the void tax should be included in the aggregate taxes to be reduced under the Junl law; the taxes remaining after excluding the city tax being less than 3 per cent. of the taxable property.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 127.*]

Appeal from Coles County Court; T. N. Cofer, Judge.

Action by the People, on the relation of N. M. Baird, County Collector of Coles County, against the Cairo, Vincennes & Chicago Railway Company, for judgment for taxes. From a judgment granting insufficient relief, relator appeals, and defendant assigns cross-error. Affirmed.

Robert Hammond, State's Atty., and James W. & Edward C. Craig, for appellant. A. C. Anderson, for town of Charleston. H. A. Neal (L. J. Hackney, of counsel), for appellee.

CARTWRIGHT, J. The county court of Coles county sustained the objection of the appellee, the Cairo, Vincennes & Chicago Railway Company, to the application of the appellant, the county collector of said county, for judgment for the road and bridge tax for the town of Mattoon, and overruled the objection of the railway company to the town tax of the township of Charleston. Judgment was entered accordingly, from which the collector appealed, and assigns for error the adverse ruling concerning the road and bridge tax; and the railway company questions the ruling against it as to the town tax by means of a cross-error.

At the semiannual meeting of the commissioners of highways of the town of Mattoon, held on September 7, 1909, the commissioners made a certificate of the rate of 36 cents on each \$100 of taxable property as finally agreed upon to be levied for road and bridge purposes and for the payment of outstanding orders. The certificate was signed by the commissioners, and was in all respects in accordance with the law. There was no additional levy required to be certified to the board of town auditors; but the members of that board approved the certificate and indorsed their names upon it. The certificate was filed in the office of the town clerk on the same day, and he then made a copy of the body of it down to the names of the commissioners and auditors, and this was signed by the commissioners and auditors in the same manner as the certificate filed in the clerk's office. The town clerk transmitted this last paper to the county clerk, who extended the tax by virtue of it. On the hearing the collector sought to obviate the objection that the clerk did not certify the levy to the county clerk as required by the statute by asking leave to amend the paper by annexing a certificate that it was a true copy of the certificate made by the commissioners of highways on file in the office of the town clerk. The court sustained an objection to the proposed amendment, and, there being no basis for extending the tax, the objection of the railway company was sustained.

The statute requires the commissioners to make a certificate of the rate per cent. agreed upon by them to be levied on the property

of the town for road and bridge purposes and for the payment of any outstanding orders drawn by them on their treasurer, and this certificate is to be delivered by them to the town clerk, to be kept by him on file for the inspection of the inhabitants of the town. The town clerk is then required to certify the levy to the county clerk, to be by him extended upon the collector's book of the town, and the certificate of the town clerk is the authority, and the only authority, recognized by the statute (Hurd's Rev. St. 1909, c. 121, § 16) for the extension of the tax by the county clerk. It has been repeatedly decided that any attempt of the county clerk to extend the tax without such a certificate is illegal. It was decided under a like statute with respect to town taxes in *Peoria, Decatur & Evansville Railway Co. v. People ex rel.*, 141 Ill. 483, 31 N. E. 113, and *Indiana, Decatur & Western Railway Co. v. People ex rel.*, 201 Ill. 351, 66 N. E. 293. The same doctrine was declared with reference to the statute requiring the filing of a certified copy of a tax levy ordinance as a basis for a village tax in the case of *Village of Russellville v. Purdy*, 206 Ill. 142, 68 N. E. 1065, and was adhered to in *People ex rel. v. Kankakee & Southwestern Railroad Co.*, 218 Ill. 588, 75 N. E. 1063. It was held in those cases that, in the absence of a certified copy of the ordinance, the county clerk was without authority to extend the tax, and that the certificate was jurisdictional. The rule was applied to this statute in the case of *Cincinnati, Indianapolis & Western Railway Co. v. People ex rel.*, 213 Ill. 197, 72 N. E. 774, where it was held that the filing by the town clerk of the original certificate of levy made by the highway commissioners, instead of the certified copy required by the statute, invalidated the tax. The law is settled that a county clerk has no authority to act at all unless the tax levy is certified to him by the town clerk.

The revenue act (Hurd's Rev. St. 1909, c. 120), however, provides (section 191) that no error or informality in the proceedings of any of the officers connected with the assessment, levying, or collecting of taxes, not affecting the substantial justice of the tax itself, shall invalidate or in any manner affect the tax, and any irregularity, informality, omission, or defective act of any officer may, in the discretion of the court, be corrected, supplied, and made to conform to the law. By virtue of that provision any mere error, irregularity, informality, or omission of a town clerk in certifying the tax levy to the county clerk may be corrected by amendment or supplied, and if anything is received by the county clerk from the town clerk which appears to be a copy of the certificate of the commissioners, or which he is justified in accepting as such, any omission, defect, irregularity, or informality in the act of the town clerk may be corrected, in the discretion of the court, for the purpose of sustaining the tax. If,

however, there is nothing filed with the county clerk which appears to be a certificate of the town clerk, or to be a copy of the certificate of the commissioners of highways, there is an absolute want of authority to extend the tax, since there is an entire omission of one of the necessary steps to the validity of a tax. Such a failure to comply with the statute is not a mere error, informality, or omission required to make the certificate of the town clerk complete and perfect. If a paper is filed with the county clerk which appears on its face to be a copy, it may be amended on the hearing by adding a complete and proper certificate. *Toledo, St. Louis & Western Railroad Co. v. People ex rel.*, 225 Ill. 425, 90 N. E. 283; *People ex rel. v. Kankakee & Southwestern Railroad Co.*, 237 Ill. 362, 86 N. E. 742.

The application of the statute providing for the correction of errors and omissions is illustrated by the latter case, where the certificate of the commissioners, with the written consent of the auditors and assessor, was made in duplicate, and one was deposited in the office of the town clerk, and the other was annexed to other papers, and all delivered as one document to the county clerk, with a certificate which was not complete, because it related only to a part of the papers. One of the papers attached to the certificate was a copy of a vote at the town meeting attempting to levy the additional road and bridge tax. That was necessarily a copy of the town record, and the papers did not bear any file mark, so that there was clearly an attempt of the town clerk to comply with the law, and his omission could be supplied by an amendment. In this case the paper filed with the county clerk did not appear to be a copy, but showed the different handwriting of the various persons who signed it, and had the appearance of being an original certificate required to be kept in the town clerk's office. It did not bear any file mark, and that is the only thing insisted upon as evidence that it appeared to be a copy and not the original. The want of a file mark, standing alone, would raise no inference, except that the town clerk had sent the paper to the county clerk, instead of filing it in his office. As the paper did not appear to be a copy, and could not have been so regarded by the county clerk, there was nothing which could be amended. *Cincinnati, Indianapolis & Western Railroad Co. v. People ex rel.*, *supra*; *Village of Russellville v. Purdy*, *supra*. The court did not err in sustaining the objection to the road and bridge tax.

The court overruled the objection of the railroad company to the town tax of the township of Charleston. The objection was that the total taxes subject to reduction under the Juul law exceeded 3 per cent., including the city tax of the city of Charleston, and that reduction was not made as required by that law. It was agreed by the parties

that the aggregate tax rates, including the city tax, amounted to 4.15 per cent., but that the city tax was illegal and void for want of a certified copy of the tax levy ordinance as a basis for the tax. If the city tax was excluded, the remaining taxes were less than 3 per cent. of the taxable property. As that tax was void, and the clerk was without authority to include it, there was no violation of the statute, and the fact that the railroad company elected to pay the void city tax did not alter the situation. It had no right to insist that a void tax should be included in the aggregate taxes to be reduced.

The judgment is affirmed.

Judgment affirmed.

(247 Ill. 376)

TERRE HAUTE & P. R. CO. v. ROBBINS et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. CORPORATIONS (§ 29*)—ATTACKING VALIDITY OF INCORPORATION—COLLATERAL ATTACK.

Where a railroad corporation, duly authorized to condemn property for railroad purposes, has not within the time required by its charter either built a track or acquired a right of way over a part of its chartered line, but operates its trains over that part of its line on the tracks of a connecting railroad with which it has an agreement and brings proceedings to condemn property situated on that part of its operated line, the owner cannot raise the question of the company's de jure existence, it being sufficient that the organization of the company was authorized by statute, and that it was a corporation de facto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79; Dec. Dig. § 29.*]

2. CORPORATIONS (§ 29*)—CREATION AND EXISTENCE—CORPORATION DE JURE—HOW DETERMINED.

The existence of a corporation as a corporation de jure can only be determined by a direct proceeding on a writ of quo warranto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79; Dec. Dig. § 29.*]

3. RAILROADS (§ 80*)—OPERATION—RIGHT OF WAY—STATUTES—LEASED LINE.

Under the express provisions of Hurd's Rev. St. 1909, c. 114, §§ 44, 45, a railroad may be operated within its charter without owning all of its right of way, as where a part of its line is operated under an agreement with other railroad companies.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 80.*]

4. CORPORATIONS (§ 387*)—AGREEMENT BETWEEN CORPORATIONS—ILLEGAL COMBINATION—HOW DETERMINED.

In condemnation proceedings by a railroad company to acquire land for a freight depot, it was shown that the railroad was operated under a contract with a connecting railroad which provided that it should not take passengers or freight from the place at which it sought to enlarge its freight depot. Held, that the owner could not raise any question as to illegal combination entered into by it, and, as the company retained its franchise, the question of whether or not it was properly exercising such franchise was one between it and the state, and any question of illegal combination or arrangement entered into by it that might affect the

franchise could only be raised by the state in a proceeding instituted for that purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548-1553; Dec. Dig. § 387.*]

5. EMINENT DOMAIN (§ 66*)—NATURE—PUBLIC USE—QUESTION FOR COURT.

Where private property is proposed to be taken and appropriated to a public use, the question whether such use is a public use is a question for the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

6. EMINENT DOMAIN (§ 66*)—EXERCISE OF DELEGATED POWER—NECESSITY FOR APPROPRIATION.

Where the use for which property is sought to be acquired by condemnation proceedings is a public use, the courts cannot inquire into the necessity or expediency of the exercise of the right of eminent domain except to prevent a clear abuse in the exercise of such right.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

7. EMINENT DOMAIN (§ 196*)—NECESSITY FOR APPROPRIATION—EVIDENCE.

Evidence, in a proceeding by a railroad to condemn land for use in enlarging its freight depot, held to show no such abuse of discretion as to justify interference by the court.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 529-534; Dec. Dig. § 196.*]

8. EMINENT DOMAIN (§ 10*)—DELEGATION TO RAILROAD COMPANY—AGREEMENT AS TO OPERATION—CHARTER POWERS.

Where a railroad has a delegated power under its charter to condemn property for railroad purposes, and has not acquired a right of way over a part of its line as chartered, but operates over that part of its line by an agreement with a connecting railroad, it retains its power under its charter to condemn for its own railroad purposes land situated on that part of its line.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

Appeal from Macon County Court; O. W. Smith, Judge.

Petition by the Terre Haute & Peoria Railroad Company against H. F. Robbins and others for the condemnation of property for railroad purposes. Petition dismissed, and petitioner appeals. Reversed and remanded.

Outten, Roby, Ewing & McCullough, for appellant. Hugh Crea, Hugh W. Housum, and Whitley & Fitzgerald, for appellees.

CARTER, J. This was a petition brought in the county court of Macon county by the Terre Haute & Peoria Railroad Company, appellant, to condemn certain property in the city of Decatur for the purpose of building thereon a freight depot. On a preliminary hearing before the court as to the right and authority of the petitioner to condemn the property in question, the court, on motion of appellees, dismissed the petition, holding that on the petition and evidence then before the court appellant was without such authority. This appeal was thereupon prayed and allowed.

January 17, 1887, petitioner was granted a charter to construct and operate a railroad from Peoria, Ill., to a point on the eastern

boundary of said state in Clark county, the line as constructed between these two points to pass through Decatur, in Macon county. It is now operating, through its lessee, the Vandalla Company, a railroad between these two points, and thence eastward to Terre Haute, Ind. From Maroa, a city in Macon county about 12 miles north of Decatur, to Decatur Junction, some two miles south of Decatur, appellant has not constructed and does not now own a track of its own, but has an agreement with the Illinois Central Railroad whereby the trains of appellant are permitted to be operated between Maroa and Decatur Junction, and through said city of Decatur, over the track of said Illinois Central Railroad Company, the latter company also using said tracks for its own railroad business. At Maroa, and also at Decatur Junction, the tracks owned by appellant connect with the Illinois Central Railroad, and by its contract arrangements with the latter company appellant has a continuous line of railroad from Peoria, Ill., to the Illinois state line and thence to Terre Haute. Appellant has a freight house and team tracks in the city of Decatur which the testimony tends to show are inadequate because of restricted room, location, and surroundings to meet its convenient and effective operative demands. In order to enable it to perform its duties as a railroad and common carrier of freight it has sought a new location in the city of Decatur for the purpose of constructing a new freight house and team tracks and the necessary approaches, and has expended some \$26,000 in acquiring property, but has been unable to agree with appellees as to the fair cash market value of the property owned by them and desired by appellant for this improvement.

The chief contention of appellees as showing that appellant is without power to condemn the property in question is that appellant does not own the tracks and right of way upon which it is operating between Maroa and Decatur Junction. No question is made as to appellant being duly incorporated under the laws of this state and thereby authorized to condemn property for railroad purposes. To support their contention that appellant is without authority to condemn this property, appellees allege that appellant has been incorporated for 23 years, and long since, under the obligations placed upon it by its charter and the statutes, should have obtained the right of way over the 14 or 15 miles between Maroa and Decatur Junction. In *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73, it was argued that a railroad company could not condemn certain property because it had failed to finish its road within 10 years from the filing of its articles of incorporation, and therefore, under section 26 of the act on railroads (Hurd's Rev. St. 1909, c. 114, § 28), its authority to condemn had ceased. This court overruled that contention, stating (page 429 of 177 Ill.,

page 74 of 53 N. E.): "In a proceeding for the condemnation of real estate for railroad uses the question of the de jure existence of the company cannot be determined. It is sufficient that the statute authorized the organization of the corporation, and that the petitioner is a corporation de facto. Whether or not it has a legal existence as a corporation can only be determined by a direct proceeding—the writ of quo warranto." To the same effect are *Thomas v. South Side Elevated Railroad Co.*, 218 Ill. 571, 75 N. E. 1058; *Thomas v. St. Louis, Belleville & Southern Railway Co.*, 164 Ill. 634, 46 N. E. 8; *Chicago & Eastern Illinois Railroad Co. v. Wright*, 153 Ill. 307, 38 N. E. 1062; *McAuley v. Columbus, Chicago & Indiana Central Railway Co.*, 83 Ill. 348.

Railroad companies incorporated or organized under the laws of this state have the power to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or renting their roads or any part thereof, and also to contract for and hold, in fee simple or otherwise, lands or buildings in this or other states for depot purposes. Such companies also are authorized to connect with each other and with the railroads of other states on such terms as may be mutually agreed upon. Hurd's Rev. St. 1909, c. 114, §§ 44, 45, p. 1745; *Illinois Midland Railway Co. v. People*, 84 Ill. 426; *Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co.*, 149 Ill. 272, 37 N. E. 91. Railroads may thus be united and merged into a single line or two companies may arrange for the joint use of the same tracks. *Illinois Central Railroad Co. v. Chicago, Burlington & Northern Railroad Co.*, 122 Ill. 473, 13 N. E. 140. The contract between appellant and the Illinois Central Railroad Company for the use of the latter's right of way and tracks between Maroa and Decatur Junction, executed on November 14, 1894, for the period of 25 years, can be ended by either party on one year's notice. The law does not require a railroad company to acquire, by condemnation, all the lands necessary for the construction and operation of its road at the same time. *Fisher v. Chicago & Springfield Railroad Co.*, 104 Ill. 323; 2 *Lewis on Eminent Domain* (2d Ed.) § 607. While a corporation must act within its charter powers and the statutes of the state, it is manifest that a railroad can be operated, within its charter, without owning all of its right of way and tracks, by leasing from other railroad corporations, as provided in the statute.

In this connection it is urged by appellees that the contract between the Illinois Central Railroad and the appellant provides that the latter shall not take passengers or freight, locally, between Decatur and Maroa or intermediate points between said stations, and that this destroys all competition between these railroads between those points. This court, in *Thomas v. St. Louis, Belle*

ville & Southern Railway Co., supra, stated, on page 639 of 164 Ill., on page 9 of 46 N. E.: "While it retained its franchise, the question of whether or not it was improperly exercising such franchise was one between it and the state. Any question of illegal combination or arrangement entered into by it that might affect the franchise could only be raised by the people in a proceeding instituted for that purpose."

It is further urged by appellees that no necessity exists for the condemnation of the property in question. Courts have the right to determine whether the use of private property proposed to be taken and appropriated is public in its nature, but when the use is public it has been held that the courts cannot inquire into the necessity or propriety of exercising the right of eminent domain. *Smith v. Drainage District*, 229 Ill. 155, 82 N. E. 278; *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake*, 71 Ill. 383. Courts will prevent an abuse of the exercise of the right of eminent domain, but where property is subject to condemnation, in the absence of a clear abuse of the petitioner's privilege, the court cannot deny the right to condemn upon the ground that to condemn is unnecessary or inexpedient, as the determination of that question devolves upon the legislative department of the government and not upon the judiciary. *Pittsburgh, Ft. Wayne & Chicago Railway Co. v. Sanitary District of Chicago*, 218 Ill. 236, 75 N. E. 892, 2 L. R. A. (N. S.) 226; *Smith v. Chicago & Western Indiana Railroad Co.*, 105 Ill. 511; 2 *Lewis on Eminent Domain* (3d Ed.) §§ 602, 603. A railroad company, acting in good faith, may under certain circumstances change the location of its depot. *Chicago & Eastern Illinois Railroad Co. v. People*, 222 Ill. 896, 78 N. E. 784; *Chicago & Northwestern Railway Co. v. Mechanics' Institute*, 239 Ill. 197, 87 N. E. 983. All the evidence introduced on this point tends to show that the business of appellant required additional depot, freight, and switch track facilities for its business within the city of Decatur. There was no such abuse of power shown as to justify the interference of the courts.

Appellees further contend that on the facts in this record the appellant is a mere lessee of the right of way of the Illinois Central between Maroa and Decatur Junction, and therefore cannot maintain condemnation proceedings. Counsel admit that this question is one of first impression in this state. The authorities cited in support of this contention are usually cases where one company has leased its franchise and all of its rights under its charter, and the lessee has attempted to exercise the right of eminent domain granted by the charter of the lessor. *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U. S. 594,

25 Sup. Ct. 150, 49 L. Ed. 332; *Mayor v. Railroad Co.*, 109 Mass. 115; 2 *Elliot on Railroads* (2d Ed.) § 958. Those cases hold that while the Legislature can authorize the transfer of this authority to the lessee, the lessee does not possess this power without clear legislative authority. 1 *Lewis on Eminent Domain* (3d Ed.) § 376. In all of the cases relied upon by counsel for the appellees the only authority to condemn the lessees had was the authority that they obtained under the lease. Clearly, these cases are not in point on the question here. Appellant, by its charter, is granted full authority to condemn this property. Furthermore, it is not a lessee of the franchise rights and all charter powers of the Illinois Central Railroad Company. Between Maroa and Decatur Junction appellant has only a limited operating contract. Appellant is not attempting to condemn as a lessee, but in its own right under its charter.

Other objections were urged by counsel for appellees in the trial court, but are not urged here. We are not, therefore, required to consider or decide them.

From the record before us we conclude that appellant was authorized to condemn the property in question for depot and switch track purposes. The judgment of the county court must therefore be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(247 Ill. 591)

PEOPLE ex rel. WARREN, County Collector, v. YORK.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 33*)—CREATION—TERRITORIAL ANNEXATION—COLLATERAL ATTACK—QUO WARRANTO.

The legality of proceedings by which additional territory is added to a municipality cannot be questioned, except by direct proceeding by quo warranto, and will not be determined upon a bill in equity, or by objections to a tax.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 96, 97; Dec. Dig. § 33.*]

2. DRAINS (§ 15*)—COLLATERAL ATTACK—QUO WARRANTO.

The rule with regard to additional territory annexed to corporations applies to additional territory annexed to drainage districts, and those proceedings cannot be collaterally attacked, but must be attacked by a proceeding in quo warranto.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 15.*]

3. DRAINS (§ 15*)—ASSESSMENT—REMONSTRANCES—WAIVER OF DEFECTS.

Where the drainage commissioners, by petition, notice, and voluntary appearance of the landowner, obtained jurisdiction to organize a drainage district, any errors committed in including lands therein cannot be availed of in defense of an application for judgment on an assessment levied against the land; and thus,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where lands were through mistake excluded from a drainage district, and, upon the mistake being discovered, were informally included, and the owner had notice and protested against the amount of the assessment against such land; he waived the right to remonstrate against inclusion.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 15.*]

Appeal from Moultrie County Court; T. N. Cofer, Judge.

Proceedings by the People, on the relation of H. Ray Warren, County Collector, to collect certain taxes levied against S. A. York. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. K. Martin, State's Atty., Marion Watson, and E. J. Miller, for appellants. F. M. Harbaugh, for appellee.

VICKERS, O. J. This is an appeal by the people from an order of the county court of Moultrie county refusing judgment for a special drainage assessment levied by the drainage commissioners of Drainage District (by user) No. 7 of the town of Lowe, in said Moultrie county, against the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 13, township 15, range 6 E., which was owned by S. A. York. The drainage district was organized by the petition of three landowners, which set forth that there was a ditch already made and in existence which drained the land described in the petition and had been made by mutual agreement of the adjoining landowners, and that said ditch had become out of repair, so that the lands of the proposed district were not adequately drained, and that the improvement of said ditch could not be done by mutual agreement. The district was organized under section 76 of the farm drainage act (Hurd's Rev. St. 1909, c. 42, § 151). Appellee, York, owned six tracts of land in this district, all of which, except the land in question, were located in section 24, township 15, range 6. Appellee's lands in section 13 were principally within the watershed drained by the old ditch, the improvement of which was the object of the drainage district. In fact, said lands adjoined the old ditch for the distance of 80 rods, and had been connected therewith by tile drains a number of years before the formation of the present district.

The particular 80 acres of land against which the assessment in question was levied were not described in the original petition for the formation of said district, nor in the notices or other preliminary proceedings in relation to the formation of the district, nor were they described in the final order of the commissioners organizing said district, which was entered on July 10, 1909. A few days after the entry of the order organizing the district, on the 28th of July, the commissioners met for the purpose of classifying the lands of the district for assessment pur-

poses. At this meeting it was discovered that by mistake the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 13, township 15, range 6 E., had been omitted in the petition, order organizing the district, and the map thereof, and that the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 24 had been erroneously included in the district, instead of the 80 acres in section 13. Upon discovering such mistake the commissioners made the following order: "We found that a mistake had been made in the map of said drainage district in this, to wit: The N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 24 is included in the map of said drainage district, instead of the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 13. We therefore classified the latter, instead of the former; and we do hereby certify that said mistake be corrected on the map, which we have indicated by red marks, including the latter tract and excluding the former." Said order was signed by the three commissioners, and dated July 28, 1909. The tract of land in question was classified at 60. The commissioners then caused proper notice to be given that they would meet on the 6th day of September, at 1 o'clock, at Bolinger's schoolhouse, for the purpose of hearing objections to the classification of all the lands in said district. Notice of this meeting was served upon appellee, York, and he appeared for himself and others, and objected to the classification of the 80 acres in question, for the reason that 15 acres thereof were in another watershed and did not drain toward the old ditch. Other objections of appellee were interposed for other lands owned by him in the district. All of the objections of appellee and other landowners were considered and disposed of. The objection of appellee that 15 acres of the 80 in section 13 were not benefited by the proposed improvement of the old ditch was sustained by the commissioners, and said 15 acres were classified at zero. The appellee made no other or further objection to the classification of the lands against which the special assessment was levied.

Appellee's contention is that the drainage commissioners were without jurisdiction to include the 80 acres in section 13 without giving him notice and an opportunity to be heard. The county court sustained appellee's view, and refused judgment for the said special assessment. Appellee concedes that the district was both a de facto and a de jure district; but he denies the power of the drainage commissioners to exercise jurisdiction over the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 13. Appellant contends that the objections interposed are, in effect, an attack upon the legality of the organization of the drainage district, which cannot be questioned except by a quo warranto proceeding.

This court has held in a number of cases that the legality of proceedings by which additional territory is added to a municipality

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cannot be inquired into except upon a direct proceeding by quo warranto, and will not be determined upon a bill in equity, or by objections to a tax which has been levied by the municipality upon the property in such added territory. Some of the cases where this principle has been announced by this court are *Osborn v. People*, 103 Ill. 224; *Blake v. People*, 109 Ill. 504; *Keigwin v. Drainage Com'rs*, 115 Ill. 347, 5 N. E. 575; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246; *Bodman v. Lake Fork Special Drainage District*, 132 Ill. 439, 24 N. E. 630; *People v. Jones*, 137 Ill. 35, 27 N. E. 294; *People v. Dyer*, 205 Ill. 575, 69 N. E. 70; *Shanley v. People*, 225 Ill. 579, 80 N. E. 277.

Appellee, without questioning the rule laid down in the authorities above cited and other like cases, contends that the case at bar is within the rule laid down in *Payson v. People*, 175 Ill. 267, 51 N. E. 588. That case is like the case at bar, in that it was an application for judgment for a special assessment levied by the Oliver & Corn Grove Drainage District. Payson, the landowner, resided in Washington, D. C. An attempt was made to organize a drainage district which included certain lands belonging to Payson, and a ditch was located on Payson's land 80 rods long, which took about 4½ acres of his land. No notice of any kind was ever given Payson of the proceedings for the organization of the district. Apparently the first intimation the landowner had that a district had been organized affecting his land was the published notice of the delinquent assessment and notice of sale. There was no finding in the record in that case that Payson had been notified, or that the court had any jurisdiction of either the person or subject-matter, and the landowner had not appeared either in person or by counsel during any of the proceedings. Under that situation this court held that the orders attempting to organize said drainage district and include therein Payson's land were void for the want of jurisdiction, and that, being so void, they were subject to attack in any proceeding, collateral or otherwise, whenever they were called in question.

We think that case is decided correctly both upon reason and authority. The case at bar, however, is clearly distinguishable from the Payson Case. In this case the landowner appeared and filed objections to the classification of the identical land that is here involved. We think that his appearance and filing objections waived all prior irregularities, if any, in regard to the manner in which this tract of land was brought into the district. It is to be noted that, although appellee knew on the 6th day of September, when the commissioners met to hear objections to the classification, that this tract of land was included in said district and was being assessed, yet he raised no objec-

tion at that time as to the method by which such tract had been included in the district. His sole objection then was that there were 15 acres of said 80-acre tract that were not benefited by the proposed improvement of the old drainage ditch. Appellee admits in his testimony that he learned on the 6th day of September that this 80-acre tract was included in the district. There is a clear distinction between the case at bar and the Payson Case, where the record shows an utter failure of the drainage commissioners to obtain jurisdiction of the landowner.

Where the drainage commissioners, under section 76, obtain jurisdiction, by notice or voluntary appearance, of the landowner, and there is a petition filed authorizing such commissioners to proceed with the organization of the district, any mere errors that may be committed in pursuance of such jurisdiction cannot be availed of in defense of an application for judgment for an assessment levied by such commissioners. The same rule applies to the organization of districts which are organized by order of the county court under other sections of the farm drainage law.

We are of the opinion that, regardless of anterior proceedings, the drainage commissioners obtained jurisdiction of the land in question and the person of the owner by the voluntary appearance of the owner and the filing of objections to the classification; that, such jurisdiction having attached, irregularities or errors in regard to the manner in which this land was attached to the district are not available as objections to the rendition of judgment for a special assessment levied against such lands. It follows, from what we have said, that the county court erred in sustaining objections of appellee.

The judgment of the county court will be reversed, and the cause remanded.

Reversed and remanded.

(247 Ill. 327.)

PEOPLE ex rel. CORRELL, County Collector,
v. CAIRO, V. & C. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HIGHWAYS (§ 127*)—HARD ROAD TAX—RELATION BETWEEN TAXPAYERS AND MUNICIPALITY.

The relation between the taxpayers of a town and the town on the voting of a hard road tax, as authorized by the hard road act (Hurd's Rev. St. 1909, c. 121, §§ 245-264), is not contractual, and when a levy for a tax has been authorized by vote a taxpayer stands in the same relation to the town in reference to the tax as he does in reference to any other tax, and there is no obligation resting on the taxing officers to extend the tax on any different basis from that used for the extension of all other taxes.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 127.*]

2. HIGHWAYS (§ 122*)—TAXES—RELATION BETWEEN TAXPAYERS AND MUNICIPALITY—LEGISLATIVE AUTHORITY.

The electors of a town voting to levy a special tax under Hard Road Act, § 1 (Hurd's Rev. St. 1909, c. 121, § 245), authorizing a town meeting to levy a tax not exceeding \$1 on each \$100 assessed valuation to construct roads, do so with knowledge that the Legislature may change the method of fixing the assessed valuation; and a statute changing the valuation from one-fifth, in force at the time of the voting of the levy, to one-third, of the full value, does not invade any constitutional right of any taxpayer.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 122*.]

3. HIGHWAYS (§ 125*) — TAXES — RELATION BETWEEN TAXPAYERS AND MUNICIPALITY—LEGISLATIVE AUTHORITY.

Hard Road Act, § 1 (Hurd's Rev. St. 1909, c. 121, § 245), authorizing the electors of a town at a town meeting to levy a road tax not to exceed \$1 on each \$100 assessed valuation, provides only for the voting of a tax at a given rate per cent, without determining the exact amount needed, and a levy of \$1 on each \$100 valuation on a basis of one-fifth of the full value of the property, in force at the time, is subject to the modification made by Act June 12, 1909 (Laws 1909, p. 308), and Act June 14, 1909 (Laws 1909, p. 323), changing the valuation of property from one-fifth to one-third of the full value, without making any provision for any change in the extension of the rate per cent. of the hard road tax, and the statutes making the change of valuation must be followed in extending the tax, though the original hard road act (Laws 1883, p. 132), amended on June 14, 1909 (Laws 1909, p. 327), contains the provisions for the maximum rate per cent, to be voted for a road tax, and the statutes making the change do not invade the constitutional right of a taxpayer.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 125.]

Appeal from Crawford County Court; John C. Maxwell Judge.

Application by the People, on the relation of Arthur A. Correll, County Collector, against the Cairo, Vincennes & Chicago Railway Company, for judgment for delinquent taxes. From a judgment for the taxes, defendant appeals. Affirmed.

Callahan, Jones & Lowe, for appellant. Manford E. Cox, State's Atty., and Parker & Eagleton, for appellee.

COOKE, J. Upon application being made to the county court of Crawford county by the county collector of that county for judgment for delinquent taxes assessed against appellant for the year 1909, objections were made by appellant to the special tax for hard roads of the towns of Hutsonville, Lamotte, Robinson, Honey Creek, and Montgomery. The basis of each of these objections was that each of said towns had in April, 1909, voted a hard road tax at the rate of \$1 per annum on each \$100 of the assessed valuation of the property of the town for five years for the construction and maintenance of hard roads, as described in the petition for the election in each town; that the

assessment should have been determined by the statute in force at the time such vote was taken, on the basis of one-fifth of the full value of the property; that the Legislature, by an act approved June 12, 1909 (Laws 1909, p. 308), changed the basis of assessment for taxation from one-fifth to one-third of the full value of the property; that the vote of the people of \$1 per annum on each \$100 for hard roads was on the basis of one-fifth of the valuation of their property, and the Legislature, by increasing the assessed value from one-fifth to one-third without the consent of the taxpayers, had increased the amount voted for hard roads in each of said towns proportionately, and had therefore increased appellant's hard road tax from \$1 on each \$100 on the basis of one-fifth of the valuation of its property to \$1 on each \$100 on the basis of one-third of the valuation; that the taxes extended upon the difference between an assessment on the basis of one-fifth of the value of its property and the assessment as made is in excess of the amount voted by the taxpayers in each of said towns, and such excess should not have been extended by the county clerk against the property of appellant; and that the tax to that extent is illegal and void. Appellant admitted its liability to pay this hard road tax if extended on the basis of one-fifth of the valuation of its property, and paid that proportion of the tax levied in each of said towns. Upon the hearing the court overruled each of said objections, and entered judgment against appellant for the full amount of the taxes as extended. From this judgment appellant has perfected an appeal, and presents for our consideration the sole question whether the Legislature had the power, after a tax for hard road purposes had been voted by the electors of a town, and during the time for which it is to be extended, to change the assessed valuation of property from one-fifth to one-third of the full value.

Appellant does not contend the assessment as made was improper, for the reason that its right to be assessed for 1909 under the old law became fixed before the act of June 12, 1909, went into effect on July 1st of that year, or that its property was not assessed on the same basis as that used for the assessment of the other property within those towns, but presents only the question whether the Legislature has the power, during the period for which a hard road tax is being extended, to change the basis for fixing the assessed valuation of property for the purposes of that tax from that which was fixed by statute at the time the hard road tax was voted by the people. To use the language of counsel for appellant, "the objection is not as to the manner of ascertaining the value or to the officer making the valuation,

but the raising the tax on the property from the one-fifth to the one-third value beyond the vote of the people and beyond the necessities of the public for hard roads in the several five towns voting for said hard roads." Appellant contends that the vote of the electors in each of said towns authorizing the levy of a hard road tax constituted a contract between the taxpayers of the town and the municipality, and that the law in force at the time the vote was taken fixing the basis of the assessed valuation of all property entered into and became a part of the contract, and that during the time such tax was to be levied the Legislature did not have the power to change that contract by changing the basis of fixing the assessed valuation from one-fifth to one-third of the full value of the property of the taxpayers. No question is raised as to the time when the law became effective as to this tax, but the whole argument of appellant is based on the proposition that the change in the law providing for assessments to be based on one-third instead of one-fifth of the full valuation impairs the obligation of the contract which it is alleged arose between the taxpayers and the municipality upon the voting of the hard road tax.

The relations arising between the taxpayers of the town and the municipality itself, upon the voting of a hard road tax, is in no sense contractual. The fact that the statute requires the levy of this tax to be authorized by a vote of the people does not create any special relationship between the taxpayer and the municipality upon the voting of the levy, in reference to the extension and collection of the tax. When the levy for the special tax has been authorized by vote, the taxpayer stands in the same relation to the town in reference to this tax as he does in reference to any other tax, and there is no obligation resting upon the taxing officers, by reason of any condition existing at the time the levy is voted, to extend the tax on any different basis from that used for the extension of all other taxes. The effect of the vote is to merely direct the commissioners of highways to make the levy at the rate per cent. voted, and it then becomes the duty of the proper officers to extend the tax, at the rate specified, on the same assessed valuation that all other taxes are extended.

The hard road act (Hurd's Rev. St. 1909 c. 121, § 245), at the time the elections in these several towns were held, provided (section 1) that upon a proper petition being filed with the town clerk he should give notice that at the next annual town meeting a vote would be taken for or against levying a tax, "not to exceed one dollar on each \$100 assessed valuation of all the taxable property," for the purpose of constructing the road or roads described in the petition, and that the petition shall "state the rate per cent., not exceeding one dollar on each \$100, and the

number of years, not exceeding five, for which said tax shall be levied." The fixing of any portion of the full valuation of property to be used as the assessed value is statutory, and is subject to change by the legislature at any time. When the electors of these several towns voted to levy a tax of \$1 per annum on each \$100 of the assessed valuation of their property for five years, they did so with the knowledge that the Legislature had the power to change the method of fixing the assessed valuation of property, and even to raise the assessed valuation until it would coincide with the full value.

The amount of property of subject to taxation contained within any given town varies from year to year. The value of the property fluctuates, being worth more in some years than in others, and this necessarily affects the assessed value of such property, whether that be fixed at the full value of the property or at some portion of that value. It cannot be seriously contended that, when a town by a vote determines to levy a tax at a given rate per cent. for a period of five years, the valuation of the property of the town as fixed by the assessment for that year enters into and becomes a part of a contract between the taxpayers and the town, and for the purpose of levying that particular tax the valuation of the property in that town cannot be changed from that assessment during such five-year period; and yet that could be urged with as much force as to say that the Legislature has no power to provide a new or another method of arriving at the assessed value of property, so far as that particular tax is concerned, during the same period.

By the act of June 12, 1909, the assessed valuation of all property was changed from one-fifth to one-third of the full value. On June 14, 1909, another act (Laws 1909, p. 323) to amend section 2 of an act entitled "An act concerning the levy and extension of taxes," approved May 9, 1901 (Laws 1901, p. 272), was approved, whereby provision was made for a change of the rate per cent. in the extension of certain taxes on account of the change of the assessed valuation from one-fifth to one-third of the full value; but no provision was made for any change in the extension of the rate per cent. of the hard road taxes which had theretofore been voted in any town or road district of the state, but, on the contrary, on the same day there was approved an act (Laws 1909, p. 327) to amend sections 1 and 4a of the hard road act (Laws 1883, p. 132), in which the same provisions for the maximum rate per cent. to be voted were retained as contained in the original act. The taxing officers have no lawful authority to extend any tax on any value other than the assessed value, and there being no authority left, in law, for the county clerk to extend the hard road tax upon an assessed valuation of one-fifth

of the full value, the only way in which the contractual relations which appellant alleges existed between the taxpayers and the municipality could be preserved, and the terms of the proposed contract carried out, would be to reduce the rate per cent. from \$1 on the \$100 on the basis of an assessed valuation of one-fifth of the full value to such a rate per cent. as would produce the same tax on an assessed valuation of one-third of the full value, which would be 60 cents on the \$100. There is no authority in the statute for the county clerk, or any other officer, to so change the rate per cent. as fixed by the voters of the several towns.

When the hard road tax was voted in each of these towns at the rate of \$1 on every \$100 assessed valuation, it was voted to be levied on such assessed valuation fixed in such manner as was then or should thereafter be provided by law during the period for which the levy was to be made. The hard road act does not provide for the voting of a special tax to raise a specified sum of money, but only for the voting of a tax at a given rate per cent., to be levied annually, for a period not to exceed five years. There is no provision for determining the exact amount needed for the improvement before the vote is taken. The survey, plans, specifications, and estimates of the work are not made until after the levying of the tax has been voted. The statute does not contemplate that the exact cost of the proposed work shall be known at the time the vote is taken, and provision is made by section 20 of the act for the disposition of any surplus which may remain in the hands of the treasurer after the completion of the work.

No constitutional right of appellant was invaded by the method used in the extension of this tax. The objections to the application for judgment were properly overruled, and the judgment of the county court is affirmed.

Judgment affirmed.

(247 Ill. 380)

PEOPLE ex rel. MOONEYHAM, County Collector, v. CAIRO, V. & C. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 301*)—CERTIFICATE OF LEVY—SUFFICIENCY.

A certificate of a town clerk, which recites that a tax to pay an indebtedness is to be levied on the taxable real and personal property in the town, as appears from the record entries of moneys voted to be raised at the annual town meeting and from the certificates of the board of town auditors, is sufficient to enable the county clerk to properly extend the taxes, not only for town charges, which must be audited by the board of auditors, but also any moneys to be raised by taxes authorized by the town meeting.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 301.*]

2. HIGHWAYS (§ 125*)—TAXES—"CONTINGENCY."

Under Road and Bridge Law (Hurd's Rev. St. 1909, c. 121) § 14, authorizing an additional levy of taxes for roads and bridges in view of some contingency, a certificate that in view of the contingency that recent and unusual storms and rains in the town have so washed away the roads and bridges thereof that a specific tax on each \$100 will be insufficient sum to repair the roads and bridges, does not show a "contingency," within the meaning of the section, and an additional tax is illegal.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1497-1498.]

3. TOWNS (§ 56*)—TAXES—LEVY—VALIDITY.

A tax levy of a town to pay contingent expenses of the town is sufficiently specific, and the tax is valid, within Hurd's Rev. St. 1909, c. 139, § 125, providing that contingent expenses generally incurred for the use of a town shall be deemed town charges.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 56.*]

4. TAXATION (§ 305*)—"ROAD TAXES"—HARD ROAD AND ROCK ROAD TAXES—STATUTES.

The hard or rock road taxes authorized by the statute, providing that such taxes may not be levied without a vote of the people, on petition, declaring that the taxes shall be extended in a separate column on the tax books, requiring the treasurer to give a separate bond to account for such taxes before the same can be paid over to him, and directing that the taxes shall only be applied to the construction of the roads designated by the vote, are "road taxes," within the amended revenue law of 1909 (Laws 1909, p. 323, § 2), requiring the county clerk to reduce the rate per cent. of a tax levy, exclusive of state, village, levee, school building, high school building, and road and bridge taxes, so that hard or rock road taxes are properly excluded in determining the correctness of a county clerk's reduction of the taxes of a town.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 305.*]

For other definitions, see Words and Phrases, vol. 7, p. 6255.]

5. TAXATION (§ 145*)—RAILROADS—PROPERTY SUBJECT TO LOCAL TAXATION—STATUTES.

Under the statute requiring a railroad company to list its railroad tracks and other property liable to taxation by the state board of equalization, land of a railroad company which is not connected with its tracks, or with any side track, and which is only used for stock pens, in which live stock is placed preparatory to loading on cars of the company, and which is entirely outside of the company's right of way, is subject to local taxation as property other than railroad track and right of way.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 145.*]

6. TAXATION (§ 301*)—LEVY OF TAXES—CERTIFICATE OF TOWN CLERK.

The town clerk is not required under the law to state in his certificate to the county clerk of tax levies specifically what amount is levied for each specific purpose.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 301.]

Appeal from Saline County Court; G. H. Dorris, Judge.

Application by the People, on the relation of Joel Mooneyham, County Collector, against the Cairo, Vincennes & Chicago Rail-

way Company, for judgment for delinquent taxes. From a judgment for the taxes, defendant appeals. Affirmed in part; reversed and remanded in part.

W. F. Scott (L. J. Hackney, of counsel), for appellant. W. C. Kane, State's Atty., for appellee.

VICKERS, C. J. The Cairo, Vincennes & Chicago Railway Company has appealed from a judgment of the county court of Saline county overruling certain objections filed by appellant to the rendition of judgment for various items of taxes levied by said county, and other municipalities in said county, against the property of appellant. In some instances the same objection is made to an item of taxes levied by different municipalities. Where this condition exists, it will not be necessary to consider such items separately.

Appellant objects to the taxes levied in the towns of Hector and Raleigh to pay bonded indebtedness, and in the town of Harrisburg to pay "outstanding indebtedness," for the reason, it is said, the certificate of the town clerk shows that these taxes were levied by the electors at the town meeting, when they should have been audited as claims by the board of auditors. All the certificates of the respective town clerks are substantially the same in form. Each of them contains a recital that the tax is to be levied "upon all real and personal property in said town liable for taxation for the year 1909, as appears from the record entries of moneys voted to be raised at the annual town meeting held in said town on the first Tuesday in April, A. D. 1909, and from the certificate of the board of town auditors of said town in my office remaining." These certificates were sufficient to enable the county clerk to properly extend the taxes, and that is the only office the certificate of the town clerk performs. Appellant does not contend, nor attempt to prove, that the several boards of town auditors did not, in fact, audit these items and properly certify them to the town clerk. The certificate covers, not only taxes for town charges which, under the law, must be audited by the board of auditors, but also any moneys that were to be raised by taxation for future purposes, which must be authorized by the town meeting. The objections to these items of taxes were properly overruled.

In the towns of Raleigh, Harrisburg, and Eldorado an additional levy, under section 14 of the road and bridge law (Hurd's Rev. St. 1909, c. 121), was attempted under a certificate reciting that "in view of the contingency and emergency that recent and unusual storms, recent and unusual freshets, and rains in said town have so washed away the roads and embankments of said roads, and so washed away, damaged, and impaired the bridges in said town, that 36 cents on each \$100 will be insufficient sum to replace and repair said

roads and bridges." These certificates are insufficient to show a "contingency" under section 14 of the road and bridge law, as that section has been construed by this court. *People v. Toledo, St. Louis & Western Railroad Co.*, 231 Ill. 125, 83 N. E. 118; *People v. Elgin, Joliet & Eastern Railway Co.*, 243 Ill. 546, 90 N. E. 1090. The court erred in overruling the objections to the additional road and bridge taxes in the towns named.

In the town of Harrisburg a levy of \$500 was made to pay "contingent expenses" of the town. Appellant objects to this item of taxes, because the purposes for which the levy is made are not specifically stated. A contingent fund is necessary for all municipal corporations. The reason for making such a levy is to provide a fund, usually a small one, out of which items of expenses which will necessarily arise during the year, and which cannot appropriately be classified under any of the specific purposes for which other taxes are levied, may be paid. If all of the purposes for which a contingent fund could be used could be foreseen, so as to enable the municipality to specify each particular purpose, then no contingent fund would be necessary. Every detailed item of expense would be classified under its appropriate name. It is because it is impracticable to always provide in advance for incidental expenses that will arise during the year that a contingent fund is usually provided by the various municipalities of the state. In *People v. Cairo, Vincennes & Chicago Railway Co.*, 237 Ill. 312, 86 N. E. 721, this court held that a levy for "incidentals" of \$100 by the town of Pana was not void, because not sufficiently specific. Section 8, art. 13, c. 139, of Hurd's Rev. St. 1909, provides, among other things, that "contingent expenses necessarily incurred for the use and benefit of the town" shall be deemed town charges. No question is made as to the amount of the levy. The court properly overruled the objection to this item of tax.

In the town of Harrisburg the aggregate of all the taxes made a total rate of \$3.88 on each \$100 valuation. It became necessary, under the law, to reduce this rate. Under the amended revenue law of 1909 (Laws 1909, p. 323) certain taxes are to be deducted or excluded before the rate is reduced, so that which remains will not exceed \$3 on each \$100. Among other taxes levied in the town of Harrisburg was an item of 50 cents on each \$100 for "rock road tax." The only question involved in this objection is whether the hard road tax should be excluded from the total rate before the reduction is made. Under section 2 of the law of 1909 it is provided that the county clerk shall reduce the rate per cent. of the tax levy of such taxing district or municipality in the same proportion in which it will be necessary to reduce the highest aggregate per cent. of all the tax levies, "exclusive of state taxes, village taxes, levee taxes, school building taxes,

high school taxes, road and bridge taxes," etc. Under the language of this law it seems clear that "hard road" and "rock road" taxes must be classified as road and bridge taxes. While the statute (Hurd's Rev. St. 1909, c. 121, §§ 245-264) provides that such taxes cannot be levied without a vote of the people petitioned for by 50 landowners of the township, and that the tax is to be extended in a separate column on the tax books, and requires the treasurer to give a separate bond to account for this fund before it can be paid over to him, and such tax can only be applied to the construction of such roads as were designated by the vote, still it is in all of its essential characteristics a road tax. The purpose of it is to permanently improve the public roads of the township for the benefit of the public, and to relieve the taxpayers from the burden of annually paying large sums to maintain dirt roads in a usable condition. In a sense it is intended to take the place of other road and bridge taxes. The statute under which such hard road taxes are collected provides that they can be used for no other purpose than that for which they were collected. If they are not road taxes, it would be difficult to classify them under our revenue law. The court did not err in excluding the hard road taxes in the town of Harrisburg in determining the correctness of the clerk's reduction of taxes.

Appellant objected to all of the taxes levied on lots 4, 5, and 6 in Sloan's division of Railroad addition to the town of Harrisburg, on the ground that said lots should have been assessed by the state board of equalization as a part of railroad track or right of way and that they were improperly assessed by the local authorities. The evidence shows that these lots are not connected with the appellant's railroad track or any side track thereof; that they are used for stock pens, in which live stock is placed preparatory to being loaded on the cars of appellant; that said lots are entirely outside of appellant's right of way. The statute requires that the railroad company shall make a list of its railroad track and other property liable to taxation by the state board of equalization, and that said board shall assess the same. The evidence shows that appellant made such certificate, a copy of which for Saline county was filed with the county clerk, and that the lots in question were not included in said certificate. The omission to include such lots in said certificate, unexplained, affords a fair basis for the conclusion that appellant did not regard said lots as a part of its property liable to assessment by the state board. We agree with the court in its decision, and with the appellant when it made its certificate to the state board, that these lots are properly assessed as property other than railroad track and right of way.

Appellant objected to certain taxes in the town of Stone Fort, because the certificate of the town clerk did not show the specific

purposes for which each item of taxes was levied. This question has been considered during the present term of court, and decided contrary to the contention of appellant. The law does not require the town clerk to state specifically what amount is levied for each purpose. Any information the taxpayer may desire on that subject is obtainable from the certificate of the board of town auditors on file with the town clerk.

Appellant also objected to certain hard road taxes, for the reason that they were extended on a basis of one-third valuation, instead of one-fifth, as required by the old law, and the objection was overruled. This ruling is complained of by appropriate assignments of error in this court. This question has had the consideration of this court in the case of *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 402, and has been determined adversely to the contention of the appellant. There was no error in overruling this objection.

Appellant also objected to certain taxes in the village of Ledford, but the objection is not insisted upon in this court.

The judgment of the county court is erroneous, in that it overruled the objections of the appellant to the additional road and bridge tax which was attempted to be levied under section 14 of the road and bridge law. In all other respects the judgment of the county court is right.

The judgment is reversed, and the cause remanded, with directions to the county court to sustain the objections to that portion of the road and bridge tax in the towns of Raleigh, Harrisburg and Eldorado which was levied in excess of 36 cents on the \$100 assessed valuation. In all other respects the judgment will be affirmed.

Reversed in part, and remanded, with directions.

(247 Ill. 387)

PEOPLE ex rel. CORRELL, County Collector,
v. INDIANAPOLIS SOUTHERN R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

Appeal from Crawford County Court; John C. Maxwell, Judge.

Application by the People, on the relation of Arthur A. Correll, County Collector, for judgment against the Indianapolis Southern Railroad Company for delinquent taxes. From a judgment for the taxes, defendant appeals. Affirmed.

John G. Drennan and Parker & Crowley, for appellant. Manford E. Cox, State's Atty., and Parker & Bagleton, for appellee.

PER CURIAM. Upon application being made to the county court of Crawford county by the county collector for judgment against appellant for delinquent taxes for the year 1909, objections were made to the excess of the assessment for hard road tax in the towns of Oblong, Robinson, and Lamotte over the one-fifth of the value of the property in said towns as fixed by the assessment of 1909. In the town of Oblong, at the annual town election held in April, 1908, 75 cents per annum on each \$100 of the assessed valuation of the property is

said town was voted for hard roads. The town of Robinson, at the annual town elections of 1907 and 1908, and the town of Lamotte, at the annual town elections in 1905 and 1909, each voted \$1 per annum on each \$100 of the assessed valuation of the property in said towns for five years for the same purpose. The objections were overruled by the court, and judgment entered, from which judgment appellant has perfected this appeal.

The sole question presented for review is the one determined in *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 402. As the conclusion there reached is decisive of the question involved here, the judgment of the county court is affirmed.

Judgment affirmed.

(247 Ill. 392.)

PEOPLE ex rel. WHITLOCK, County Collector, v. CLEVELAND, C. C. & ST. L. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

Appeal from Vermillion County Court; Lawrence T. Allen, Judge.

Application by the People, on the relation of H. H. Whitlock, County Collector, for judgment against the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company for delinquent taxes. From a judgment for the taxes, defendant appeals. Affirmed.

Rearick & Meeks and George B. Gillespie (L. J. Hackney and Gillespie & Fitzgerald, of counsel), for appellant. John H. Lewman, State's Atty. (R. W. Fisk, of counsel), for appellee.

PER CURIAM. Upon application being made in the county court of Vermillion county by the county collector for judgment against appellant for delinquent taxes for the year 1909, objection was made to that part of the hard road tax for the town of Ellwood which was in excess of \$1 for each \$100 of one-fifth of the full value of the property of the appellant as fixed by the assessment of 1909. The town of Ellwood, by a vote taken at the annual election in April, 1907, authorized a levy of \$1 per annum on each \$100 of the assessed value of the property in that town for a period of five years. The court overruled the objection, and entered judgment, from which appellant has prayed and perfected this appeal.

The sole question raised is the one determined in *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 402. As our conclusion in that case is decisive of the question here presented, the judgment of the county court is affirmed.

Judgment affirmed.

(247 Ill. 446.)

PEOPLE ex rel. OWEN, County Collector, v. CINCINNATI, L. & C. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HIGHWAYS (§ 125*)—ROAD AND BRIDGE TAXES—VALIDITY.

A tax levy by a town of \$1 on each \$100 valuation for 5 years, as authorized by Hard Roads Act (Hurd's Rev. St. 1909, c. 121, § 245) § 1, becomes, when properly certified, a valid tax levy for 5 years; and a change by the Legislature of the valuation of property for taxation from one-fifth, in force at the time of the levy, to one-third, of the actual value of the property does not affect the tax which may be levied against the property of a taxpayer, no change being made in the hard roads act, amended by the same Legislature.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 125.*]

2. HIGHWAYS (§ 125*)—TAX FOR ROADS AND BRIDGES—STATUTES—CONSTRUCTION.

Under Hard Roads Act (Hurd's Rev. St. 1909, c. 121, § 245) § 1, authorizing a levy of a special tax of \$1 on each \$100 valuation for road and bridge purposes, and section 4a, incorporated into the act in 1909, authorizing the issuance of bonds for roads and bridges, not to exceed the amount which can be raised for 5 years by a levy of \$1 on each \$100 of taxable property, two funds for road construction purposes are created, and each fund is limited to \$1 on each \$100 of taxable property of a town, and the special tax of \$1 on the \$100 may be collected, and a tax of a sufficient amount, not in excess of \$1 on the \$100 for 5 years, may be levied to pay the interest and principal of the bonds issued.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 125.*]

Appeal from Iroquois County Court; John H. Gillan, Judge.

Application by the People, on the relation of James E. Owen, County Collector, for judgment against the Cincinnati, Lafayette & Chicago Railway Company for delinquent taxes. From a judgment sustaining objections to a part of the taxes, relator appeals. Reversed and remanded.

John P. Pallissard, State's Atty. (O. F. Morgan, of counsel), for appellant. Free P. Morris and Eugene R. Morris (L. J. Hackney and C. N. Saum, of counsel), for appellee.

HAND, J. This is an appeal from a judgment of the county court of Iroquois county sustaining objections to a part of a tax levied in Sheldon township, in said county, under the provisions of "An act to authorize the construction and maintenance of gravel, rock, macadam or other hard roads," commonly called the "Hard Roads Act" (Hurd's Rev. St. 1909, p. 1955).

It appears from the record that at the annual town meeting in Sheldon township in the year 1909 a vote was taken and was carried upon the proposition to levy a tax of \$1 on the \$100 assessed valuation in said town, for a period of five years, for the construction of two hard roads in said town, and that the certificates required by section 8 of said act to be made by the commissioners of highways and the town clerk of said town were made, and that the county clerk extended a tax in said township, upon a valuation of \$47,285, of \$1 on the \$100, which made a total tax levied against the property of the appellee for the year 1909 for hard roads of \$472.85. Appellee paid \$283.71, and filed objections to the balance of the tax, which were sustained as to \$141.85 of the tax, and overruled as to \$47.29 thereof, which latter amount has been paid. It also appears that on May 8, 1909, at a special election held for the purpose in the township of Sheldon, a vote was taken under section 4a of said act, and the proposition carried to issue bonds in the sum of

\$32,700 for the purpose of constructing hard roads in said town, and that on the 11th day of August, 1909, pursuant to said election, \$32,400 in bonds were issued, and that the commissioners of highways have received the proceeds of the said bonds.

The position of the appellee is, first, that since the vote authorizing the levy of a tax of \$1 on the \$100 was taken, the law in regard to the valuation of property for taxation has been changed by the Legislature from one-fifth of the actual value to one-third of the actual value thereof, and that no more tax can be extended since the change in the law, by virtue of said vote, than could have been extended before, had the law not been changed, and that it is entitled to have the tax extended against its property on the basis of 60 cents on the \$100, instead of \$1 on the \$100; and, secondly, that when the bonds were issued under section 4a of said act they took the place of the original tax levy of \$1 on the \$100, and that the only amount of tax which could lawfully be levied against its property was an amount which would pay the interest on said bonds and principal of said bonds as they mature.

We do not agree with either of such contentions. The tax levy of \$1 on the \$100 was made according to the provisions of the statute, and when properly certified it became a valid tax levy for five years. *People v. Illinois Central Railroad Co.*, 237 Ill. 154, 86 N. E. 720. At the time the Legislature changed the valuation of property for taxation from one-fifth to one-third of its actual value, it made no change in the statute under which this tax was levied, and while, subsequently, in many instances it changed the rate at which taxes might be levied, so that the total tax that might be collected would be no greater than before, no change in that particular was made in the hard roads act, although that statute was also amended by the same Legislature. We are of the opinion the change by the Legislature from one-fifth to one-third of the actual value of property, as a basis for the extension of taxes did not reduce the tax in this case which might be levied against the appellee's property. *People v. Cairo, Vincennes & Chicago Railway Co.*, 98 N. E. 402.

It is provided by section 4a of the hard roads act that in those townships or districts where a special tax for the construction of hard roads has been voted, "if the commissioners desire to expend on hard roads in their town (or district) a greater sum than is available to them from other sources," upon the petition of the commissioners and the requisite number of freeholders the proposition of borrowing money to expend on hard roads in the town may be submitted to a vote of the people, and if it shall appear that a majority of the legal voters voting at the election shall vote for

the proposition, the supervisor and town clerk, acting under the direction of the commissioners of highways of the town, shall issue from time to time, as the work progresses, a sufficient amount, in the aggregate, of the bonds of said town or district for the purpose of building and maintaining gravel, rock, macadam or other hard roads, etc; that said bonds shall be issued in not more than ten annual series, the first series of which shall mature not more than five years from the date thereof, and each succeeding series in succeeding years thereafter; and that the amount, including the principal and interest, to be voted upon, shall not exceed the amount which can be raised during a period of five years by a levy of \$1 on each \$100 of taxable property in said township or district as computed on the value of such property as taken for assessment purposes in such town or district, and that such town or district shall provide for the payment of such bonds, and the interest thereon, by appropriate taxation. Section 4a was incorporated into the hard roads act in the year 1909, and was clearly intended by the Legislature to provide funds with which to construct hard roads in addition to the tax mentioned in the preceding sections of the act. We therefore have two funds which may be used for constructing hard roads; the one from a special tax levied under the first four sections of the act, and the other under section 4a of the act. Each of these funds is limited to \$1 on each \$100 of taxable property of the town or district, and neither fund can be raised without a vote of the people. In the case at bar the town voted to levy a special tax and subsequently to issue bonds. The two methods of raising funds are different, and the proceedings by which the funds are raised are not brought about by the same parties, and we are of the opinion that the issuing of bonds under section 4a of the act does not annul the proceedings under which a tax had theretofore been levied under sections 1, 2, 3, and 4 of the act. In no event can more than \$2 on the \$100 on the assessable property of the town in one year be raised. No constitutional inhibition is infringed in this case, and as the legislative intent is reasonably clear, we see no reason for limiting the tax to an amount that will only pay the interest on all the bonds and the maturing bonds in any one year. In other words, we are of the opinion that the \$1 on the \$100 levied at the annual town meeting in 1909 can be lawfully collected, and that a tax of a sufficient amount, provided it does not exceed the amount of \$1 on the \$100 for five years, may be levied to pay the interest on said bonds and the maturing bonds.

For the reasons suggested, the judgment of the county court will be reversed, and the cause will be remanded to that court,

with directions to enter judgment against the appellee for \$141.85 and costs.

Reversed and remanded, with costs.

(248 Ill. 81.)

PEOPLE ex rel. **McCALL**, County Treasurer,
v. **CHICAGO, B. & Q. R. CO.**

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TOWNS (§ 57*)—TAXATION—CONSTITUTIONAL AND STATUTORY PROVISIONS—LEVY FOR SPECIAL PURPOSES.

The inhabitants of a town voted to borrow money for bridges, and to issue bonds for those purposes, and resolved that a direct annual tax should be levied to pay the interest and principal of the bonds; the amount of such levy to be certified by the town clerk to the county clerk. Section 20 of the act relating to roads and bridges authorizes the supervisors and other officers of towns to borrow money for such purposes and to issue the bonds of the town; it being the town's duty to make previous provision for the collection of a direct annual tax for the payment of the bonds, as required by Const. art. 9, § 12. *Held*, that the voters, after providing for the issue of the bonds and for a direct annual tax, had not the further authority to levy a tax to pay the interest and principal of the bonds.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 57.*]

2. TOWNS (§ 62*)—CLAIMS AGAINST TOWNS—PRESENTATION AND ALLOWANCE.

Where a town has issued bonds and provided for a direct annual tax to pay the interest and principal on the bonds, as required by Const. art. 9, § 12, the basis for the levy of such tax is the certificate of the board of town auditors; the bonds being charges or claims against the town which it is the duty of the board of auditors to examine and allow.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 62.*]

3. MANDAMUS (§ 115*)—LEVY OF TAX TO PAY BONDS.

Where a town has issued bonds, and provided for a direct annual tax to pay interest and principal, as required by Const. art. 9, § 12, the bondholders have the right to compel the levy of the tax in accordance with such provision.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 115.*]

4. TOWNS (§ 56*)—TAXATION—LEVY FOR CONTINGENT EXPENSES.

Where a levy for "contingent expenses" of a town is certified by the town clerk to the county clerk, and the nature of the expenses is not specified, the levy is illegal.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 56.*]

Appeal from Whiteside County Court; **R. W. E. Mitchell**, Judge.

Action by the People, on the relation of **Charles W. McCall**, County Treasurer, against the **Chicago, Burlington & Quincy Railroad Company**. Judgment for defendant, and plaintiff appeals. Judgment affirmed.

J. J. Ludens and **C. L. & C. E. Sheldon**, for appellant, **A. A. Wolfersperger** and **J. A. Connell**, for appellee.

CARTWRIGHT, J. The disputed question in this case is whether the voters at their

annual town meeting, are authorized to levy a tax to pay bonds of the town and the interest thereon.

At a special town meeting held on May 16, 1905, in the town of **Hahnman**, in **Whiteside county**, it was decided to borrow \$1,900 to build certain bridges in the said town, and at the annual town meeting held April 5, 1906, a resolution was adopted reciting that bonds had been issued to the amount of \$1,795 for said purpose, and it was resolved that a direct annual tax be levied sufficient in amount to pay the principal and interest of said bonds as the same should fall due, and the times and amounts were specified. It was further resolved that the town clerk should certify, in each year, to the county clerk such part of said direct tax as might be necessary to pay the interest and so much of the principal as would fall due in the following year. At the annual town meeting held April 2, 1907, a resolution was adopted reciting that the legal voters had that day voted in favor of borrowing \$1,300 to build a bridge and approaches and to take out, replace, reconstruct, and repair another bridge, and it was resolved that a direct annual tax be levied sufficient in amount to pay the interest and principal of the bonds to be issued in pursuance of said vote, and that the proper authorities of the town should certify to the county clerk, each year, the amount necessary to be raised to pay the principal and interest of the bonds as they should mature. There was a vote the same day to borrow said sum of \$1,300 for the purposes specified. On April 7, 1908, it was voted to borrow \$2,250 to build certain bridges, and on the same day, at the annual town meeting, it was resolved that a direct annual tax should be levied sufficient to pay the interest and principal of the bonds as they should mature, and that the proper authorities should certify to the county clerk, each year, the amount necessary to be raised to pay the principal and interest on the bonds as they should mature. A special town meeting was held on April 7, 1908, in the town of **Montmorency**, in said county, at which it was decided to borrow \$4,000 to construct, repair, and reconstruct certain bridges, and at the annual town meeting held April 6, 1909, a resolution was adopted that a direct annual tax be levied sufficient to pay the principal and interest of the bonds issued for the money borrowed and specified in the resolution, and the town clerk was directed to certify, in each year, to the county clerk such part of said direct tax as might be necessary to pay the interest on the bonds and so much of the principal as would fall due in the following year. The town clerks, by virtue of these resolutions, certified to the county clerk certain sums to be levied as taxes for the payment of interest and maturing bonds. The town clerk of the town of **Montmorency**

also certified to the county clerk the sum of \$500 to be raised by taxation for "contingent expenses" of said town. The taxes were extended by the county clerk by virtue of these certificates, and the Chicago, Burlington & Quincy Railroad Company objected to the application of the county collector to the county court of said county for judgment against its property for said taxes. The court sustained the objections, and denied the application for judgment, and the collector appealed.

Section 12 of article 9 of the Constitution provides that any municipal corporation incurring any indebtedness shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within 20 years from the time of contracting the same. Section 20 of the act in regard to roads and bridges in counties under township organization provides for calling a special town meeting to vote on the proposition of borrowing money for building a bridge or other distinct and expensive work, and if the vote is in favor of the proposition, the supervisor and town clerk, under the direction of the commissioners, are authorized to issue, from time to time, as the work progresses, the bonds of the town for the specified purpose. If bonds are issued under that section of the statute, the Constitution enjoins upon the town a duty, at or before the time of incurring the indebtedness, to provide for the collection of a direct annual tax to pay the interest and principal of the proposed debt. The provision for the direct annual tax secures to the bondholder the right to compel the levy of the tax in accordance with such provision. It is then the duty of the board of town auditors to audit the claim or charge against the town and make a proper certificate providing for the necessary taxation to pay it, without any other presentation of the claim by a holder of a bond. The tax is to be levied and collected so as to be ready to pay the interest and principal of the debt as it matures, but the bonds are a claim or charge against the town with which the town meeting has nothing to do and for the payment of which it has no authority to order the levy of the annual tax. *St. Louis, Rock Island & Chicago Railroad Co. v. People ex rel.*, 147 Ill. 9, 35 N. E. 228. In that case it was held that the bonds of the town of Frederick were charges and claims against the town which it was the duty of the board of auditors to examine and audit; and in the previous case of *People ex rel. v. Getzen-daner*, 137 Ill. 234, 34 N. E. 297, a peremptory writ of mandamus was awarded to compel the board of town auditors to audit and allow the claim of petitioner on bonds issued by the town of Mt. Morris under an act providing that the town should, by its proper corporate authority, annually assess and levy a tax to pay the interest and principal of

the bonds as they became due. The principle of that decision was that the proper corporate authority for levying a tax to pay bonds and interest is the board of town auditors. And in *Cincinnati, Indianapolis & Western Railway Co. v. People ex rel.*, 207 Ill. 566, 69 N. E. 938, it was held that the certificate of the board of town auditors is the basis for the levy of a tax to pay claims and demands against a town, and the vote of the electors at the town meeting cannot be substituted for the certificate. If provision is made for a direct annual tax when bonds are issued, the liability of the town is fixed, and the board of town auditors have no discretion whether to allow the amount of the tax or not. But that does not affect the question who is to levy the tax. The same thing is true of a judgment against a town, and yet action by the board of town auditors is necessary for the levy of a tax to pay a judgment. It was so decided in *People ex rel. v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064, and the court held that the tax levied to pay a judgment against a town could not be legally authorized by a vote at the annual town meeting.

The question whether the power to pass upon and allow charges against a town based upon town bonds should be exercised by the board of town auditors or by the voters at the town meeting was not considered in *Wright v. People ex rel.*, 87 Ill. 582. The question considered was whether the voters at the town meeting could make provision for a sinking fund for the retirement of bonds which had been issued by the West Chicago Park Commissioners and the debt be thereby distributed through a series of years. It is manifest that such provision could not be made by the board of town auditors, whose authority is confined to auditing claims and charges against the town. The board could only audit the amount necessary each year for the sinking fund in case such a charge against the town had been created in favor of the bondholders, either in the issue of the bonds or by some lawful authority, and it was held that the voters at the town meeting could create such a charge. It must be regarded as settled law that the voters at the town meeting have no authority to levy a tax to pay the interest or principal of bonds issued by the town; but the basis of a tax is the certificate of the board of town auditors to the town clerk and a certificate of the town clerk to the county clerk. The board of town auditors, in auditing a charge against the town on account of bonds issued under section 20 of the act concerning roads and bridges, may see that the provisions of the statute in relation to the issuing of the bonds by the supervisor and clerk, under the direction of the commissioners, have been complied with and compute the amount necessary to meet the obligation, but are without discretion to refuse to audit the claim in accordance with the provision

for the direct annual tax made at or before the time of incurring the indebtedness.

It is conceded that the levy for contingent town expenses of the town of Montmorency, which did not specify the nature of the expenses, was illegal, as it clearly was. *People ex rel. v. Chicago & Alton Railroad Co.*, supra; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People ex rel.*, 205 Ill. 582, 69 N. E. 89.

The judgment is affirmed.
Judgment affirmed.

(248 Ill. 105)

PEOPLE ex rel. OWEN, County Collector, v. TOLEDO, P. & W. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

HIGHWAYS (§. 125*)—TAXES FOR ROADS AND BRIDGES—ISSUE OF BONDS.

Under Hard Roads Act (Hurd's Rev. St. 1909, c. 121, § 245) § 1, authorizing the electors of a town at the annual town meeting to vote a special tax not exceeding \$1 on each \$100 valuation to construct hard roads, and authorizing a special election to vote bonds for road purposes, a town voting the special tax may vote to issue bonds for road purposes, and the special tax must be extended each year at the rate authorized, and the tax to pay the principal and interest on the bonds must be extended each year at a rate sufficient to produce the amount to pay the interest on the bonds and the principal at maturity.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 125.*]

Appeal from Iroquois County Court; John H. Gillan, Judge.

Application by the People, on relation of James E. Owen, County Collector, against the Toledo, Peoria & Western Railway Company, for a judgment for delinquent taxes. From a judgment sustaining objections to a part of the taxes, relator appeals. Reversed and remanded.

John P. Pallissard, State's Atty. (O. F. Morgan, of counsel), for appellant. Stevens, Miller & Elliott and Free P. Morris, for appellee.

FARMER, J. The county collector of Iroquois county made application to the county court of the said county for judgment against the property of appellee for delinquent hard roads tax for the year 1909 levied by the township authorities of Sheldon township, in said county. Appellee objected to judgment. The total hard road tax extended against the appellee's property was \$749.69. It paid \$449.81 of this amount, and filed objections to the remainder, \$299.88. The court sustained the objections as to \$224.91 of the amount objected to, but overruled the objections as to \$74.93, and this sum appellee paid. The collector has appealed from the judgment sustaining objections to \$224.91 of the hard road tax.

It appears from a stipulation agreed to between the parties at the hearing that at

the annual town meeting of said Sheldon township in 1909 the proposition of levying a tax of \$1 on each \$100 assessed value of the property, for a period of five years, for the construction of two hard roads in said town, was voted upon, and the proposition carried; that on the 8th of May, 1909, at a special election held for the purpose of voting upon the question of borrowing \$32,700 for the purpose of constructing and maintaining two hard roads in said town, a majority of the votes were for borrowing the money; that on the 11th day of August, 1909, bonds in the sum of \$32,400 were issued and registered with the county clerk, as required by law. It is also stipulated that the commissioners of highways have disposed of the bonds issued and received the money therefor.

The town clerk of the town of Sheldon certified to the county clerk, under date of July 30, 1909, a levy by the commissioners of highways, under authority of the election at the annual town meeting in 1909, of a special tax of \$1 on each \$100 assessed valuation each year for five years, for the purpose of constructing and maintaining two gravel, rock, macadam, or other hard roads in the said town. The roads to be constructed were described in the certificate of the commissioners of highways. This certificate of the town clerk was filed with the county clerk on July 31, 1909. Under this certificate the county clerk extended the tax of \$1 on each \$100 assessed valuation. Appellee objected to the validity of a part of the tax thus extended, on the ground "that the bonds issued in pursuance of the vote taken at the special election were for the same purpose as the original vote at the annual town meeting, and that by operation of law and by virtue of the hard roads act the bonds took the place of the original tax levy, and no amount of tax could be legally levied or extended, except such an amount as was required to pay the bonds maturing in the year 1910, together with interest on all the bonds"; also "that at the time the original vote was taken authorizing a tax of \$1 on each \$100 valuation, the law provided that the taxable value of property should be one-fifth of the full valuation thereof, and that the vote taken was with reference to such taxable value, and that afterwards, and prior to the extension of the tax, the law was changed, making the taxable value one-third of the full actual valuation of the property, and that consequently, by operation of law, the rate was reduced, so that only such an amount as would have been raised under the original valuation could legally be levied and extended." This last objection has been disposed of contrary to the appellee's contention in *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 402, and *People v.*

Chicago & Eastern Illinois Railway Co., 98 N. E. 761.

The bonds bore interest at the rate of 5 per cent. per annum, payable semiannually, and 11 bonds, of \$500 each, matured August 2, 1910. Others mature each year thereafter until 1914, when the last of them becomes due. Appellee's position is that the only tax that could be levied by Sheldon township for hard roads was a tax sufficient to pay the interest on all bonds and the principal of those maturing in 1910; that the money received from issuing and selling the bonds was simply anticipating the hard road tax authorized to be levied at the rate of \$1 on each \$100 assessed valuation; and that that tax could not be levied, and an additional tax to meet the principal and interest of the bonds. The principal and interest of the bonds payable in 1910 was \$7,120. Sixty cents on each \$100 of the assessed valuation of Sheldon township would have produced that sum, and appellee insists that to the extent the levy exceeded 60 cents on each \$100 assessed valuation it was invalid. Upon that basis appellee concluded \$299.88 of the tax extended against its property was unauthorized and illegal, and after paying the excess above that amount objected to judgment against its property for \$299.88. The county court adopted the view of appellee, except it held that the tax should have been extended sufficient, not only to pay the interest and principal of bonds maturing in 1910, but the semiannual interest maturing in February, 1911. For that reason the court overruled the objection as to the sum of \$74.93 of the amount for which it was sought to recover judgment, and sustained the objections as to the residue, \$224.91. The question presented, then, is whether a township having voted a tax of \$1 on each \$100 assessed valuation for five years, for hard roads, and having also, by authority of a vote held in accordance with the statute, issued bonds for hard road purposes, may levy a tax of \$1 on each \$100 assessed valuation for five years, and also an additional tax to pay the principal and interest of the bonds.

The first section of the amended hard roads act of 1909 (Hurd's Rev. St. 1909, p. 1955) authorizes an election to be held at the annual town meeting to vote on the proposition "for or against levying a tax not to exceed one dollar on each \$100 assessed valuation of all the taxable property, including railroads, in the township or road districts, for the purpose of constructing and maintaining gravel, rock, macadam or other hard roads." The petition of the landowners for the holding of such election is required to describe the location and route of the proposed road or roads, and to state the rate per cent., not exceeding \$1 on each \$100 of the assessed valuation, and the period of years, not exceeding five, for which the tax shall be levied. Section 2 prescribes

the form of the ballot to be used at the election, and section 3 provides that, if a majority of the ballots cast at said election are in favor of the special tax, it shall be the duty of commissioners of highways to levy a tax in accordance with the vote and to certify the same to the town clerk in counties under township organization, and the town clerk is required to certify the amount levied to the county clerk, who shall cause the same to be extended on the tax books for the current year. The time for which the special tax levied shall continue is limited to not exceeding five years. Section 4a provides that in counties under township organization where the people have voted for the special hard roads tax, or concurrently, with the election for such special tax, "if the commissioners desire to expend on hard roads in their town (or district) a greater sum than is available to them from other sources, they, or a majority of them, may petition the supervisor of the town (or the county clerk of the county) to call a special election to vote on the proposition, which shall be clearly stated in the petition, substantially as follows: 'To borrow dollars to construct and maintain gravel, rock, macadam or other hard roads in the town (or district) of'" Said section further sets out the requirements necessary to a valid petition, prescribes the notice of election to be given and the manner of giving it, the form of the ballot to be voted at the election, and then provides that if a majority of the legal voters voting at said election favor the proposition to borrow money, the supervisor and town clerk, acting under the direction of the commissioners of highways, "shall issue from time to time, as the work progresses, a sufficient amount in the aggregate of the bonds of said town (or district) for the purpose of building and maintaining gravel, rock, macadam or other hard roads; said bonds to be of such denominations, bear such rate of interest, not exceeding five per cent. upon such time, and be disposed of as necessities and convenience of said town (or district) officers require." The first series are required to mature not more than five years from their date and each succeeding series in succeeding years thereafter. "A record of all issues of said bonds shall be kept in the office of the county clerk of the county in which said township or district is located, and it shall be the duty of such county clerk to extend annually against the property in said township or road district a tax sufficient to pay the interest of said bonds in each year prior to the maturity of such first series and thereafter he shall extend the tax in each year sufficient to pay each series as it matures, together with interest thereon and with the interest upon the unmatured bonds outstanding: * * * Provided, however, that the amount, including the principal and interest to be voted upon shall

not exceed the amount which can be raised during a period of five years by a levy of one dollar on each \$100 of taxable property in said township (or district) as computed on the value of such property as taken for assessment purposes in such town (or district): And, provided, however, that the total amount of such bonded indebtedness shall in no case exceed thirty-five thousand dollars (\$35,000), and such town or district shall provide for the payment of such bonds and the interest thereon by appropriate taxation."

It must be conceded that the language used in the act is not as clear and unambiguous as it might be; but considering the entire act, together with the object for which it was adopted, it seems reasonably clear that the legislative intent was that the special tax levied of \$1 on each \$100 assessed valuation for five years should be entirely independent of the fund borrowed under authority of a special election, and the special tax is not to be applied to the payment of bonds issued upon which the money is borrowed. Provision is first made for authorizing a special tax for hard roads. Then authority is given in townships having voted for a special tax, if it is desired to expend a greater sum for hard roads than is available from other sources (which means the special tax), to hold a special election for the purpose of voting on the question of borrowing money to be expended on hard roads. If a majority of the legal voters voting at the said election favor borrowing money, a sufficient amount of bonds of said town, not exceeding the aggregate amount voted for, shall be issued, from time to time, for the purpose of building and maintaining hard roads. The petition for a special election to authorize the levy of a tax of \$1 on each \$100 assessed valuation is required to state the location and route of the proposed road or roads. Neither the petition for nor the notice of the election held to vote upon the question of borrowing money for hard roads is required to describe the roads the money is to be used in the construction of. The bonds issued are required to be registered with the county clerk, "and it shall be the duty of such county clerk to extend annually against the property in said township or road district a tax sufficient to pay the interest of said bonds in each year prior to the maturity of such first series and thereafter he shall extend the tax in each year sufficient to pay each series as it matures, together with interest thereon and with the interest upon the unmatured bonds outstanding."

Appellee contends that, where money has been borrowed and bonds issued, the county clerk is not to be governed, in the extension of the tax, by the levy of \$1 on each \$100 val-

uation made by the commissioners of highways, but he is authorized only to extend the tax at a rate necessary to produce the amount required to pay interest on all the bonds and the principal of said bonds as they mature. This seems clearly incorrect, and not to have been intended by the Legislature. The special tax authorized might produce a very much larger sum in any one year than would be required to pay the principal and interest on the bonds issued. The amount of money borrowed, including principal and interest, cannot exceed the amount which can be raised during a period of five years by the levy of \$1 on each \$100 assessed valuation of the property in the township, but it may be any sum less than that amount. If the construction contended for by appellee is correct, the amount of tax that could lawfully be extended and collected would be limited to the amount necessary to pay the bonds, and the township would thus be prevented from collecting the amount it had voted to raise and expend on hard roads. While money for hard roads can only be borrowed by townships that have authorized the special tax, the statute does not require it to be expended upon the roads the special tax is levied to construct. The roads upon which the borrowed money is to be expended appear to be left to the discretion of the commissioners of highways, while the money received from the special tax levy of \$1 on each \$100 assessed valuation is required to be expended upon the roads described in the petition for the election to authorize the tax.

The authority given by the statute to borrow money for the construction of hard roads was not intended to enable the commissioners to anticipate the taxes under the levy of \$1 on each \$100 assessed valuation, but was intended to produce means for the construction of hard roads in addition to said special tax. The special tax is to be extended each year at the rate authorized and levied by the commissioners of highways. The tax to pay the principal and interest on the bonds is to be extended each year by the county clerk with whom the bonds are registered, at a rate sufficient to produce the amount required to pay the interest on all the bonds and the principal of maturing bonds. It seems to us any other construction of the statute would lead to confusion and inconsistencies.

Our conclusion, therefore, is that the county court erred in sustaining the objections to a part of the special tax, and its judgment is therefore reversed, and the cause remanded, with directions to overrule the objections and render judgment for said tax.

Reversed and remanded, with directions.

(247 Ill. 467)

PEACOCK et al. v. PHILLIPS et al.**SCUDDER v. MASTERSON.**

(Supreme Court of Illinois. Dec. 21, 1910.)

PLEDGES (§ 56*)—NOTE AND TRUST DEED—ENFORCEMENT BY PURCHASER.

The provision in a note, as collateral for which another note secured by trust deed is given, that on default in payment the payee may sell the collateral pledged for such payment, gives the purchaser of the collateral, with knowledge of the facts, no right to enforce it for a greater amount than could the one to whom it was pledged; that is, the amount owing the pledgee.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 169, 170; Dec. Dig. § 56*.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; George A. Carpenter, Judge.

Suit by Emilie Wilhelmine Peacock and another against Lillie M. Phillips and others. J. Arnold Scudder filed a cross-bill, whose asserted right Edwin F. Masterson disputed. From the judgment of the Appellate Court, reversing a decree in favor of said Scudder, he appeals. Affirmed.

Matz, Fisher & Boyden (Laird Bell, of counsel), for appellant. E. F. Masterson and E. F. Dunne, for appellee.

CARTWRIGHT, J. Emilie Wilhelmine Peacock, who was the owner of a promissory note for \$15,000 secured by a trust deed on premises known as 151 Astor street, in Chicago, and the trustee in the said trust deed, filed their bill in the circuit court of Cook county to foreclose the same. The appellant, J. Arnold Scudder, filed his cross-bill in the case to foreclose a trust deed which was a second lien on the premises, and was made to secure the payment of a note for \$4,000 which he had purchased from the Chicago Savings Bank & Trust Company, and which was held by the bank as collateral security for a note of \$2,500. The appellee, Edwin F. Masterson, had purchased the premises, and he and his wife by their answer disputed the right of the appellant to a foreclosure for the full amount of the trust deed, and insisted that it was a lien upon the premises only to the amount of the note for which it was collateral, which amount they were ready and willing to pay. The appellant had paid for the note and trust deed on April 29, 1907, \$2,530.62, which was the amount due the bank, and appellee offered to pay that amount, with interest. The appellee paid the amount secured by the first trust deed, and the original bill was dismissed without prejudice to the cross-bill. He also paid to appellant the amount which appellant had paid for the note and trust deed, together with interest covering the amount for which it had been held as collateral, and \$200 solicitor's fees agreed upon by the parties. Appellee also deposited with

the clerk of the court \$1,800, to be held pending the result of the suit, and the lien of the trust deed was transferred, by order of the court, from the land to the fund deposited. The issues were referred to a master in chancery, who reported that appellant was entitled to the full amount of the \$4,000 note, with interest. The chancellor overruled exceptions to the report and entered a decree for \$1,618 and interest from March 3, 1908, and ordered the clerk to pay that sum to the appellant out of the funds in his hands. The Branch Appellate Court for the First district reversed the decree and remanded the cause, with directions to order the payment of the amount deposited to the appellee, and to dismiss the cross-bill of the appellant. The court then granted a certificate of importance and an appeal to this court.

The question to be decided is whether the appellant, who purchased the note of \$4,000, and the trust deed securing the same, with notice that they had been deposited for the payment of a note for \$2,500, was entitled to a decree for the full amount of the note and trust deed purchased, or was only entitled to the amount due the bank and secured by the note and trust deed, which was paid to him, together with solicitor's fees. The material facts were agreed upon before the master, as follows: Lillie M. Phillips, who was the owner of the mortgaged premises, made her promissory note on November 27, 1906, for \$2,500 to the Chicago Savings Bank & Trust Company, and at the same time she and her husband executed their note for \$4,000, payable to their own order and indorsed in blank, together with a trust deed to secure its payment. The \$4,000 note and trust deed were delivered to the bank as collateral security for the \$2,500 note, which provided that upon default in payment the bank might sell the collateral pledged for such payment. Upon the maturity of the \$2,500 note, on January 26, 1907, a new note for the same amount, payable 30 days after date, with interest at 7 per cent., and with the same provisions as to the collateral, was given, and the same collateral security was retained by the bank. The \$2,500 note was not paid, and on April 29, 1907, the bank sold the collateral security for the amount due it, to the appellant. The amount due was \$2,530.62, and appellant knew all the circumstances of the pledge. The bank canceled the \$2,500 note and returned it to Mrs. Phillips. Six weeks after the sale of the collateral to appellant, Mrs. Phillips and her husband conveyed the premises to the appellee, who was informed of the note and trust deed pledged as collateral security with the bank, and that the bank had authority to sell the note and trust deed on default of payment of the \$2,500 note;

but he did not know that the sale had already been made.

A creditor, holding goods, chattels, or tangible personal property as a pledge to secure the payment of the indebtedness to him, may sell the same and apply the proceeds to the payment of his debt, accounting to his debtor for any surplus. 22 Am. & Eng. Ency. of Law (2d Ed.) 882. From the nature of the property, the only method of applying it to payment of the debt is through a sale; but it is not so with bonds, mortgages, or promissory notes, which are available for the payment of the principal debt by collecting them and applying the proceeds. *Joliet Iron & Steel Co. v. Scioto Fire Brick Co.*, 82 Ill. 548, 25 Am. Rep. 341; *Union Trust Co. v. Rigdon*, 93 Ill. 458. In *Jenkins v. International Bank*, 111 Ill. 462, where notes and a mortgage were pledged to the bank, it was said that a creditor holding such securities has three remedies, and may file his bill to have the collaterals sold for the payment of the principal indebtedness, or may bring suit upon the collaterals themselves, or collect the same by a sale of property conveyed in trust to secure them. The creditor, in the absence of a power of sale given him by his debtor, cannot sell commercial paper or choses in action, but may collect the same and apply enough of the proceeds to pay his debt, and, if there is any balance, must return it to the pledgor. *Zimbleman v. Veeder*, 98 Ill. 613. If the collateral security consists of a mortgage, the holder of it has a right to foreclose (*Union Trust Co. v. Hasseltine* [Mass.] 16 Am. & Eng. Ann. Cas. 123, note), and in such case must account for any surplus above his debt (31 Cyc. 888). If the securities of a third person are deposited as collateral, the creditor may collect the whole amount due from the maker, and will hold any surplus above his own debt as trustee for his debtor, and in such a case the maker of the securities is not concerned how the pledgor and pledgee should settle between themselves, but is held for the full amount of his debt. *Tooke v. Newman*, 75 Ill. 215. In this case there was a contract authorizing the bank to sell the \$4,000 note and trust deed at public or private sale, without advertising the same, or demanding payment, or giving notice, and with the right of the bank to purchase at the sale, if made at any broker's board or any public sale. Where there is a contract for such a sale of securities on default in payment of the debt secured, the right to sell is conferred, not by the law, but by the contract, and is to be exercised according to the contract. *McDowell v. Chicago Steel Works*, 124 Ill. 491, 16 N. E. 854, 7 Am. St. Rep. 381. The bank, therefore, might have foreclosed the trust deed pledged for the payment of its note of \$2,500, and could not have had a decree for any more than the amount due on such note, or it could elect to sell the collateral in accordance with the power given by the con-

tract. In case of foreclosure, the equities between the parties would have forbidden an enforcement of the lien for more than the debt to the bank; and the question is whether that result could be accomplished by selling the note and trust deed, in pursuance of the agreement, to one who had notice of the facts.

A trust deed or mortgage is not assignable either by the common law or under the statute; and while the assignment of a promissory note secured by mortgage carries with it the mortgage as an incident of the debt, it does so only in equity. When resort is had to a court of equity to enforce the obligation created by the mortgage, it will let in any defense which would have been good against the mortgage in the hands of the mortgagee himself, excepting only defenses based on latent equities of third persons, of whose rights the assignee had no notice. *Olds v. Cummings*, 31 Ill. 188; *Silverman v. Bullock*, 98 Ill. 11; *Mullanphy Savings Bank v. Schott*, 135 Ill. 655, 28 N. E. 640, 25 Am. St. Rep. 401; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 378; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287. A mortgage gives notice, on its face, that the mortgagor is the debtor; and if the assignee fails to obtain actual notice of any equities or defenses of such debtor it is due to his own neglect. 20 Am. & Eng. Ency. of Law (2d Ed.) 1041. The assignee is not bound to inquire of third persons whether they have any equities, and is presumed to take without notice of any such equities and free from them. The equities here involved existed between the bank and the makers of the note and trust deed, and were not latent. There can be no room for doubt that in case of an ordinary sale by the bank of such securities they would be subject to such equities in the hands of the assignee, and the argument that they are not is based on the fact that there was a contract giving the bank a power of sale. As we have seen, the bank could not sell at all without a power so conferred, and the purpose of the contract was merely to enable the bank to do an act to obtain payment which could not otherwise be done. We do not see any good reason for saying that a mere grant of power to sell enabled the bank to confer a greater right upon the purchaser, with full notice of the facts and circumstances and the extent to which the bank could enforce the obligation, than the bank would have had in case of foreclosure.

Counsel for appellant regard the collateral as answering the same purpose as accommodation paper; but there is no similarity between the two. Accommodation paper is made without legal consideration, and would fall of its only purpose if the assignee could not recover on it discharged of all defenses that might have existed against the accommodated party. *Miller v. Larned*, 103 Ill. 562; *Naef v. Potter*, 226 Ill. 628, 80 N. E.

1084, 11 L. R. A. (N. S.) 1084. There is an exception to the doctrine that one seeking to enforce in equity a mortgage security is subject to any defense which would have been good against the mortgage in the hands of the mortgagee. That is the case of corporation bonds, and the appellant relies upon a decision relating to collateral of that kind. *Morris Canal & Bank Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423. Bonds of that kind are issued for the purpose of raising funds for the corporation, and are intended to be thrown upon the market and to pass from hand to hand. The mortgage or trust deed secures the holders of the bonds, and they can be enforced by such holders for the full face value, regardless of equities. To permit equitable defenses to be interposed would practically destroy such methods of raising money, and the corporation is properly estopped to deny its liability. *Peoria & Springfield Railroad Co. v. Thompson*, 103 Ill. 187. The case of *Trust Estate of Weeks & Co.*, 52 Md. 520, related to notes deposited as collateral security, and no question concerning choses in action not assignable was involved. No well-considered case has been cited expressing a view contrary to the settled law in this jurisdiction.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(247 Ill. 394.)

PEOPLE v. JACOBSON.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. CRIMINAL LAW (§ 84*)—JURISDICTION—MUNICIPAL COURTS.

The jurisdiction conferred by Const. art. 6, § 26, vesting in the criminal court of Cook county jurisdiction of all criminal cases arising in the county, is not exclusive, but the Legislature may confer concurrent jurisdiction on another court, and Municipal Court Act (Hurd's Rev. St. 1909, c. 37) § 265, in so far as it attempts to confer on the municipal court jurisdiction in criminal cases is not unconstitutional.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. § 84.*]

2. CRIMINAL LAW (§ 1018*)—APPEAL AND ERROR—CONSTITUTIONAL PROVISIONS.

Const. art. 6, § 26, provides that all appeals in criminal cases in Cook county shall be taken to the criminal court. *Held*, to only provide that all appeals in criminal cases in Cook county which may be given by law shall be taken to the criminal court, and not to give an appeal in all cases in such county to the criminal court, and not to authorize an appeal in any criminal case from the municipal court to such criminal court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1018.*]

3. CRIMINAL LAW (§ 1179*)—APPEAL AND ERROR—QUESTIONS REVIEWABLE.

Where plaintiff in error seeking to review a conviction in the municipal court did not request in such court an appeal to the criminal court, an assignment of error that Municipal Court Act (Hurd's Rev. St. 1909, c. 37) § 285, providing for review on error by the Appellate

and Supreme Courts of judgments in the municipal courts is unconstitutional, will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1179.*]

4. CRIMINAL LAW (§ 620*)—TRIAL OF INDICTMENTS TOGETHER.

Const. Bill of Rights, § 9, giving to person accused of crime the right to a speedy trial by a jury of the county or district, does not prohibit a trial at one time for several offenses committed in the same county.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 620.*]

5. INDICTMENT AND INFORMATION (§ 130*)—JOINDER OF OFFENSES—MISDEMEANORS.

The joinder in separate counts of several offenses in violation of the same statute defining and punishing a misdemeanor does not vitiate the prosecution, and in such cases the practice of quashing the indictment or information or calling on the prosecution to elect on which charge it will proceed does not exist.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 130.*]

Error to the Municipal Court of Chicago; Michael F. Girtlen, Judge.

Jacob Jacobson was convicted of persuading a female to enter a house of prostitution for the purpose of practicing prostitution, and he brings error. Affirmed.

Louis Greenberg and Henry A. Berger, for plaintiff in error. W. H. Stead, Atty. Gen., and John E. W. Wayman (Zach Hofheimer, of counsel), for the People.

DUNN, J. An information was filed against the plaintiff in error on July 19, 1909, in the municipal court of Chicago, which charged him with persuading a female (naming her) to enter a house of prostitution for the purpose of practicing prostitution. On July 29th a jury was sworn to try the issues, leave was granted to file an amended information, and an amended information was filed charging that the plaintiff in error procured the person named in the first count, and another (naming her), as female inmates of another house of prostitution. On July 30th the jury impaneled on the previous day was discharged. The plaintiff in error was arraigned and entered a plea of not guilty to the amended information, and was also arraigned and entered a plea of not guilty to the original information. A jury was sworn, and a verdict was returned finding the plaintiff in error "guilty in manner and form as charged in the information filed herein," upon which he was sentenced to imprisonment in the house of correction for two months and to pay a fine of \$600 and the costs. A writ of error was sued out to bring the record before us for review.

It is first contended that section 2 of the municipal court act (Hurd's Rev. St. 1909, c. 37, § 265), in so far as it attempts to confer upon the municipal court jurisdiction in criminal cases in which the punishment is by fine or imprisonment otherwise than in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the penitentiary, is unconstitutional, because under section 26 of article 6 of the Constitution the criminal court of Cook county is vested with jurisdiction of all cases of a criminal nature arising in the county of Cook. It was held in the case of *Berkowitz v. Lester*, 121 Ill. 99, 11 N. E. 860, that this jurisdiction was not exclusive, even though the Legislature, by section 2 of division 10 of the Criminal Code (Hurd's Rev. St. 1906, c. 38, § 393), had attempted to make it so. Section 12 of article 6 of the Constitution confers upon the circuit court jurisdiction of all causes in law and equity in language as broad as that which in section 26 confers upon the criminal court of Cook county jurisdiction in all cases of a criminal nature, yet in *Myers v. People*, 67 Ill. 503, we held that the jurisdiction conferred on the circuit court by section 12 was not exclusive, but that it was within the power of the Legislature to confer upon county courts concurrent jurisdiction in criminal cases. The jurisdiction conferred upon any court by the Constitution cannot be diminished by the Legislature, but in the absence of a constitutional prohibition the Legislature may confer concurrent jurisdiction of the same subject-matter upon another court.

It is next insisted that section 22 of the municipal court act, so far as it provides for the review upon error by the Appellate and Supreme Courts of the judgments of the municipal court of Chicago in criminal cases, is unconstitutional, because section 26 of article 6 of the Constitution provides that all appeals in criminal cases in Cook county shall be taken to the criminal court, and for this reason counsel think the judgment should be reversed and the cause remanded to the municipal court with directions to grant the plaintiff in error an appeal to the criminal court. The constitutional provision does not give an appeal in all criminal cases in Cook county to the criminal court, but provides that all appeals in criminal cases in Cook county which may be given by law shall be taken to the criminal court. The appeals referred to are such as are tried de novo in the appellate tribunal. No appeal is authorized by law in any criminal case in the municipal court. The plaintiff in error did not request in the municipal court an appeal to the criminal court, he was not denied such appeal, and the question of his right to such appeal was neither presented to nor decided by the municipal court. This assignment of error presents nothing for our consideration, because its determination would not affect the correctness of the judgment below.

It is finally urged that the plaintiff was tried at one time for two separate offenses, and that this was in violation of section 9 of the Bill of Rights, which provides that persons accused of crime shall have the right

to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Counsel argue that this prohibits a trial for several offenses at one time though all were committed in the county where the trial may be had. There is no such prohibition in this clause, which merely determines the place of the trial. Whether the defendant might have objected to going to trial on both the original and amended informations on other than constitutional grounds is not presented to us and is not decided. He went to trial without objection, and made no motion at any time to require the prosecutor to elect. There is no bill of exceptions in the record, and so far as appears no evidence of more than one offense was heard. Each information charged a violation of the same section of the statute, which was a misdemeanor. Each offense was of the same grade and subjected the offender to the same punishment. The charge of two different misdemeanors of the same nature may be embraced in separate counts of the same information. In the case of misdemeanors the joinder of several offenses of the same character will not, in general, vitiate in any stage of the prosecution. In such cases the practice of quashing the indictment or information or calling on the prosecution to elect on which charge he will proceed does not exist. 1 Chitty on Crim. Law, 254.

The judgment of the municipal court is affirmed.

Judgment affirmed.

(247 Ill. 484.)

MARTIN et al. v. McCALL et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. MUNICIPAL CORPORATIONS (§ 510*)—RES JUDICATA—SUBSEQUENT ACTION.

A judgment confirming a special assessment for a local improvement bars a subsequent bill in equity to enjoin the officers of the city from proceeding any further with the special assessment proceedings, alleging that the improvement in running a sewer across a certain lot was wrongfully done, in that it was not provided for by the ordinance, as the judgment conclusively determined that the sewer had been constructed in substantial compliance with the ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1180; Dec. Dig. § 510.*]

2. MUNICIPAL CORPORATIONS (§ 516*)—COLLATERAL ATTACK—WHAT CONSTITUTES.

Such suit in equity was a collateral attack on the judgment of the county court confirming the assessment, and also the judgment of that court approving the acceptance of the improvement by the city officers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 516.*]

3. MUNICIPAL CORPORATIONS (§ 365*)—RES JUDICATA—ORDER CONFIRMING ASSESSMENT.

A judgment of the county court approving the acceptance of a local improvement by the city is res judicata of all questions of fact approved and confirmed by said order, under Local Improvement Act (Hurd's Rev. St. 1906, c. 24)

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

§ 590, providing that the order of the court in regard to the presentation of a certificate of the completion of a local improvement by the board of local improvements shall be conclusive upon all the parties, and no appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same, and such judgment bars a subsequent suit to restrain collection of an assessment on the ground that the improvement did not comply with the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898; Dec. Dig. § 365.*]

4. PLEADING (§ 214*)—DEMURRER—EFFECT.

Under Local Improvement Act (Hurd's Rev. St. 1909, c. 24) § 590, providing that the order of the court in regard to the confirmation of the acceptance of public improvements by the city shall be conclusive upon all parties, and no appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same, where a subsequent bill in equity to enjoin the proceedings on the special assessments alleged that the improvements were not in accordance with the ordinance, it could not be contended that the demurrer to the bill admitted such fact, since the averment of such fact could not be inquired into on the hearing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. PLEADING (§ 214*)—DEMURRER—EFFECT.

The demurrer to a bill to enjoin proceedings on special assessments for improvements admits the truth of facts stated in the bill so far as they are well pleaded, but does not admit conclusions of law drawn therefrom though they are also alleged in the bill.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 527; Dec. Dig. § 214.*]

6. MUNICIPAL CORPORATIONS (§ 365*) — IMPROVEMENTS—ACCEPTANCE—JUDGMENT CONFIRMING—EFFECT.

Local Improvement Act (Hurd's Rev. St. 1909, c. 24) § 590, providing that the judgment of the court confirming the acceptance of local improvements by the city shall be conclusive of the fact that the improvement is made in substantial compliance with the ordinance, cannot be nullified by the admissions of parties, in their pleadings or otherwise, in a subsequent suit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 898; Dec. Dig. § 365.*]

7. JUDGMENT (§ 423*) — EQUITABLE RELIEF — ERRONEOUS JUDGMENT.

It is no ground for relief in equity that a judgment at law is wrong in law or fact, or both, if the complaining party had an opportunity to make his defense at law and omitted to do so.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 797-801; Dec. Dig. § 423.*]

8. MUNICIPAL CORPORATIONS (§ 513*)—TRIVIAL MATTERS—IMPROVEMENTS—ORDINANCE.

A bill attacking special assessment proceedings, alleging that the sewer was not constructed in conformity to the ordinance, in that it was constructed on a part of a certain lot, whereas the ordinance did not so stipulate, was defective, in that it did not show that the sewer was upon some substantial portion of the lot, such as the law would take cognizance of.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1206; Dec. Dig. § 513.*]

Appeal from Circuit Court, Whiteside County; Frank D. Ramsay, Judge.

Suit by David L. Martin and others against Charles W. McCall and others. Judgment

for defendants, and plaintiffs appeal. Affirmed.

Jarvis Dinsmoor and Frank J. Bowman, for appellants. J. J. Ludens, State's Atty., and C. L. & C. E. Sheldon, for appellees.

VICKERS, C. J. On February 4, 1907, the city of Sterling passed an ordinance providing for the construction of the east end sewer system. A petition was thereafter filed praying that steps be taken to levy a special assessment to pay for such sewer system. The special assessment was levied and duly confirmed May 30, 1907. A contract was let, and the work of constructing the sewer being completed, on November 25, 1908, a judgment was entered confirming the acceptance of the work by the board of local improvements. The complainants below appeared and filed objections to the rendition of the judgment confirming the acceptance of the work. At the June term of the county court complainants below filed objections to the rendition of judgment for the first installment of the special assessment against their property. These objections were overruled, and the objectors appealed to this court, and the judgment below was affirmed. *People v. Martin*, 243 Ill. 284, 90 N. E. 699. After the judgment of affirmance in this court complainants below filed a bill in equity for the purpose of enjoining the city and its officers from proceeding any further with such special assessment proceedings, from taking any further steps toward the collection of subsequent installments, and from paying to the contractor any money on hand that may have been paid in on account of the first installment. The defendants interposed a demurrer to the bill, which was sustained. Complainants below elected to stand by their bill, and the same was dismissed for want of equity. To reverse this decree, complainants below have brought the record to this court for review.

A copy of the original ordinance is appended to the bill as an exhibit, and all of the proceedings subsequent to its passage are recited very fully in the bill. It is alleged in the bill that the county court, on May 30, 1907, confirmed the assessment roll and overruled appellants' objections thereto. It is also alleged that on September 18, 1908, the county court of Whiteside county made an order approving the acceptance of this work by the city, and that said order of approval was entered over the objections of the appellants. This averment is accompanied by the statement that the certificate of completion of the work in accordance with the ordinance and contract was false; and made with the purpose of defrauding appellants and other property owners. The bill sets out with considerable detail several particulars in which it is claimed that the sewer was not constructed in the manner that the ordinance required. Among other things complained of as to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

manner in which this sewer was constructed, the bill alleges that the sewer as provided for by the ordinance was located across lots 4, 3, 2, and 1 in block 39, and lots 7, 8, 9, 10, 11, and 12 in block 34. It is alleged in the bill, and the same appears from the copy of the ordinance, that no part of the sewer was located on lot 9 in block 38. The bill charges that, in fact, the sewer as constructed is located on a part of lot 9 in said block 38, and that there is nothing in the petition, or elsewhere in the special assessment proceedings, showing that the city owned or had acquired a right of way for such sewer over said lot 9. It appears from the bill that this lot is owned by John W. and David L. Martin, two of the appellants herein, and that they own other property assessed for the improvement. Lot 9 in block 38 was specially assessed for the improvement in question, and was among the property for which objections were filed to the judgment of confirmation, the judgment approving the acceptance and the judgment for first delinquent installment. Appellants aver that since the filing of said objections and the rendition of said judgments the fact has been ascertained, which was before unknown to them, that the sewer had been built over and across lot 9 in block 38, and that appellants were kept in ignorance of this fact by the failure of the ordinance to describe any land that would be necessarily taken or damaged in the construction of said sewer and by reason of the map of the sewer territory made by the engineer failing to show that the sewer would cross any part of said lot 9 in block 38.

The only question involved is whether the court erred in sustaining the demurrer and in dismissing appellants' bill. There are a number of objections to this bill which are urged by appellees in their brief. In view of the conclusion we have reached with respect to one of these objections the others need not be considered. If this bill is sustained it will have the effect of nullifying the judgment of confirmation as well as the judgment approving the acceptance of this work by the city. This bill is a collateral attack upon those judgments. It seeks to vacate the assessment for reasons which existed at the time the judgment of confirmation was entered. We are of the opinion that the judgment of confirmation is *res judicata* of all the questions that are presented in this bill. The validity of the ordinance under which this improvement was constructed was involved in the case of *People v. Martin*, *supra*, and this court held it valid. That case conclusively settles the validity of the ordinance, regardless whether the specific objection to said ordinance now insisted upon was raised in that case or not. The validity of the ordinance cannot be thus attacked by the same parties by piecemeal although the action may be in a different form. *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878. The bill shows that the improvement was accepted by the city,

and that such acceptance was, after notice, appearance, and objection of the appellants, confirmed by a judgment of the county court. That judgment is *res judicata* of all questions of fact approved and confirmed by said order. *People v. Cohen*, 219 Ill. 200, 76 N. E. 388. Section 84 of the local improvement act (*Hurd's Rev. St. 1909*, c. 24, § 590) provides that the court, upon the presentation of a certificate of the completion of a local improvement by the board of local improvements, shall hear and determine the same in a summary manner, and shall enter an order according to the fact. "Such order of the court shall be conclusive upon all the parties, and no appeal therefrom, or writ of error thereto, shall be allowed to review or reverse the same." The effect of this judgment is to conclusively determine that the work has been constructed in substantial compliance with the ordinance. The effect of appellants' bill is to raise an issue as to whether the sewer was constructed in accordance with the ordinance. This cannot be done without showing that the county court approved the certificate of completion of the work without jurisdiction. The jurisdiction of the county court to pass upon the certificate of the board of local improvements affirmatively appears from the allegations of the bill. Appellants seek to avoid the effect of this judgment by averring that the court acted upon a false certificate and that the judgment was obtained fraudulently. The only fact set out in the bill in support of the general allegation of fraud is the omission from the ordinance, and from the map of the sewer district, of any reference to the location of a part of the sewer on lot 9 in block 38. Appellants say that the demurrer admits the averment in the bill that the sewer is, in fact, located upon a part of lot 9 in block 38. The rule is that a demurrer admits the truth of facts stated in the bill so far as they are relevant and well pleaded, but it does not admit the conclusions of law drawn therefrom although they are also alleged in the bill. *Story's Eq. Pl. § 452*. The averment of a fact which appellants' bill shows could not be inquired into on hearing is not admitted by the demurrer. The statute, which makes the judgment confirming the acceptance of a local improvement conclusive of the fact that the improvement is made in substantial compliance with the ordinance, cannot be nullified by the admissions of parties, in their pleadings or otherwise. This case will not be determined on the assumption that the sewer was not located in the place and constructed in the manner required by the ordinance, but, on the contrary, giving to the judgment of the county court the conclusiveness required by section 84 of the local improvement act, we must assume that the sewer was located and constructed in substantial compliance with the statute, and that neither averment nor proof to the contrary will be considered. The power of a court of equity to set aside and nullify

judgments at law is exercised according to the fixed rules, one of which is that it is no ground for relief in equity that a judgment is wrong in law or fact, or both, if the complaining party had an opportunity to make his defense at law and omitted so to do. *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742; *Cosgrove v. City of Chicago*, 235 Ill. 358, 85 N. E. 599.

The bill does not state how much of said sewer is on lot 9 in block 38. The allegation is that it is upon a part of said lot. The pleading will be construed most strongly against the pleader. The bill is defective in that it does not show that the sewer is upon some substantial portion of said lot, such as the law would take cognizance of. If the sewer only occupied one inch off the corner of said lot it would hardly be contended that the law would pay any attention to such an infinitesimally small matter, and yet the averments of the bill do not negative this condition of affairs. There was no error in sustaining the demurrer to this bill and dismissing the same.

The decree of the circuit court of Whiteside county will be affirmed.

Decree affirmed.

(247 Ill. 506.)

PEOPLE ex rel. LEE, County Collector, v. CINCINNATI, L. & O. RY. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 644*)—SALE OF LAND—PROCEEDINGS—BURDEN OF PROOF.

Where a county tax collector made a prima facie case in proceedings for judgment against property for delinquent taxes, the property owner was required to overcome such case by evidence.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1309; Dec. Dig. § 644.*]

2. COUNTIES (§ 192*)—TAXES—PURPOSES—SALARIES OF COUNTY OFFICERS—"OFFICE."

A janitor is not a county officer, within the constitutional definition of an "office," so that the salary of a janitor cannot be considered in determining whether a certain amount was properly levied for the salary of county officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

For other definitions, see Words and Phrases, vol. 8, pp. 4921-4931; vol. 8, p. 7736.]

3. COUNTIES (§ 192*)—TAXES—PURPOSES—COUNTY OFFICERS.

Since county officers have no authority to appoint a stenographer, the salary of such a stenographer cannot be included as an item of a county tax for salaries of county officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

4. PAUPERS (§ 10*)—TAXES—PURPOSES—COUNTY TAX—MAINTENANCE OF PAUPERS.

While Laws 1861, p. 185, require the several towns of Kankakee county to support paupers residing within their limits, as well as nonresident paupers chargeable as such therein, the county may maintain a county poorhouse and fix the rate which each town will pay for the support of its paupers therein, or transient persons not chargeable to any town may be maintained therein, so that such county, hav-

ing established a county poorhouse, may levy a tax for the care of paupers.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. §§ 12, 22; Dec. Dig. § 10.*]

Appeal from Kankakee County Court; A. W. De Selm, Judge.

Proceedings by the People, on the relation of Dan G. Lee, County Collector, against the Cincinnati, Lafayette & Chicago Railway Company. From a judgment for relator, defendant appeals. Affirmed.

W. R. Hunter and Walter O. Schneider, for appellant. J. Bert Miller, State's Atty., for appellee.

CARTWRIGHT, J. Dan G. Lee, county collector of Kankakee county, applied to the county court of the said county for judgment against the property of the Cincinnati, Lafayette & Chicago Railway Company for delinquent taxes for the year 1909, and the railway company filed objections to the different taxes. A county tax of \$60,000 was levied, made up of different items, including building purposes, \$11,000; salary of the officers, \$12,500; and care of paupers, \$8,000. The objections included the items for building purposes and care of paupers and \$5,000 of the item for salary of officers. The collector admitted that the item for building purposes was not sufficiently specific, and the court sustained the objection to that item and the objections to the other taxes, except the items for salaries of officers and care of paupers. Judgment was entered in accordance with the finding, and the railway company appealed.

The collector made the formal proof which constituted a prima facie case in his favor, and the railway company was called upon to overcome it by evidence. The objection to \$5,000 of the item of \$12,500 for salaries of officers was that \$7,500 would cover all the salaries which the county was required to pay, and no evidence whatever was offered to sustain that objection. It was stipulated that the item was included in the county tax, but that did not establish the invalidity of any part of it. It is argued that some of the county officers must receive their compensation and office expenses out of the fees of the office, and that no tax whatever can be legally levied to pay the same. It is true as to some county officers that they must get their compensation out of fees; but the county is required to pay them fees, under the fees and salaries act, for certain services, the amount of which the record in this case does not show.

The collector offered in rebuttal evidence of the salaries allowed to county officers, and included a janitor and a county stenographer. Counsel for the railway company are correct in their claim that a janitor is not an officer under the accepted definition of an office given in the Constitution, and there is

no authority for the appointment of a county stenographer. If the county officers who receive compensation, either in the form of fees or salary, require the services of a stenographer, they must pay for such services themselves. Excluding these items, however, is not sufficient to show that the amount included in the tax for salaries was in excess of the amount for which the county authorities were authorized to levy a tax.

The only evidence relating to the item for care of paupers consisted of a stipulation that certain amounts therein named were levied at the annual town meetings in the respective towns for the support of paupers; but if the county could not, under any circumstances, levy a tax for the care of paupers, the objection would be good as a matter of law, and no evidence would be required. The several towns in Kankakee county are required to support all paupers residing within their respective limits and all non-resident paupers becoming chargeable as such therein. Laws 1861, p. 135. But even where the paupers are supported in that way, the county is authorized to establish and maintain a county poorhouse, and to fix a rate per day or per week that each town shall pay for the support and maintenance of its paupers therein. The collector proved that there was a poorhouse in Kankakee county, with stock on the farm and employes raising garden produce for the paupers, and a superintendent, who, with his wife, was paid a salary of \$100 per month. There is also a physician for the paupers, who is paid \$240 a year, and transient paupers whose homes are not in that county, and who are not chargeable to any particular town, are aided and cared for at the poorhouse.

It is intended that the charges against the towns for the support of their paupers shall be sufficient to cover the expense of such support; but there may be transient persons, requiring temporary relief, for which no charge could be made to any particular town, and there might be expenses connected with the poorhouse and its maintenance which the county might properly pay, and which would be fairly included under the item of care of paupers. The objection was that the county had no power to levy any tax for the care of paupers, and it was not sustained by the evidence.

The judgment is affirmed.

Judgment affirmed.

(247 Ill. 340.)

PEOPLE ex rel. GRAFF, County Collector, v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. JUDGMENT (§§ 540, 713*)—CONCLUSIVENESS—BAR TO SUBSEQUENT ACTION.

Where a matter has been adjudicated by a court of competent jurisdiction, it is conclusively settled in a subsequent litigation in a court

of concurrent jurisdiction between the same parties, where the same question arises; but where the former adjudication is relied on as a bar to a subsequent action, it is necessary that there shall be identity both of the subject-matter and the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1079, 1234-1241; Dec. Dig. §§ 540, 713.*]

2. JUDGMENT (§ 660*)—CONCLUSIVENESS—ACTUAL CONTROVERSY.

Where a suit is devised to have a certain judgment entered, it will not be binding on the public, or those who are not parties to the scheme.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 660.*]

3. JUDGMENT (§ 660*)—CONCLUSIVENESS—ACTUAL CONTROVERSY—BURDEN OF PROOF.

Where there is some evidence indicating that a mandamus proceeding, begun by county commissioners and others against the county clerk to compel him to extend taxes at a specified rate, was collusive in character, the burden was on the sheriff, in a subsequent action against a taxpayer to enforce the tax, to show that such proceeding involved an actual controversy and was contested between the parties, in order to sustain a plea that the judgment therein was res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.*]

4. JUDGMENT (§ 656*)—CONCLUSIVENESS—JUDGMENT ON DEMURRER.

A judgment may be conclusive of an issue, though rendered on a general demurrer contesting the facts alleged, if the issue of law was contested in good faith.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1167; Dec. Dig. § 656.*]

5. JUDGMENT (§ 660*)—CONCLUSIVENESS—ERRONEOUS JUDGMENT.

It is not material to the conclusiveness of a judgment that it was erroneous, and would have been reversed on appeal or writ of error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.*]

6. JUDGMENT (§ 702*)—RES JUDICATA—IDENTITY OF PARTIES.

A tax rate having been fixed for county, park, and library purposes, county commissioners, park commissioners, and officials of the library instituted a mandamus proceeding against the county clerk, alleging that he had refused to extend the taxes at such rate, and threatened to extend them at lower rates, by authority of a specified law, and prayed for a writ commanding him to extend the taxes at the rate certified to him. The clerk entered an appearance, and the state's attorney filed a demurrer to the petition, and the court, without sustaining or overruling the demurrer, or determining the issue except inferentially, entered judgment awarding the writ. Held, that the clerk in such proceedings did not represent the taxpayers, and that such judgment was not a conclusive adjudication of the validity of the levy at the rate imposed, as against taxpayers.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1227; Dec. Dig. § 702.*]

7. TAXATION (§§ 538, 587*)—TAXES VOLUNTARILY PAID—RECOVERY—SET-OFF.

Where defendant voluntarily paid certain library taxes against which it might have successfully defended, it could not recover the amount so paid, or set it off against unpaid taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 999, 1000; Dec. Dig. §§ 538, 587.*]

Appeal from Morgan County Court; Thomas Henshaw, Judge.

Action by the People, on the relation of Charles B. Graff, County Collector, against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and relator appeals, and defendant assigns cross-error. Affirmed.

Robert Tilton, State's Atty., Bellatti, Barnes & Bellatti, and M. T. Layman, for appellant, Kirby & Wilson (J. A. Connell, of counsel), for appellee.

CARTWRIGHT, J. Appellant, as sheriff and ex officio collector of Morgan county, applied to the county court of said county for judgment against property of appellee, the Chicago, Burlington & Quincy Railroad Company, assessed in the name of the St. Louis, Rock Island & Chicago Railroad Company and the Jacksonville & St. Louis Railroad Company, and appellee filed objections to that part of the county tax in excess of 54 cents on each \$100 of the assessed valuation of its property, and also to the excess above 9 cents on each \$100 of said valuation of the taxes levied for park purposes and library purposes, respectively. The county tax was extended at the rate of 75 cents, and the library and park taxes were each extended at the rate of 12 cents, on each \$100 of assessed valuation, and the ground of objection was that they were not extended under the provisions of the amended revenue act in force July 1, 1909. Laws 1909, p. 323. The appellee had paid the library tax as extended, which was \$9.93 in excess of the lawful rate under said act, and appellee alleged that it was paid through mistake and oversight. The court sustained the objections to the county tax and park tax, but refused to credit the appellee with the alleged overpayment on account of the library tax. This appeal was prosecuted from the judgment, and the appellee assigns a cross-error upon the refusal of the court to allow a set-off of the overpayment on the library tax against the balance due on another tax.

Counsel for appellant do not in this case dispute the validity of the Juul law, or that it was the legal duty of the clerk to obey it, but claim that the appellee was precluded from objecting to the tax by a former adjudication of the circuit court of Morgan county concerning the same subject-matter. The affairs of Morgan county are managed by a board of county commissioners, and appellant offered in evidence the record and files of a mandamus proceeding in the circuit court, in which the county commissioners, the park commissioners, and the officials of the public library were petitioners and the county clerk was defendant. The court sustained an objection to the evidence and appellant excepted to the ruling, which raises the only question under the errors assigned by appellant.

The suit was begun and finished on the same day, and the proceedings consisted of

the petition, a demurrer, and judgment. The petition filed on December 6, 1909, alleged the levies by the petitioners of taxes at the rates at which the same were extended, and that the county clerk had refused to extend the same at such rates, but threatened to extend them at lower rates by authority of the act before referred to, known as the "Juul law," and the prayer was for a writ of mandamus commanding the clerk to extend the taxes at the rates certified to him. The clerk filed an entry of appearance, agreeing that the cause should stand for immediate hearing, and the state's attorney filed a demurrer to the petition. The demurrer, confessing the facts alleged in the petition, raised an issue of law; but the court did not sustain or overrule the demurrer or determine that issue, except inferentially, by entering a judgment awarding the writ. The judgment entered the same day commanded the county clerk to extend such a rate of taxes as would produce the aggregate amount levied and certified by the petitioners; but no mandate was issued on the judgment. If the judgment was res judicata between the people, represented by the collector and the appellee, the court committed an error in not receiving it in evidence; but if it was not res judicata, it was not competent for any purpose, and no error was committed.

A matter which has been adjudicated by a court of competent jurisdiction is deemed to be finally and conclusively settled in any subsequent litigation in a court of concurrent jurisdiction between the same parties, where the same question arises. Neither the parties to an action nor persons in privity with them can relitigate any fact or question actually or directly in issue in such suit, which was passed upon and determined by a court of competent jurisdiction; but where the former adjudication is relied on as a bar to a subsequent action, it is essential that there shall be identity both of the subject-matter and the parties. *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Tilley v. Bridges*, 105 Ill. 336; *Jenkins v. International Bank*, 111 Ill. 462; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; 23 Cyc. 1215; 24 Am. & Eng. Ency. of Law (2d Ed.) 709. To bring a case within the rule that a former judgment is res judicata of the cause of action, it must appear that such former adjudication was upon a matter contested between the parties (*Wadhams v. Gay*, 78 Ill. 415); and if a suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who are not parties to the scheme adopted for that purpose (*People v. Knopf*, 198 Ill. 340, 64 N. E. 842, 1127). It is contended that the mandamus suit begun by the board of county commissioners and others against the clerk of the board was of that character, and the above recital of facts pertaining to that suit shows some ground for such an inference, which we think was sufficient to cast upon the appel-

lant the burden of showing that the matter was actually in controversy and contested between the parties. There was no such evidence.

It is not material that the judgment in the mandamus suit was rendered on a general demurrer confessing the facts alleged, if the issue of law was contested in good faith; and it is immaterial that the judgment was erroneous, and would have been reversed on appeal or error. *Stempel v. Thomas*, 89 Ill. 146; *Jenkins v. International Bank*, supra. It is necessary, however, to the application of the doctrine of *res judicata*, that the appellee was a party to the mandamus suit in which the judgment was rendered, or in privity with a party thereto. The appellee was not a party to the record in the former proceeding, and was in no way connected with it, and there is no privity between the clerk and the appellee. There has been no succession by appellee to rights of property adjudicated or affected in the mandamus proceeding, and no mutual or successive relation to such rights. The appellee has derived nothing through the clerk; but it is contended that it was represented in the mandamus suit by the clerk, and was therefore a party to that suit by representation. There are many cases where persons, although not parties to the record, are represented by such parties, and their rights fully protected; but the clerk was in no proper sense a representative of the taxpayers, whose rights were not derived through him, or dependent upon his acts, which are purely ministerial.

Persons who are not parties to the record may also be concluded by a suit in the name of other persons of the same class, such as taxpayers of the town who bring a suit against the town on behalf of themselves and other taxpayers, in which the merits of the controversy are decided. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 18 N. E. 161, 5 Am. St. Rep. 502. There are also cases where the rights of an individual are dependent upon the rights of a municipality, and can only be derived and held through such municipality, and in such cases the individual is concluded by a judgment against the municipality. *Elson v. Comstock*, 150 Ill. 303, 37 N. E. 207. Where a right is asserted against a municipality and a judgment is recovered, it is binding on taxpayers, although they are required, as individuals, to pay the judgment; but a decree enjoining the collection of a tax to pay a demand against a town in a suit by taxpayers against the town is not *res judicata* against the holder of the demand, who is not a party to the suit. *Town of Lyons v. Coolidge*, 89 Ill. 629. The interest of the holder of the demand is adverse to that of the town and the taxpayers, and he is not represented by either in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the

record. The court did not err in refusing to admit in evidence the record and files of the mandamus suit.

The cross-error assigned is that the court erred in refusing to credit against other taxes \$9.93 voluntarily paid as a library tax, against which the appellee might have successfully defended. There is no ground upon which the money so paid could be recovered back or set off against unpaid taxes, and the court did not err in so holding.

The judgment is affirmed.

Judgment affirmed.

(247 Ill. 378)

PEOPLE ex rel. GRAFF, County Collector, v. CHICAGO & A. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HIGHWAYS (§ 127*) — ROAD AND DITCH TAXES—CERTIFICATION OF RATE BY CLERK.

Hurd's Rev. St. 1909, c. 121, § 190, provides that when damages or benefits have been agreed on, allowed, or awarded for laying out, widening, altering, or vacating roads, or for ditching, or leveeing, or draining to protect roads, the amount of any installment, not to exceed in any year 12 cents on each \$100 of taxable property of the town or road district, shall be included in the next tax levy. Section 63 requires the commissioners to certify the rate per cent, finally agreed on for the levy fixed under section 2, and cause the certificate to be delivered to the clerk, and that the clerk of the district shall keep such certificate on file for the inspection of the inhabitants. Section 63 provides that the clerk of the district shall certify the levy to the county clerk, to be by him extended, etc. Held, that the statute did not require the road district clerk to set out in his certificate to the county clerk the evidence on file in his office showing that the antecedent steps had been taken, and that a levy to liquidate road and ditch damages was not objectionable because the certificate of the road district clerk did not show that any damages for road and ditch purposes had been agreed on or allowed.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 127.*]

2. TAXATION (§§ 537, 587*)—TAXES PAID BY MISTAKE—RECOVERY—SET-OFF.

Illegal taxes paid by mistake cannot be recovered, nor can they be set off against unpaid taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 906-908, 1200; Dec. Dig. §§ 537, 587.*]

Appeal from Morgan County Court; Thomas Henshaw, Judge.

Action by the People, on relation of Charles B. Graff, County Collector, against the Chicago & Alton Railroad Company. Judgment for defendant, and relator appeals, and defendant assigns cross-error. Reversed and remanded, with directions.

Robert Tilton, State's Atty., Bellatti, Barnes & Bellatti, and M. T. Layman, for appellant. Kirby & Wilson (Winston, Payne, Strawn & Shaw, of counsel), for appellee.

VICKERS, C. J. This is an appeal by the collector of taxes for Morgan county from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a judgment of the county court refusing judgment for certain taxes assessed against the Chicago & Alton Railroad Company. In obedience to a peremptory mandamus, the county clerk extended the taxes under the law as it existed prior to July 1, 1909. The mandamus was awarded upon the theory that the amendatory act of 1909 was unconstitutional.

The most important question in this case, and the one that is conclusive of all matters involved, except one in relation to an item of road tax in road district No. 10, is as to the effect of the judgment in the mandamus proceeding as an estoppel against the railroad company to question the legality of the acts of the clerk done in obedience to the mandamus. This precise question has already had the consideration of this court at the present term in the case of *People v. Chicago, Burlington & Quincy Railroad Co.*, 93 N. E. 422, and the conclusion there reached was that there is no privity between the county clerk and the taxpayers, so as to make a judgment against the former res judicata as to the latter. What is said in that case is conclusive of the same question here.

In road district No. 10 a levy of 10 cents on \$100 was made upon the property of said district to liquidate road and ditch damages. Objection was interposed by appellee to this item of taxes, because the certificate of the clerk of the road district did not show that any damages for road and ditch purposes had been agreed upon or allowed. The objection is, not that no damages had been agreed upon or allowed on account of roads or ditches, but that the certificate of the clerk of the road district did not state that any damages had been allowed. Section 64 (paragraph 160) of chapter 121 of Hurd's Revised Statutes of 1909 provides that when damages or benefits have been agreed upon, allowed, or awarded for laying out, widening, altering, or vacating roads, or for ditching or leveeing to drain or protect roads, the amount of such damages or benefits, or of any installment or installments thereof, not to exceed for any one year 12 cents on each \$100 of the taxable property of the town or road district, shall be included in the first succeeding tax levy provided for in section 62 (paragraph 188) of the act, and shall be in addition to the levy for road and bridge purposes. Section 62 of said act provides that the road commissioners shall at their September meeting determine what per cent. shall be levied on the property of the district for roads and bridges, which shall not exceed 30 cents on each \$100. Section 63 (paragraph 189) of said act provides that the commissioners shall at said meeting make a certificate of the rate per centum finally agreed upon by virtue of section 62, and cause such certificate to be delivered to the district clerk; to be by him kept on file for the inspection of the inhab-

itants of said district. Said section 63 requires the clerk of the district to certify said levy to the county clerk, to be by him extended, etc.

There is nothing in the statute requiring the clerk of the road district to set out in his certificate to the county clerk the evidence that may be on file in his office showing that the antecedent steps have been taken. The statute provides a means of informing the taxpayers of the rate per centum and the purposes for which taxes are being levied, by the certificate of the commissioners of the district. This certificate is kept on file in the taxing district for the convenient information of the taxpayers. The certificate that goes to the county clerk is for his information in extending the taxes, and is not intended to give the public information respecting the purposes, in detail, for which the taxes are being levied. The allowance by the commissioners of damages should precede the certification of rates by the clerk. In the absence of proof to the contrary, it will be presumed, in support of the tax, that the commissioners did their duty. The failure of the clerk to state in his certificate that such damages had been allowed or agreed upon is no evidence that none had been in fact allowed or agreed upon. The court erred in sustaining objections to the road district tax in district No. 10.

Appellee assigns a cross-error upon the refusal of the court to credit the balance due on park taxes with the excess paid by appellee through mistake on the library tax. There is no ground upon which the cross-error can be sustained. *People v. Chicago, Burlington & Quincy Railroad Co.*, supra.

For the error in refusing judgment for a part of the road and bridge tax in road district No. 10 the judgment of the county court is reversed, and the cause remanded, with directions to overrule the objection to the road and bridge tax and enter judgment therefor.

Reversed and remanded, with directions.

(248 Ill. 57)

VILLAGE OF PRAIRIE DU ROCHER v.
SCHOENING-KOENIGSMARK
MILLING CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. WORDS AND PHRASES—"CHANNEL."

The "channel" of a stream, in its larger sense, is its bed from bank to bank; the hollow or course in which the water flows.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1059, 1060.]

2. MUNICIPAL CORPORATIONS (§ 714*)—NATURAL WATER COURSES—CONTROL—ALTERATION OF CHANNEL.

Cities and Villages Act (Hurd's Rev. St. 1909, c. 24) § 1, subd. 80, which provides that the city council, or the president and board of trustees in villages, shall have power to deepen, widen, dock, cover, wall, alter, or change the channel of water courses, gives the right to

change the entire bed of the stream; for to construe the word channel as meaning the deepest part or thread of the stream would not give effect to the words "alter or change."

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1324; Dec. Dig. § 714.*]

3. CONSTITUTIONAL LAW (§ 55*) — DISTRIBUTION OF GOVERNMENTAL POWERS — PROCEDURE — EVIDENCE — MUNICIPAL ORDINANCES.

The Legislature may enact that the simple production of an ordinance, or a copy thereof, shall be prima facie evidence that every essential step has been taken to make it a valid ordinance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 59; Dec. Dig. § 55.*]

4. EVIDENCE (§ 330*) — DOCUMENTARY EVIDENCE — OFFICIAL RECORDS — MUNICIPAL ORDINANCES — ADMISSIBILITY IN EVIDENCE.

Cities and Villages Act (Hurd's Rev. St. 1909, c. 24) § 4, provides that all ordinances, etc., may be proven by the certificate of the clerk, and Hurd's Rev. St. 1909, c. 31, § 14, provides that ordinances, or parts thereof, of any city, etc., may be proved by a copy certified under the hand of the clerk or keeper thereof, etc. *Held* that, under these statutes, an ordinance is properly admitted in evidence without being signed by the president of the trustees; his signature being merely to show his approval, and no part of the ordinance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1234; Dec. Dig. § 330.*]

5. APPEAL AND ERROR (§ 232*) — PRESENTATION OF GROUNDS IN LOWER COURT — OBJECTIONS NOT PRESENTED WAIVED.

Objections not presented in the lower court are waived, and where objection was made at the close of the petitioner's case to strike an ordinance from the evidence, because it was not signed by the president of the board of trustees, other objections were waived.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

6. CORPORATIONS (§ 406*) — OFFICERS AND AGENTS — AUTHORITY — VICE PRESIDENT.

The vice president of a corporation acts for the president, and any contract pertaining to the corporate affairs within the general powers of that officer, executed by him, will be presumed to be under authority of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

7. EMINENT DOMAIN (§ 262*) — REVIEW — HARMLESS ERROR — INSTRUCTION.

In proceedings by a village to condemn land to change a water course, no direct evidence was given as to any benefit to the land not taken, because of the establishment of the new water course. The jury viewed the premises. An instruction was given on behalf of the petitioners that benefits should be offset against damages. Defendant claimed this was error, but failed to show that the amount of the verdict was not fully justified by the evidence. *Held* harmless error.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 262.*]

8. EMINENT DOMAIN (§ 223*) — PROCEEDINGS — VERDICT.

In a condemnation proceeding, the petition and cross-petition accurately described the property to be taken. The jury returned a verdict that they had gone upon the premises "described in the petition," and assessing damages for land of the defendant actually taken and for injury to land not taken. *Held*, that the description of the land could be made certain by ref-

erence to the description in the petition, so that the verdict was not defective for uncertainty.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 223.*]

Appeal from Randolph County Court; S. L. Taylor, Judge.

Condemnation proceedings by the Village of Prairie du Rocher against the Schoening-Koenigsmark Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wise, Keefe & Wheeler, for appellant, Sprigg & Gilster and H. Clay Horner, for appellee.

CARTER, J. This was a petition filed in the county court of Randolph county by the village of Prairie du Rocher, appellee, to condemn about 2.46 acres of land belonging to the Schoening-Koenigsmark Milling Company for the purpose of changing the course and channel of a certain creek which flows through said village. A cross-petition was filed, alleging damages to land not taken. On a hearing the jury assessed the damages of appellant for land actually taken at \$750, and damages to that not taken at \$800. A judgment was entered on the verdict, from which this appeal was prayed.

From the ordinance under which the appellee sought to condemn the land in question, and from the rest of the record in this case, it appears that said creek is comparatively small, and that it was proposed to change the channel within the village for some hundreds of feet, so as to connect with an old drainage ditch; that the new creek or ditch should be excavated to an average depth of not less than 7 feet, 12 feet wide at the bottom; that the right of way should be not less than 80 feet wide; and that all material excavated should be placed upon both sides of the ditch in a uniform manner, to serve as a levee.

Counsel for appellant contend that the appellee village had no authority to pass the ordinance in question. They argue that division 80 of section 1 of article 5 of the general cities and villages act, which provides that the city council or the president and board of trustees in villages shall have power "to deepen, widen, dock, cover, wall, alter or change channel of water courses" (Hurd's Rev. St. 1909, p. 344); authorizes the municipal authorities to change the location of the deepest part from one side to the other of the original bed of the water course for navigation or commercial purposes, but does not authorize them to make an entirely new bed to the stream. The channel of a stream, in its larger sense, is its bed from bank to bank; the hollow or course in which the water flows. 6 Cyc. 891, and cases cited; 25 Am. & Eng. Ency. of Law (2d Ed.) 843, and cases cited; *Buttenuth v. St. Louis*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; Webster's New Int. Dict.; 2 Words and Phrases, p. 1059. Although it is true that the word is sometimes restricted to mean the deepest part of the stream which navigation follows, the more natural and reasonable construction of this provision of the statute is that for the purpose of improving navigation, for the protection of a public road, or for any other public use, the public authorities can make an entirely new bed or course for the stream, and divert the water thereto from the old bed, in which case, however, proper compensation must be paid to the owners of riparian rights injured thereby. 1 Lewis on Eminent Domain (2d Ed.) § 62. If the construction of this provision of the cities and villages act contended for by the appellant be correct, then the words "alter or change" would be practically without meaning, as the word "widen" would give authority to make all the changes in the channel of a natural water course which appellant contends are authorized by the words "alter or change."

It is further contended by appellant that there was no proof that the ordinance authorizing this proceeding was properly passed by the village authorities. At the close of all the petitioner's evidence counsel for appellant moved to exclude the ordinance, on the ground that it was not properly passed, was not signed by the president of the village board, and was not good evidence. Section 4 of article 5 of the general cities and villages act provides that "all ordinances, and the date of publication thereof, may be proven by the certificate of the clerk, under the seal of the corporation." Hurd's Rev. St. 1909, p. 349. Section 14 of chapter 51, on "Evidence," provides that "ordinances, or parts thereof, of any city, village, town or county, may be proved by a copy thereof, certified under the hand of the clerk or the keeper thereof, and the corporate seal, if there be any; if not, under his hand and private seal." Hurd's Rev. St. 1909, p. 1119. The copy of the ordinance here introduced in evidence was certified under the hand and seal of the village clerk and the president of the village board. Without these provisions of the statute as to the mode of proving ordinances, it might have been incumbent on the party alleging the existence of this ordinance to prove each of the steps by which it was passed and given effect. It is competent for the Legislature to enact that the simple production of an ordinance, or a copy thereof, shall be prima facie evidence that every step has been taken with reference to it, essential to make it a valid ordinance. The signature of the mayor or president of a village board to an ordinance is no part of the ordinance itself. It is merely the evidence of his approval of the ordinance; but it is no more a part of the ordinance than are the minutes of the proceedings of the council in which is recorded the vote by

which the ordinance is passed. The ordinance need not bear, on its face, the evidence of all or any of these proceedings, except, of course, where it is signed by the mayor such signature will necessarily appear. *Terre Haute & Indianapolis Railroad Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20. Here the proof as to the passage of this ordinance brought it clearly within the statutory requirements above referred to.

The decisions of this court in *Schott v. People*, 89 Ill. 195, and *City of Alton v. Hartford Fire Ins. Co.*, 72 Ill. 323, relied upon by appellant as holding that when the ordinance was objected to the petitioner should have shown, or offered to show, that the town had authority to pass it, are not in point under the present statutes. Those decisions construed special charters granted to certain cities, and it is practically held in *Schott v. People*, supra, that under the general cities and villages act the production of an ordinance, or a certified copy thereof, would be prima facie evidence that every step had been taken essential to make the ordinance valid. See, also, *Byars v. City of Mt. Vernon*, 77 Ill. 467; *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443; *Chicago & Alton Railway Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56, 116 Am. St. Rep. 102.

It does not appear that any objection was made when the ordinance was offered in evidence. The only specific objection pointed out, when the motion was made to exclude it at the close of petitioner's case, was, as we have noted, that it was not signed by the president. It could become a law without being signed by the president. A specific objection to evidence, based solely on a particular point, is a waiver of objections to all other points not specified or relied on. *Terre Haute & Indianapolis Railroad Co. v. Voelker*, supra. No attempt is made in the argument to show that the ordinance was not properly passed, other than that it was not signed by the president. On this record we deem this objection without force.

Further objection is made that a certain contract, agreement, or permit for the appellant to maintain an intake pipe across the right of way and switch track of the St. Louis, Iron Mountain & Southern Railroad Company leading from said railroad company's main track to the mill of the milling company, for the purpose of furnishing water to said mill from said Prairie du Rocher creek, was improperly admitted in evidence. It is urged that the agreement was signed by the vice president of the railroad company, and that there is nothing in the record to show that said vice president had authority to sign such an agreement. The vice president acts for the president, and any contract pertaining to the corporate affairs within the general powers of such officer, executed by him on behalf of the corporation, will, in the absence of proof to the contrary, be presumed to have been done by the authority of

the corporation. *McCormick v. Unity Co.*, 239 Ill. 306, 87 N. E. 924. This agreement falls clearly within that rule.

The further objection is made by appellant that the fifth instruction given on behalf of petitioner was error. This instruction, in substance, told the jury that they should allow as a set-off for damages to the land not taken any special benefits that the evidence might show would accrue to that portion of the land not taken. It is contended that there is no evidence in the record tending to show that there were any benefits to the land not taken. Counsel for appellee apparently conceded in their brief that there was no direct and positive evidence from the witness stand on this question; but they contend, as the jury visited the premises, their view was rightly, under the authorities (*Stockton v. City of Chicago*, 136 Ill. 434, 26 N. E. 1095; *Peoria Gaslight Co. v. Peoria Terminal Railway Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Metropolitan Elevated Railway Co. v. Johnson*, 159 Ill. 434, 42 N. E. 871; *Sanitary District v. Loughran*, 160 Ill. 362, 43 N. E. 359), considered as evidence, along with all the other evidence in the case. Even if it be conceded that on the state of facts in this record this instruction should not have been given, we cannot see how it injured appellant. Counsel for appellant do not attempt to show that the amount of the verdict was not fully justified by the evidence. The jury were told in this instruction what to do if they believed, from the evidence, that there was any specific benefit, but were not told that their own view of the premises should be given greater weight than the evidence received and heard on the witness stand, or what weight should be given to any particular evidence bearing on this point. We do not think the jury were misled by the giving of this instruction.

Lastly, it is contended that the verdict cannot be sustained, because it does not specifically describe the property of appellant that was taken or damaged. The verdict reads: "We, the jury in the above-entitled cause, do hereby report to the court that we have gone upon the premises described in the petition. * * * We, the jury, assess the damages of the defendant, Schoening-Koenigsmark Milling Company, for land actually taken for the proposed ditch, at \$750. We further assess the damages of said milling company to property damaged, but not taken, at \$800." The verdict should be definite and certain and should follow the description in the petition (*Chicago, Ottawa & Peoria Railway Co. v. Rausch*, 245 Ill. 477, 92 N. E. 300); but it is not necessary that the description should be fully set out in the verdict. The description of the land taken or damaged may be clear and certain by reference in the verdict to the description of the land in the petition. *Suver v. Chicago, Santa Fe & California Railway Co.*, 123 Ill. 293, 14 N. E.

12; *Helm v. City of Grayville*, 224 Ill. 274, 79 N. E. 689; *Peoria, Bloomington & Champaign Traction Co. v. Vance*, 234 Ill. 36, 84 N. E. 607. It is not claimed that the petition and cross-petition do not properly describe the property. We think the reference in the verdict to the description of the property in the petition makes clear the actual property taken from the defendant.

We find no reversible error in the record. The judgment of the county court will be affirmed.

Judgment affirmed.

(247 Ill. 517.)

HANKINS v. HENDRICKS.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. EASEMENTS (§ 17*)—RIGHT OF WAY—CREATION.

Where the owner of a tract of land sells a lot thereof, representing that there is to be a certain alley from the street along the rear of it, a certain distance into the tract, with a court at the interior end sufficient for teams to turn around, and then lays out such alley and court, and the same are kept open and unobstructed to travel, and then sells other lots having such alley and court as boundaries, such lots have an easement of passage over the alley and court.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

2. EASEMENTS (§ 24*)—CONVEYANCE BY DEED OF LOT.

Where one purchases a lot, with an easement of passage over an alley and court, on which it abuts, his deed of the lot carries such easement to his grantees.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 64-69; Dec. Dig. § 24.*]

3. EASEMENTS (§ 22*)—PURCHASER OF SERVIENT ESTATE—NOTICE OF EASEMENT.

One taking a quitclaim of land which the grantor has laid out as an alley, selling abutting lots with reference to its visible advantage, having notice of the rights therein of the grantees of such lots, has no greater right than his grantor to prevent their use thereof for access to their lots.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. § 60; Dec. Dig. § 22.*]

Appeal from Circuit Court, Macon County; William C. Johns, Judge.

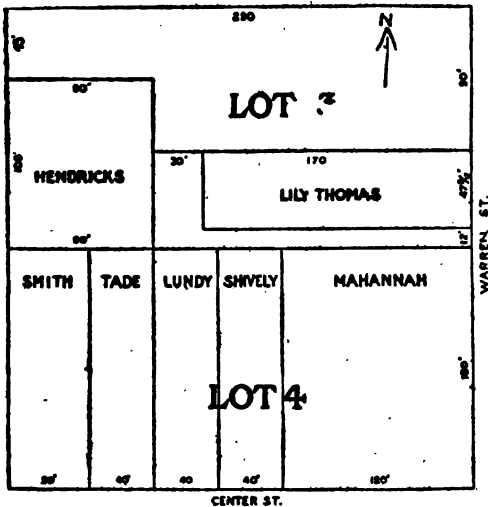
Suit by Charles S. Hankins against Arthur W. Hendricks. Bill dismissed, and complainant appeals. Affirmed.

C. E. Schroll, for appellant. Whitley & Fitzgerald, for appellee.

DUNN, J. The circuit court of Macon county dismissed the appellant's bill for an injunction restraining the appellee from removing the appellant's fence and passing over his land. The record has been brought before us for review, and presents the question of the existence of an easement of passage to and from appellee's lot over appellant's premises.

For more than 20 years prior to 1903 Harvey Mahannah owned lots 3 and 4 of block 2 in Lake & Co.'s addition to Decatur. Lot

3 was immediately north of lot 4, and each fronted east on Warren street 150 feet, with a depth of 290 feet. Center street, running east and west, was the south boundary of lot 4. Mahannah sold the west 50 feet of lot 4 to Alice E. Smith on August 14, 1903, the next 40 feet east to Elbert C. Tade on October 29, 1904, the next 40 feet east to William L. Lundy on April 7, 1905, and the next 40 feet east to Emery O. Shively on April 2, 1906. He sold 45 feet off the north side of lot 3 to Patrick Cullen, and on January 31, 1906, sold the west 90 feet of the south 105 feet of lot 3 to Elbert C. Tade. This tract Tade sold to the appellee in January, 1909. Immediately south of the Cullen tract, another tract, fronting 45 feet on Warren street and running back 200 feet, was sold; and the tract immediately south of that, fronting on Warren street 47 $\frac{1}{2}$ feet and 170 feet deep, was sold to Lily Thomas. This left a strip about 12 feet wide, fronting on Warren street, running back 200 feet, and a tract lying north of the west 30 feet thereof immediately west of Mrs. Thomas' lot, and it is concerning these tracts that the controversy arises. The following plat indicates the relative situation of the various parts of the lots (appellant owns all of lot 3 not otherwise marked):



It appears from the evidence that when Tade bought the first tract of Mahannah, which fronted on Center street, Mahannah told him that there was to be an alley for the use of the property owners, and showed him where it would be. There was also to be a court for turning, immediately north and at the rear of Tade's lot. The court was laid out by Mahannah, and was used, together with the alley, for all kinds of driving and hauling. From that time there has been no obstruction to travel, and the property owners have buildings at the south line of the alley. When Lundy bought, the same representations were made to him in regard to the alley, and he was told that it should

extend from Warren street to the west line of his lot. He insisted on having the provision for the alley in his deed, and it was accordingly inserted in these words: "The grantors hereby grant to said grantees the free use of an alley, which said grantors agree to open in 1905 from Warren street west along the north line of said lot 4 to the west line of said tract above conveyed, with a court at the west end large enough for turning teams." The alley and court have ever since been used by the owners of the adjoining property as a means of access from Warren street to the rear of their lots. The alley was fenced on the south, but not on the north, until after Mrs. Thomas' purchase, when she built the fence on the north in 1906 or 1907. When Tade made his second purchase, the tract 90 by 105 feet in the southwest corner of lot 3 was entirely shut off from access to any public street, except over that portion of lot 3 lying between it and Warren street, which was still owned by Mahannah. The alley was there, and, though not fenced, was a visible indication of its appropriation to the use of this portion of the premises, as well as to the use of the premises of the adjoining proprietors. The court was then north of Tade's first purchase, but by agreement was moved east; no one having any interest in keeping it where it was. No change was made in the alley, and later a fence was built around Mrs. Thomas' lot, and thus the court and alley were fenced out. This was the condition when the appellee purchased several years later, and when appellant later obtained a conveyance of the court and alley, on July 1, 1909. Thereupon the appellant built a fence on the west side of the court, and the appellee tore it down. This was repeated more than once, and the bill was filed to prevent the appellee from again tearing down the fence.

The principle has been often announced that where the owner of an estate has divided it into different parts, as lots and alleys or ways, and so arranged them that one part derives an advantage from another of a permanent, open, and visible character, and has afterwards sold a part of the property, the purchaser takes the part sold with all the benefits and burdens which appear at the time of the sale to belong to it. It is not necessary that the easement claimed by the grantee be absolutely necessary for the enjoyment of the estate granted, but it is sufficient that it is highly convenient and beneficial thereto. *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Newell v. Sass*, 142 Ill. 104, 81 N. E. 176; *Martin v. Murphy*, 221 Ill. 632, 77 N. E. 1126; *Powers v. Heffernan*, 233 Ill. 597, 84 N. E. 661, 16 L. R. A. (N. S.) 523, 122 Am. St. Rep. 199; *Ingals v. Plamondon*, 75 Ill. 118. The making and recording of a plat are not necessary to the creation of the easement. A subdivision and plat create no easement so long as the title remains in the orig-

inal owners; but whether recorded or not, a plat, in connection with other evidence, may tend to show the disposition and arrangement by the owner of different parts of the estate. "The foundation of the doctrine of easement in this and similar classes of cases is a disposition and arrangement of the premises as to the uses of the different parts by him having the unity of possession, and then a severance." *Clarke v. Gaffney*, 116 Ill. 362, 6 N. E. 689; *Morrison v. King*, 62 Ill. 30; *Martin v. Murphy*, *supra*.

When Mahannah sold to Tade the premises now owned by the appellee, the court and alley were used, not only for access to these premises, but to all adjacent premises. The fact was open and visible, and no other means of access existed. The purchase was made with reference to the continued existence of such access, and the conveyance of the premises carried with it the visible advantage of the easement of access. Tade's deed to the appellee conveyed this right with the premises, and the existence and use of the alley and court were plainly apparent to the appellant when he obtained the conveyance from Mahannah. That conveyance was a quitclaim deed, taken with full notice of the appellee's rights. Mahannah had no right to prevent the appellee from using the alley and court for access to his premises, and the appellant has no greater right.

The decree of the circuit court will be affirmed.

Decree affirmed.

(248 Ill. 87)

PEOPLE ex rel. HOLMES v. CHICAGO & A. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. TAXATION (§ 301*)—CERTIFYING RATE INSTEAD OF AMOUNT FOR LEVY.

While, under the provisions of the act in regard to roads and bridges in counties under township organization (*Hurd's Rev. St. 1909, c. 121, § 14*), the commissioners are required to make a certificate for levy of a certain amount of money to liquidate road and ditch damages not exceeding a certain rate, and the clerk is to ascertain the rate within the statutory limit, the fact that the commissioners make a certificate for a levy of a certain per cent. instead of a certain amount is not ground for objection to a judgment for the tax, so long as the result is not different from what it would have been if an amount had been stated.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 488; Dec. Dig. § 301.*]

2. TAXATION (§ 305*)—EXTENSION—REDUCTIONS—STATUTES.

Under Laws 1909, p. 323, amending Act May 9, 1901 (Laws 1901, p. 272) § 2, as to levy and extension of taxes, as amended by Act March 29, 1905 (Laws 1905, p. 365), requiring the county clerk to ascertain the rates per cent. required to be extended on the assessed valuation of the taxable property in the respective towns, townships, districts, incorporated cities, and villages in his county to produce the several amounts certified for extension by the taxing authorities in the county; provided that if the aggregate of all the taxes (exclusive of

certain enumerated taxes), certified to be extended against property in any taxing district, exceed 3 per cent. of the taxable property in such district, the county clerk shall reduce the rate of the tax levy of such district in the same proportion in which it would be necessary to reduce the highest aggregate per cent. of all the tax levies (exclusive of said enumerated taxes), certified for extension on any of the taxable property in said district, to bring the same down to 3 per cent. of the assessed value of the taxable property on which said taxes are required by law to be extended—the clerk is to take the district having the highest aggregate levies (exclusive of said enumerated taxes, which are not to be reduced), certified for extension on any taxable property in said district, and bring it down to 3 per cent. of the taxable property of the district on which said taxes are required to be extended; and the county rate thus established is to be applied in reduction of said aggregate levy in each of the other taxing districts.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 488; Dec. Dig. § 305.*]

Appeal from Logan County Court; Donald McCormick, Judge.

Application by the People, on the relation of Thomas F. Holmes for judgment against the Chicago & Alton Railroad Company for a tax. From an adverse judgment, defendant appeals. Affirmed in part; and in part reversed and remanded, with directions.

Blinn & Covey (Winston, Payne, Strawn & Shaw, of counsel), for appellant. W. H. Stead, Atty. Gen., and Everett Smith, State's Atty., for appellee.

CARTWRIGHT, J. The county court of Logan county overruled the objections of the appellant, the Chicago & Alton Railroad Company, to the application of appellee, county collector of said county, for judgment for a part of the road and bridge taxes of certain towns in said county and a part of the county tax, and entered judgment. From the judgment of the county court, this appeal was prosecuted.

The appellant objected to that part of the road and bridge taxes of several towns which was extended to liquidate road and ditch damages, and in one case an objection was made (which has been abandoned in argument) to that part of the road and bridge tax levied to meet an existing contingency. The objection still insisted upon is, that the respective town clerks certified a rate per cent. to be extended for road and ditch damages instead of certifying a specific amount of money required for that purpose.

The act in regard to roads and bridges (*Hurd's Rev. St. 1909, c. 121, § 14*) in counties under township organization provides that when damages have been agreed upon, allowed, or awarded for laying out, widening, altering, or vacating roads or for ditching to drain roads, the amount of such damages, not to exceed for any one year 20 cents on each \$100 of the taxable property of the town, shall be included in the first succeeding

tax levy, and when collected shall constitute and be held by the treasurer of the commissioners as a separate fund, to be paid out to the parties entitled to receive the same. The commissioners are required to make a certificate of the amount necessary to liquidate such road and ditch damages and cause the certificate to be delivered to the town clerk, who is to certify the same to the county clerk. The commissioners are required to make a certificate for an amount of money which must not exceed the rate per cent. specified in the statute. They are not authorized to certify to a rate per cent, but the clerk is to ascertain the rate within the statutory limit. A certificate for the levy of a certain per cent. might or might not work an injustice to taxpayers, depending upon the amount produced, and if the result is not different from what it would have been if an amount had been stated, the substantial justice of the tax is not affected. A similar statute was construed in the case of *Chicago & Alton Railroad Co. v. People ex rel.*, 155 Ill. 276, 40 N. E. 602, and again in *Chicago & Alton Railroad Co. v. People ex rel.*, 205 Ill. 625, 69 N. E. 72, where it was held that the statute required a certificate for a definite sum, but that the mere fact of specifying a rate was not ground for an objection to judgment for the tax. The same rule was applied in the case of the county tax in *People ex rel. v. Cincinnati, Indianapolis & Western Railway Co.*, 213 Ill. 503, 72 N. E. 1119, where it was said that the plain reading of the statute required the county board to fix the aggregate amount required, and the clerk was then to determine the rate per cent. not exceeding 75 cents on each \$100 of the taxable property, but that the objection that a rate was specified, standing alone, was not good. In this case the objection was merely that rates were specified in the several towns instead of specific amounts, and there was neither objection nor proof that the rates so fixed did not produce the same results as if amounts had been specified. There is therefore no ground for distinguishing this case from others, and the court did not err in overruling the objection to the road and bridge taxes.

The county clerk extended the full rate of 75 cents on each \$100 of taxable property as a county tax, and the objection was that the clerk did not scale the rate, as required by "An act to amend section 2 of an act entitled 'An act concerning the levy and extension of taxes,' approved May 9, 1901, in force July 1, 1901, as amended by an act approved March 29, 1905, in force July 1, 1905," in force July 1, 1909. Laws of 1909, p. 322. That act requires the county clerk to ascertain the rates per cent. required to be extended upon the assessed valuation of the taxable property in the respective towns, townships, districts, incorporated cities, and villages in his county, to produce the several

amounts certified for extension by the taxing authorities in the county, with a proviso that the aggregate of all the taxes, exclusive of certain taxes named therein, must not exceed 3 per cent. of the taxable property in the taxing district. Inasmuch as a tax levy extending over more than one town, township, district, incorporated city, or village must be at a uniform rate, so that the burden of such tax may be borne equally by all taxpayers, it is necessary that the county clerk shall ascertain which taxing district or municipality within the whole district subject to the tax has the highest aggregate per cent. of tax levies subject to reduction. In the case of a county tax, that would be the taxing district or municipality having the highest aggregate per cent. of tax levies in the county which are to be reduced. To accomplish the desired end of uniformity the act requires the county clerk to reduce the rate per cent. of the tax levies of a taxing district or municipality in the same proportion in which it would be necessary to reduce the highest aggregate per cent. of all the tax levies (exclusive of the taxes specified and not to be reduced) certified for extension upon any of the taxable property in the taxing district or municipality to bring the same down to 3 per cent. of the assessed value of the taxable property upon which said taxes are required by law to be extended. Any other method would result in different rates of the same tax in different districts subject to the levy. After finding the district having the highest aggregate levies subject to reduction, the clerk is required to reduce the same to 3 per cent. in accordance with the provisions of the statute, and he thereby fixes the county rate which applies throughout the county. He must follow the same method in fixing the rates of other taxing districts, so that the rate will apply uniformly throughout each district. This was fully explained in the case of *Town of Cicero v. Haas*, 244 Ill. 551, 91 N. E. 574.

Counsel for the appellee seek to sustain the judgment of the county court upon the theory that the clerk, in ascertaining the highest aggregate per cent. of all the tax levies, must select the district having the highest aggregate per cent. including the taxes which are not to be reduced and which by the act are to be excluded, and shall then exclude from the aggregate rate the various taxes which he is not authorized to reduce, and if what remains is less than 3 per cent. of the taxable property he is to make no reduction throughout the county, whether the aggregate levies of any other district exceed 3 per cent. or not. Putting that scheme into operation left taxing districts in which the taxes subject to reduction exceeded 3 per cent. This is a contradiction of the plain language of the act and subversive of its purpose. It would be sufficient to say that the act in terms forbids such a method, but

it is also true that the results obtained would defeat the purpose of the statute. The taxing district having the highest aggregate of rates exclusive of the rates mentioned in the act as not subject to reduction, is the taxing district to be used as the standard in determining how much, if any, the county rate shall be reduced. The county court adopted the view of the appellee, which was erroneous, and resulted in an erroneous judgment.

The judgment is affirmed as to the road and bridge taxes, and is reversed as to the county tax, and the cause is remanded to the county court, with directions to ascertain the amount of the county tax under the rules laid down in this opinion, and to sustain appellant's objection to any excess above the rate that would have been charged against the property of appellant if the statute had been complied with.

Reversed and remanded, with directions.

(247 Ill. 432)

POWELL v. POWELL et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. HOMESTEAD (§ 152*)—RIGHTS OF SURVIVING HUSBAND—CONTINUANCE OF OCCUPATION—VALUE.

The homestead law of 1851 (Laws 1851, p. 25), providing that the plot of ground and the buildings thereon occupied as a residence should be exempt, was changed by the act of 1872 (Laws 1871-72, p. 478), which made the homestead, to the extent of \$1,500, exempt from attachment or levy and from the laws of descent and devise, and continued the exemption for the benefit of the surviving husband, as well as the heirs of the wife. By an amendment in 1873 (Laws 1873, p. 99), the value of the homestead estate was reduced to \$1,000. The surviving husband brought a bill against the heirs of the deceased wife, who was the owner of the property at the time of her death for assignment of the homestead. The homestead property was valued at \$2,400, and was so situated that homestead could not be assigned. *Held*, that the plaintiff was entitled as against the heirs, to the exclusive occupancy of the homestead where no payment or tender of the value of the homestead right had been made by the heirs.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 293; Dec. Dig. § 152.*]

2. HOMESTEAD (§ 148*)—RIGHTS OF SURVIVING SPOUSE—ADULT CHILDREN.

Under the homestead law of 1872 (Laws 1871-72, p. 478), the adult heirs or devisees cannot interfere with the exclusive enjoyment of the homestead by the surviving husband or wife, where it has been assigned, or where it is less than \$1,000 in value.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 293; Dec. Dig. § 148.*]

3. HOMESTEAD (§ 143*)—STATUTES—RIGHTS BETWEEN SURVIVING HUSBAND AND HEIRS.

The language of the homestead law of 1872 (Laws 1871-72, p. 478), exempting the homestead from the laws of descent and devise, means that all rights of the heirs and devisees as such, to interfere with the homestead, must be postponed until that estate is extinguished

by the death of the life tenant, or in some of the ways provided by law.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 270; Dec. Dig. § 143.*]

4. HOMESTEAD (§ 152*)—STATUTES—ABANDONMENT—WAIVER OR RELEASE.

Sections 8, 10, and 11 of the exemption law (Hurd's Rev. St. 1909, c. 52) provide for the enforcement of liens in equity upon premises, including a homestead, and section 4, for the release of a homestead by order of court, and section 100 of the administration law (Hurd's Rev. St. 1909, c. 3), provides for sale of the homestead upon the written assent of the person entitled thereto. *Held*, that there is nothing in these statutory provisions that expressly authorizes the heirs or devisees of the deceased owner to compel the surviving husband to vacate, release, abandon, or sell the homestead, where it is not susceptible of assignment, and is of greater value than \$1,000.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 293; Dec. Dig. § 152.*]

5. HOMESTEAD (§ 150*)—ALLOTMENT AS BETWEEN HEIRS AND SURVIVING SPOUSE.

Where a homestead is of greater value than allowed by law, a court of equity, under its general chancery power, independently of the partition act (Hurd's Rev. St. 1909, c. 106), has jurisdiction to enter a decree adjusting the respective rights of the heirs or devisees and the surviving spouse.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 294-305; Dec. Dig. § 150.*]

6. HOMESTEAD (§ 152*)—RIGHTS OF CHILDREN OF HEIRS—TERMINATION OF OCCUPANCY—AMOUNT AND EXTENT OF VALUE.

Where a surviving husband has a right to the exclusive occupancy of a homestead estate of greater value than \$1,000, and which was not assignable, the children or heirs of the deceased owner are entitled to extinguish it on payment or tender of \$1,000.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 293; Dec. Dig. § 152.*]

7. HOMESTEAD (§ 150*)—ENFORCEMENT OF RIGHTS—TRIAL—DAMAGES.

Where a surviving husband entitled to the exclusive occupation of an unassignable homestead estate is excluded by the heirs from all parts of the house, except one room, and is mistreated, and put in fear, a decree awarding him the right to exclusive occupancy may award to him a fixed sum as rent for the time he was denied the use of the homestead, but should not award any damages for failure to assign his homestead estate.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 301; Dec. Dig. § 150.*]

Farmer and Hand, JJ., dissenting in part.

Appeal from Circuit Court, Peoria County;

N. E. Worthington, Judge.

Bill by Patrick Powell against James D. Powell and others. From a decree of the circuit court, defendants appeal. Affirmed.

Cameron & Cameron, for appellants. Stevens, Miller & Elliott, for appellee.

VICKERS, C. J. Ann Powell, wife of appellee, Patrick Powell, died intestate February 22, 1907, leaving her husband, and Elizabeth Kaiser, Mamie Fitzpatrick, and Margaret Powell, her daughters, and James, Frank, and William Powell, her sons, and Needa Powell, a granddaughter of her deceased son, Cornelius Powell, surviving her

as her only heirs at law. At the time of her death she was the owner of a house and lot in the city of Peoria, which was occupied by her and her husband as a homestead. Some years before her death the title to this property was in her husband, and he and his wife joined in a deed conveying these premises to their son Daniel J. J. Powell, commonly known as James Powell. Afterwards, some three years before her death, the latter conveyed the premises to Ann Powell, his mother. After the death of Ann Powell, Patrick Powell, her surviving husband, filed a bill in equity to set aside the deed to the son and the one from the son to his mother, on the ground that Patrick Powell was not mentally competent to make a deed at the time he conveyed the premises to his son. In his bill Patrick Powell prayed, in the alternative, for the assignment of his homestead in the premises in case it was found that Ann Powell was the owner of the fee at the time of her death. The circuit court of Peoria county entered a decree dismissing the bill upon the ground that the evidence showed that he was competent to make a deed at the time he conveyed the premises to his son. From that decree Patrick Powell prosecuted an appeal to this court, which was disposed of by an opinion filed at the June term, 1909, and is reported as *Powell v. Powell*, 240 Ill. 442, 88 N. E. 993. The decree of the circuit court established the title of Ann Powell at the time of her death, but failed to dispose of the homestead rights of Patrick Powell under the prayer of his bill for that purpose. This court approved of the finding of the circuit court in so far as it found that Patrick Powell was competent to make a deed at the time he conveyed the premises to his son James, but reversed and remanded the case for the purpose of disposing of the homestead question which was involved. After the cause was remanded to the circuit court, it was referred to a master to take evidence upon the charge contained in the bill that Patrick Powell had been deprived of the use of his homestead by the wrongful conduct of some of his children, and to make a finding as to the amount of rent that should be paid him for the premises during the time that they were occupied adversely to him after his wife died. The master found that Patrick Powell had been almost wholly deprived of the use and enjoyment of his home and homestead, and that the value of that portion of it occupied without his consent was \$12 per month, and, in a supplemental report, found that it would be equitable, under the circumstances, to require appellants to pay Patrick Powell one-half of the rental value of the premises so occupied—or \$6 per month. Objections and exceptions to the report of the master were filed on behalf of both parties, but they were all overruled, and a decree entered approving the findings of the master and appointing commissioners to set off a homestead to Pat-

rick Powell and his dower in the premises. The commissioners appointed by the court reported that the premises were so situated that homestead and dower could not be assigned, and valued the house and lot at \$2,400. Upon the coming in of this report the court made a further decree approving the commissioners' report and finding that none of the heirs of Ann Powell had taken any steps to have a homestead and dower of Patrick Powell assigned in the premises, and entered a decree confirming the right of Patrick Powell to occupy the homestead free from any interference of the heirs. The present appeal is by the heirs of Ann Powell for the purpose of obtaining a review of the decree below adjudging Patrick Powell to be entitled to the exclusive possession of the homestead. Cross-errors have been assigned by Patrick Powell on the refusal of the court to allow damages, in addition to the rent, because of the failure of the heirs to assign his homestead and dower.

Appellants make two principal contentions: (1) That appellee is not entitled to occupy the premises in question as a homestead to the exclusion of appellants, who are the heirs of the deceased owner; (2) that the evidence did not establish the charge in the bill that the appellants had forcibly and wrongfully deprived appellee of the possession and enjoyment of his homestead, and that therefore the decree of the court requiring them to pay him rent is erroneous.

Appellants' first contention presents the legal question whether a surviving husband or wife, under the homestead law, has the right, as against adult heirs, to the exclusive occupancy of the homestead where it is not susceptible of division and is worth more than \$1,000. The first homestead law passed in this state provided that the "lot of ground and the buildings thereon occupied as a residence," etc., should be exempt from "levy and forced sale under any process or order from any court of law or equity in this state." The extent in value of the homestead under this law was \$1,000, and the exemption was continued after the death of the householder for the benefit of the widow and family until the youngest child became 21 years of age and until the death of the widow. Laws of 1851, p. 25. This statute continued without any substantial change until the act of 1872 was passed. Under the first homestead law no exemption was continued in favor of the surviving husband, and the homestead, in whosoever vested, was only exempt from "levy and forced sale under process of court." The homestead law of 1872 (Laws 1871-72, p. 478) changed a mere exemption under the former statute to an estate, and provided that such "homestead and all right and title therein shall be exempt from attachment, judgment, levy on execution, sale for the payment of his debts or other purposes, and from the laws of conveyance, descent and devise, except," etc.

The statute of 1872 exempted a homestead to the extent and value of \$1,500, which was, however, reduced by an amendatory act in 1873 (Laws 1873, p. 99) to \$1,000 in value. Kales on Homestead Exemption Laws, § 125 et seq.

The omission in the law of 1851 to exclude the homestead from the laws of descent and devise virtually placed it within the power of the heirs, by partition, to destroy the homestead estate of the surviving spouse. It would seem, necessarily, to follow that property subject to a homestead would pass to the heirs or devisees free from the homestead of the widow, and such was the construction placed upon said act by this court. *Turner v. Bennett*, 70 Ill. 263. The act of 1872 made three important changes in the homestead law: (1) It changed a mere exemption into an estate; (2) it made the estate exempt from the laws of descent and devise; (3) it continued the exemption for the benefit of the surviving husband as well as the wife. After the passage of the law of 1872 this court gave effect to the provision in that law exempting the homestead from the effect of the laws of descent and devise, by holding that after the death of the householder the widow was entitled to a homestead against the claims of the heirs. *Merritt v. Merritt*, 97 Ill. 243; *Stunz v. Stunz*, 131 Ill. 210, 23 N. E. 407; *Best v. Jenks*, 123 Ill. 447, 15 N. E. 173; *Loveless v. Thomas*, 152 Ill. 479, 38 N. E. 907.

The case of *White v. Plummer*, 96 Ill. 394, which was decided under the law of 1872, illustrates the construction that this court many years ago placed on the statute exempting the homestead from the laws of devise. That was an action of ejectment by the heirs against the widow to recover the homestead. The will devised the homestead to the widow during her natural life. She renounced her rights under the will and elected to take under the statute. Afterwards her homestead was assigned or allotted to her by an order of court. The widow then conveyed the homestead to a third party, and the heirs, who were stepchildren of the widow, brought ejectment against her grantee. This court reversed the judgment in favor of the heirs.

Under the present homestead law, as the same has been construed by this court and as it is generally understood by the profession, no one would seriously claim that the adult heirs or devisees could by any means known to the law interfere with the exclusive enjoyment of the homestead by the surviving husband or wife where it has been assigned or where it was admittedly worth less than \$1,000. The language of the statute exempting the homestead from the laws of descent and devise means, in such case, that all right of the heirs or devisees, as such, to interfere with the homestead must be postponed until that estate is extinguished by the death of the life tenant or in some of the ways pro-

vided by law. But the situation presented by the case at bar is different. Here the residence and lot upon which it stands are worth \$2,400 and the property is so situated that it cannot be divided, and the surviving husband refuses to assent to its sale and insists on the right to occupy it to the exclusion of the heirs.

Section 8 of the exemption law (Hurd's Rev. St. 1909, c. 52) provides that in the enforcement of a lien in a court of equity upon premises including a homestead, if such right is not waived or released, the court may cause the homestead to be assigned and set off and decree the sale of the balance, or if the value exceeds the exemption and the premises cannot be divided the court may order the entire premises sold, including the homestead, and the payment of the amount of the exemption to the person entitled thereto. Sections 10 and 11 of said act provide a method by which the homestead which exceeds in value \$1,000 may be disposed of and the excess subjected to an execution against the householder. Section 4 provides for the release of the homestead by an order of a court of competent jurisdiction where the exemption is continued for the benefit of a child or children. Section 101 of our statute on administration of estates (Hurd's Rev. St. 1909, c. 3, § 100) provides that upon the application for the sale of real estate to pay debts of the decedent, if there is a homestead continued for the surviving husband or wife, upon the written assent of the person entitled to the homestead the same may be sold and the value of the estate paid to the party entitled thereto.

There is nothing in these statutory provisions that expressly authorizes the heirs or devisees of the deceased householder to compel the surviving husband or widow to vacate, release, abandon, or sell the homestead where it is not susceptible of assignment, and is of greater value than \$1,000. Still, in the construction of the homestead law, which expressly limits the extent of the homestead estate to \$1,000, in connection with other provisions of the statute, this court has held that the surviving husband or widow is not entitled to the exclusive possession of an unassignable homestead which is worth more than \$1,000 (*Wilson v. Illinois Trust & Savings Bank*, 166 Ill. 9, 46 N. E. 740), and that a court of equity, under its general chancery powers, independently of the partition act (Hurd's Rev. St. 1909, c. 106), had jurisdiction to enter a decree adjusting the respective rights of the heirs or devisees and the party entitled to the homestead (*Mix v. King*, 55 Ill. 434; *Hotchkiss v. Brooks*, 93 Ill. 386; *Wilson v. Illinois Trust & Savings Bank*, supra). In the *Wilson Case*, above cited, on page 14 of 166 Ill., page 741 of 46 N. E., this court said: "If a court of equity were powerless to prevent a person having a right of occupancy to the extent of \$1,000 in value in premises of the value of \$36,000 from occupying and using the entire property, while the owner of the balance of

the estate, amounting to \$35,000, must stand idly by and have no benefit or enjoyment of his property, the court would fail of its purpose." In *Cutler v. Cutler*, 188 Ill. 285, 58 N. E. 932, it was held that the husband, who had been deserted by and subsequently divorced from his wife, and whose right to a homestead had been adjudicated in the divorce proceeding, could be compelled by decree of court to accept \$1,000 in lieu of his homestead, and be required to surrender possession to those entitled to the excess, where the premises were worth more than \$1,000 and were so situated that the homestead could not be assigned.

Applying these authorities to the facts presented by this record, appellants would clearly be entitled to extinguish the homestead of Patrick Powell by paying or tendering to him the value of his homestead estate. But appellants have neither paid nor offered to pay appellee anything for his homestead, but, refusing to do so, are insisting upon the right to occupy a substantial portion of the dwelling house forcibly and against the will of appellee. In this situation the court below properly decreed that appellants had no right to take possession of the house, or any part of it, and exclude appellee therefrom by force and intimidation. If appellants desire to extinguish the homestead, the rule announced in the authorities above cited provides a lawful procedure for such purpose. Until such proceedings are had and until the payment or tender to appellee of the value of his homestead, he is entitled to the exclusive enjoyment thereof, regardless of its value. While there has neither been a payment nor a tender of any sum to appellee for his homestead, and the question is not directly in issue in this proceeding, still there is a sufficient discussion of the amount that ought to be paid to appellee to justify us in expressing our views upon that question, which we do in order to enable the parties to make a final adjustment of this controversy without further expense or litigation.

In *Merritt v. Merritt*, 97 Ill. 243, this court held, on a bill for partition of land among the owners of the fee, in which the widow had a homestead and the premises were not susceptible of division, and the widow filed a written consent to the sale of the homestead with the balance of the premises, that the value of the homestead was not \$1,000, but that its money value in such case must be ascertained according to the usual mode of determining the value of life estates in similar cases, or \$1,000 must be invested and the proceeds thereof paid to her during her life, leaving the principal for the heirs at her death. This rule, however, does not apply where the party entitled to the homestead is compelled to surrender the same by an order of court. In all of the cases provided for by the statute where the homestead may be sold under execution or to satisfy liens, the statute provides for the payment of \$1,000 to the

party entitled to the homestead. By analogy to these cases we think that the heirs should be required to pay or tender \$1,000 to appellee.

In the cases of *Wilson v. Illinois Trust & Savings Bank*, supra, and *Cutler v. Cutler*, supra, where the right of heirs to compel the release of the homestead is established, it was held that the heirs should pay \$1,000 to the party entitled to the homestead. The question of the amount to be paid does not appear to have been involved in either of the cases, but the court assumes that \$1,000 is the amount to be paid where the owner of the homestead is required to surrender the same to the heirs.

Appellants' second contention is that the court erred in decreeing that appellants pay \$6 a month rent for the time they occupied the homestead to the exclusion of appellee. The evidence abundantly justifies this order. It is proven that some of appellants went in and took possession of all of the house except one small room on the second floor, in which appellee was permitted to sleep. He was excluded from the balance of the house. Appellants mistreated appellee to such an extent that he was afraid to go into any part of the house except the small room in which he was allowed to sleep. The evidence shows that on more than one occasion appellants resorted to personal violence against appellee. When children so far forget their duty to their aged father as to knock him down and leave him bleeding upon the street, as the evidence shows was done in this case, such children need not be surprised if a court of equity does not look favorably upon their complaints against such abused and mistreated parent.

The cross-errors assigned by appellee involve his right to damages against appellants for a failure to assign his dower and homestead. We have already seen, from the situation of this property, that no assignment of such homestead or dower is practicable. Appellee is entitled to the possession of the whole of these premises. He could get no more by any proceeding to assign his homestead and dower. The rent allowed him is intended to compensate him for the loss of the use of such homestead during the time it was occupied by appellants adversely to him.

The decree of the circuit court of Peoria county will be affirmed.

Decree affirmed.

FARMER, J. (dissenting). It may be that the decree of the circuit court in this case should be affirmed because the owners of the fee sought possession of the homestead premises without offering to make any provision for the owner of the homestead estate, but I do not agree with the opinion of the court that in order to entitle the owners of the fee to possess and enjoy their property they must give the owner of the homestead estate \$1,000 as his absolute property.

The estate of homestead in premises where the fee is in the heirs entitles the owner of the estate to the occupancy and enjoyment of the premises to the extent and value of \$1,000 during his or her life. Upon the death or abandonment of the premises by the owner of the homestead estate the estate is extinguished. The owner of the homestead estate has no interest that can be conveyed before assignment, and a conveyance of the homestead premises after assignment vests no interest in the premises in the grantee beyond the life of the grantor. *White v. Plummer*, 96 Ill. 394. In *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566, it was said a widow's estate of homestead is a conditional life estate. In *Merritt v. Merritt*, 97 Ill. 243, the court said: "The estate of homestead is not \$1,000 worth of land, but \$1,000 is the value of the homestead premises to which the estate of homestead attaches. Such estate in the surviving wife is her right to occupy land of that value. The widow has no fee simple title to the homestead premises, but simply a right of occupancy. In its utmost extent it cannot exceed a life estate. To say that this interest in the homestead premises is of the value of \$1,000 of the whole value of the premises themselves is a contradiction in terms. It is to affirm that a part is equal to the whole—that a life estate is of equal value with the fee." In *Wilson v. Illinois Trust & Savings Bank*, 166 Ill. 9, 46 N. E. 740, the residence in which the homestead estate existed was worth \$36,000, and because homestead could not be assigned to the widow therein she claimed the right to the possession and occupancy of the entire premises. This contention was not sustained, and, following *Merritt v. Merritt*, supra, the court held that the widow's homestead estate was the right to occupy premises to the extent and value of \$1,000, and while there were no rights of creditors involved, the court said the owners of the fee had equal rights with creditors or any other class of claimants. The same rule was announced in *Cutler v. Cutler*, 188 Ill. 285, 287, 58 N. E. 932, 933, where it was said: "It was not the intention of the statute, nor will it bear the construction, that a person entitled to an estate of homestead in a lot which might be of the value of a million of dollars should prevent the sale of the lot by the owner or his use of the excess in value thereof above the estate of homestead, and the owner thus be deprived of all benefit and advantage of his estate in fee in excess of the estate of homestead, by reason of the fact that the person in whom the homestead estate existed refused to assent, in writing, to the sale." These cases seem conclusive that a homestead estate is the right to occupy premises to the extent and value of \$1,000 for life while the fee in the premises is vested in heirs or devisees; that in its utmost extent it cannot exceed a life estate; also, that the owner of the homestead estate is not, by

virtue thereof, entitled to the possession and occupancy of premises exceeding in value \$1,000 where the premises are so situated that the homestead cannot be set off.

The opinion concedes that a person having an estate of homestead in premises exceeding in value \$1,000 is not entitled to the possession, as against the owners of the fee, of the whole of the premises, but holds that where the owner of the fee in such cases seeks to secure to himself the enjoyment of his interest in the premises he must pay to the owner of the homestead estate \$1,000 as and for his or her absolute property. This is to make a life estate equal in value to the fee. All will agree that where premises are so situated that the homestead can be set off, its extent is limited to premises the fee in which does not exceed \$1,000 in value. The right to occupy for life the premises thus set off is, of course, not equal in value to an estate in fee in the premises. If, on the other hand, the owner of the homestead estate in premises worth more than \$1,000 and so situated that the homestead cannot be set off is entitled to \$1,000 absolutely, then the same estate created by law has one value in one case and another value in the other case. This does not seem to be logical. It is true the person entitled to the homestead estate cannot be compelled to accept its present worth in money, but neither can such owner, by reason of the homestead right, have the use and benefit of premises in excess of \$1,000. In *Cutler v. Cutler*, supra, the fee in the premises belonged to a divorced wife. The divorce was granted on the application of her husband, and in that proceeding it was decreed that the husband was entitled to an estate of homestead in the premises that had been occupied by the parties as a residence while living together, and which the husband continued to occupy after the separation. The premises were worth more than \$1,000. After the divorce was granted the divorced wife filed a bill against her former husband for the assignment of homestead to him. Commissioners were appointed to set off the homestead, but reported the premises were so situated that homestead could not be set off. The complainant brought into court and tendered to defendant \$1,000. The court decreed that said sum be paid to him, and that complainant have writ of possession for the premises. The case was brought to this court by the husband on writ of error. He was in no position to complain of not having received a sufficient sum of money for his homestead estate and did not make any such complaint. His contention was that, under his homestead right, he was entitled to the possession and use of the whole of the premises, and the owner of the fee was not entitled to any benefit or advantage of her estate in fee in the premises in excess of the homestead estate until the homestead estate was extinguished. Neither the *Wilson Case* nor the *Cutler Case* is authority in support

of the position that the owner of the homestead estate in premises so situated that the homestead cannot be set off must be given \$1,000 as his or her absolute property by the owner of the fee before such owner is entitled to any benefit or enjoyment of any portion of his property. As I understand the law, whether the owner of the homestead estate is assigned \$1,000 worth of the premises or allowed \$1,000 in money, his interest is the same; that is, the life use of the property or money.

HAND, J., I concur in the dissenting opinion of FARMER, J.

(247 Ill. 239.)

PEOPLE ex rel. ESPEY v. DENEEN et al.

PEOPLE ex rel. MCINERNEY v. SAME.

(Supreme Court of Illinois. Dec. 21, 1910.)

1. ELECTIONS (§ 122*)—NUMBER OF CANDIDATES—DETERMINATION—STATUTES.

Laws Sp. Sess. 1909-10, p. 80, § 11, authorizing the senatorial committee to determine the number of candidates for the General Assembly to be voted for at the general election, gives that committee absolute power to limit the number of candidates, and is not merely advisory.

Per Vickers, C. J., and Farmer, Cooke, and Hand, JJ. Contra: Cartwright, Carter, and Dunn, JJ.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122.*]

2. ELECTIONS (§ 122*)—NUMBER OF CANDIDATES—STATUTES.

Under such section, any number of candidates may be placed on the primary election ballot, and any voter may vote for three candidates, or may cumulate his votes on one or two, and the candidates highest in votes, but only to the number fixed by the senatorial committee, will be the party nominees to be voted for at the general election.

Per Vickers, C. J., and Farmer and Cooke, JJ.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 122.*]

3. ELECTIONS (§ 126*)—PRIMARY ELECTIONS—CONSTITUTIONAL PROVISIONS.

A primary election to nominate candidates for the General Assembly is an election, within Const. art. 4, §§ 7, 8, declaring that at all elections for representatives each voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same among the candidates as he shall see fit.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 126.*]

4. ELECTIONS (§ 16*)—PRIMARY ELECTIONS—NUMBER OF CANDIDATES—STATUTES—VALIDITY.

Laws Sp. Sess. 1909-10, p. 80, § 11, construed to give the senatorial committee power to determine absolutely the number of candidates for the General Assembly to be voted for at the general election, is an infringement of the right of minority representation, guaranteed by Const. art. 4, §§ 7, 8, and invalid.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 11; Dec. Dig. § 16.*]

5. ELECTIONS (§ 16*)—PRIMARY ELECTIONS—NUMBER OF CANDIDATES—DETERMINATION—STATUTES—VALIDITY.

A construction of Laws Sp. Sess. 1909-10, p. 80, § 11, which should hold that such section

gave the senatorial committee no power to absolutely limit the number of party candidates for election to the General Assembly, but that any resolution of the committee looking to that end is a mere declaration of party policy, not binding on the voter at the primary election, would render the section an infringement of the constitutional right of minority representation, since in that case there would probably be three candidates nominated in every district, who would all be defeated by the majority party.

Per Vickers, C. J., and Farmer, Cooke, and Hand, JJ. Contra: Cartwright, Carter, and Dunn, JJ.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 11; Dec. Dig. § 16.*]

6. STATUTES (§ 64*)—PARTIAL INVALIDITY—EFFECT.

Laws Sp. Sess. 1909-10, p. 80, § 11, being invalid, the entire act is invalid.

Per Vickers, C. J., and Farmer and Cooke, JJ.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

7. ELECTIONS (§ 16*)—PRIMARY ELECTIONS—NUMBER OF CANDIDATES—STATUTES—VALIDITY.

Laws Sp. Sess. 1909-10, p. 80, § 11, is not an infringement of the right of minority representation, that right being one guaranteed to political parties and not to the individual voter, who is given by the act the right to participate in the nomination of all candidates of his party for representative in the General Assembly who are to be nominated.

Per Hand, J.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 11; Dec. Dig. § 16.*]

Cartwright, Carter, and Dunn, JJ., dissenting.

Mandamus by the People, on the relation of Charles W. Espey, against Charles S. Deneen and others, and by the People, on the relation of Joseph A. McInerney, against Charles S. Deneen and others. Denied.

David K. Tone and Henry M. Ashton, for petitioners. W. H. Stead, Atty. Gen., and Charles E. Woodward (George H. Wilson, of counsel), for respondents. Ross C. Hall, for John J. McLaughlin.

FARMER, J. At our October term leave was granted, at the relation of Charles W. Espey, to file an original petition in this court for a writ of mandamus against the Governor, Secretary of State, and State Treasurer, composing the state primary canvassing board, directing said board to certify the name of relator as one of the Democratic nominees to the Secretary of State, to be placed upon the official ballot as a candidate at the election to be held November 8, 1910, for representative in the General Assembly for the First senatorial district. The petition alleges that the relator complied with the requirements of the primary election law for the nomination of candidates for the General Assembly, and that his name was duly and lawfully placed on the primary ballot as one of three Democratic candidates in the First senatorial district for nomination for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig., Key No. Series & Rep'r Indexes

representative in the General Assembly to be voted for at the primary election held on the 15th day of September, 1910; that John Griffin and Lawrence Byrne were the other two candidates on the same ticket with relator for nomination by the Democratic party for the office of representative in the General Assembly for the First senatorial district. The petition alleges that Griffin received 6,078 votes, Byrne 1,567, and relator 545; that, the relator being one of the three highest candidates in votes, it became the duty of the state primary canvassing board to certify his name as one of the Democratic candidates to be placed on the official ballot to be voted for at the election, November 8, 1910. The petition alleges that on the 5th day of October, 1910, at a meeting of the state primary canvassing board duly called and held in the city of Springfield, said board issued a proclamation declaring that John Griffin was the only Democratic nominee for representative in the General Assembly for the First senatorial district, and that it was the intention of said board, after the expiration of 10 days, to file their certificate in writing with the Secretary of State certifying said John Griffin as the only Democratic nominee for representative for the First senatorial district. The petition alleges that said board refused to certify the relator's name as one of the Democratic nominees, for the reason that on August 1, 1910, a resolution was adopted by the Democratic senatorial committee for the First senatorial district determining that only one candidate for representative in the General Assembly in that district should be nominated by the Democratic party at the primary election. A similar petition, except in one unimportant particular not necessary to be referred to, was also filed by leave of the court at the October term at the relation of Joseph A. McNerny. The Attorney General entered the appearance of the defendants, and demurred to each of said petitions. Printed briefs and arguments were filed, and as the canvassing board was required to file its certificate of the nominations made within 10 days after the completion of the canvass, the cause was set down for oral argument at the October term, and was argued orally by counsel on both sides. The cases were considered at once by the court, and the conclusion reached that the writs should be denied. The decision was announced orally by the Chief Justice during the October term, with the statement that the reasons for the denial of the writ would be stated in an opinion to be subsequently filed. As the decision of one case is conclusive of the other, but one opinion will be filed.

The cases involve the validity of an act entitled "An act to provide for the holding of primary elections by political parties for the nomination of members of the General Assembly and the election of senatorial committeemen." Laws Sp. Sess. 1909-10, p. 77. The act was approved March 9, 1910, and

went into effect July 1, 1910. It is a separate act for the nomination of candidates for the General Assembly by a primary election. Another act for the nomination of other officers by primary election was passed, approved, and went into effect at the same time.

Section 1 of the act under consideration provides that "the nomination of all candidates for members of the General Assembly by all political parties, and the election of senatorial committeemen, as defined in section 2 of this act, shall be made in the manner provided in this act and not otherwise." Said section further provides that the name of no person should be placed upon the official ballot to be voted for at the election in November, 1910, unless such person had been nominated under the provisions of the act. By section 4, September 15, 1910, was fixed as the date for holding the first primary election after the adoption of the act, and after that time the second Tuesday in April was fixed as the date for holding such primary elections. Section 5 provides that there shall be a senatorial committee for each senatorial district, and provides for the election of said committee at the primary election. Subsequent sections prescribe the requirements to be complied with by a candidate in order to get his name placed upon the official primary ballot to be voted at the primary election. Section 10 requires the Secretary of State to certify to the county clerk the names of the candidates for senatorial offices entitled to be printed on the primary ballot and the position such names shall occupy on such ballot. Said section also requires the Secretary of State to certify to the county clerk, the names of the candidates for senatorial committeemen, and their names shall also be printed on the official primary ballot. The provision of the said primary election law upon the construction of which the decision of these cases depends is section 11. Said section reads as follows: "Sec. 11. At least thirty-three (33) days prior to the date of the April primary the senatorial committee of each political party shall meet and by resolution fix and determine the number of candidates to be nominated by their party at the primary for representative in the General Assembly. A copy of said resolution, duly certified by the chairman and attested by the secretary of the committee, shall, within five days thereafter, be filed in the office of the Secretary of State, and in the office of the county clerk of each county in the senatorial district. In all primaries for the nomination of candidates for representatives in the General Assembly each qualified primary elector may cast three votes for one candidate, or may distribute the same or equal parts thereof among two candidates or three candidates, as he shall see fit. And the said candidate or candidates for nomination highest in votes shall be declared nominated for the office to be filled."

Counsel for relators contend that this court having heretofore decided, in passing upon the validity of primary election acts, that a primary election law requiring all nominations of candidates for representative in the General Assembly to be made at a primary election is governed by sections 7 and 8 of article 4 of the Constitution, each legal voter has the right to vote for three candidates at such primary election or to cumulate his vote upon one or two candidates, and that this right of the voter cannot be abridged or restricted by the Legislature. It is also contended that the provision of section 11 authorizing a senatorial committee of a political party to fix and determine the number of candidates for representative to be nominated by that party at a primary election was not intended to authorize the committee to limit the number of candidates the party should nominate, or to prohibit the nomination of three candidates if the electors of the district voted for the nomination of that number of candidates. It is argued that the authority of the senatorial committee to fix and determine the number of candidates to be nominated is a mere declaration of party policy, which the voters are at liberty to follow or disregard, as they see fit. If this construction is the proper one to be given to said provision of section 11, it would result in the nomination of three candidates by each political party in every district where three candidates were voted for, and the canvassing board would be required to certify the names of the three candidates of each political party receiving the highest number of votes, as nominees of said party for the office of representative. It is insisted that was the legislative intent, and that by giving section 11 that construction the law would be subject to no constitutional objections and would be a valid law, whereas if it were construed to mean that the Legislature intended conferring power upon a senatorial committee of a political party to fix the number of candidates that party should nominate, said section 11 would be unconstitutional and void. The position taken by the Attorney General is that section 11 will admit of no other construction than that the Legislature intended to confer power upon the senatorial committee to fix and determine the number of candidates to be nominated by a political party, but he contends that sections 7 and 8 of article 4 of the Constitution do not apply to nominations of candidates for representative in the General Assembly, and the delegation of power, therefore, to the senatorial committee to determine the number of candidates to be nominated is not invalid. The Attorney General further contends that if this construction is incorrect the result would be that the names of three nominees for each political party would have to be placed upon the official election ballot in each district where three candidates were voted for for

the nomination by the voters, and that this would nullify the constitutional provision for minority representation. It will thus be seen that each party insists that the construction contended for by the other would render section 11 unconstitutional and void.

In our opinion the provision of section 11 authorizing the senatorial committee to fix and determine the number of candidates to be nominated by a political party is not susceptible of the construction contended for by relators. It seems plain from the language used that it was unquestionably the intention of the Legislature to give the senatorial committee authority to fix the number of candidates that should be nominated. It was decided in *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109, and *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135, that the constitutional provisions with reference to cumulative voting at the election for representative in the General Assembly applied also to a primary election for the nomination of candidates for representative, and that the voter at a primary election could not be deprived of the right to vote for one, two, or three candidates or to cumulate his vote upon one or two candidates. The act under consideration in the *Rouse Case* authorized the voter to vote for only one candidate at the primary election for nomination for representative in the General Assembly, and if more than one candidate for that office was to be nominated by the political party the additional candidate or candidates were required to be nominated by a senatorial convention, and in making such additional nominations the senatorial convention acted without reference to the vote at the primary election. The court held that this denied the voter his constitutional right to vote for one, two, or three candidates or to cumulate his vote, and was therefore invalid. The provisions of section 11 of the primary election law considered by this court in the *Strassheim Case*, relating to the powers of the senatorial committee to fix and determine the number of candidates to be nominated, were identical with the provisions of section 11 of the act now under consideration, but the act before the court in the *Strassheim Case* did not restrict the right of the elector to vote for but one candidate for nomination, but authorized him to cast one vote for each of as many candidates as the senatorial committee had decided should be nominated. This, it was held, following the *Rouse Case*, violated the constitutional right of the elector to vote for three candidates or to cumulate his vote, and rendered the section invalid. That section and others of the act being unconstitutional, it was held rendered the whole act invalid, and it was not necessary to construe or pass upon the validity of the provision relating to the power of the senatorial committee.

The only difference between section 11 of

the act considered in the Strassheim Case and the present act is that the present act authorizes the elector to cast three votes for one candidate or to distribute the same, or equal parts thereof, among two or three candidates, if he sees fit so to do, "and the said candidate or candidates for nomination highest in votes shall be declared nominated for the office to be filled." The voter is not restricted in the number of candidates he may vote for or in his right to cumulate his vote, but the plain meaning of the section is that the number of candidates to be nominated is to be limited to the number fixed and determined by the senatorial committee. Any number of candidates may procure their names to be placed on the primary election ballot, and each elector may vote for three or cumulate his vote on one or two candidates, but, if the senatorial committee has determined that only one candidate shall be nominated, the candidate receiving the highest number of votes at the primary election is to be the nominee, and his name, only, is to go upon the official ballot to be voted for for said office at the election. If the committee of each political party determines to nominate more than one candidate, the candidates highest in votes, to the number fixed and determined by the committee, shall be the nominees of the political party. There is not the slightest warrant in the language used to justify the construction that the Legislature intended the resolution of the senatorial committee should mean nothing more than that the committee had decided it would be the best party policy to nominate the number of candidates fixed in the resolution, but that this was to be in no sense binding upon the electors and might be disregarded by them. Section 11 says, in explicit language, that the senatorial committee of each party shall meet at least 33 days prior to the date of the primary election, "and by resolution fix and determine the number of candidates to be nominated by either party at the primary for representative in the General Assembly." There is no more reason for holding that the Legislature did not mean what it said, but meant something else, than there would be for saying that the Legislature did not mean what it said when it said in section 1 that all candidates for members of the General Assembly should be nominated at a primary election but meant that they should be nominated at a delegate convention. It never was the intention of the Legislature to pass a law the effect of which would be to require in any district that each political party should nominate three candidates. This could only be avoided by giving the senatorial committee power to fix or limit the number of candidates to be nominated, and this the Legislature intended to do by section 11. If, then, sections 7 and 8 of article 4 of the Constitution apply to primary elections for the nomination of candidates for representative

in the General Assembly, section 11 must be held invalid.

We had supposed this question settled by previous decisions, but it is contended by counsel for respondents that it has not been so settled. The validity of the primary election law of 1905 was considered by this court in *People v. Election Com'rs*, 221 Ill. 9, 18, 77 N. E. 321, 323, and it was there said: "The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, and is of precisely the same nature. There is scarcely a possibility that any person will or can be elected to office under this system unless he shall be chosen at a primary election, and this statute, which provides the methods by which that shall be done, and prescribes and limits the rights of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law. * * * The legitimate purpose of such a law, however, must be to sustain and enforce the provisions of the Constitution and the rights of voters, and not to curtail or subvert them or injuriously restrict such rights." In *Rouse v. Thompson*, supra, it was held that a primary election is an election within the purview of the Constitution, and is controlled by the provisions of the Constitution; that the constitutional provisions apply to primary elections with the same force as they do to general elections. It was said the right to nominate candidates for representative is of precisely the same nature as the right to vote for them after they are nominated, and a primary election law for such nominations is governed by the Constitution and cannot deprive the voter of any right given him by the Constitution. In *People v. Strassheim*, supra, we considered the validity of a provision of the act of 1903 which authorized the elector to vote at a primary election one vote each for as many candidates as the senatorial committee had determined should be nominated, and, following the previous decisions, we held said provision was an attempted abridgment or restriction of the elector's constitutional right to vote for three candidates or cumulate his vote upon a less number, if he so desired.

We know of no valid distinction or reasonable basis upon which we would be justified in holding that a primary election law is an election law within the meaning of the Constitution, and that the rights of electors cannot be abridged or restricted by a primary election law for the nomination of candidates to any office except that of representative in the General Assembly, but as to that office the constitutional right guaranteed by sections 7 and 8 of article 4 does not apply. We are therefore forced to the conclusion that the provision of section 11 referred to is invalid, on the ground that it

is an attempt by the Legislature to confer upon a senatorial committee power to fix and determine the number of candidates for representative that shall be nominated by a political party in a senatorial district.

We are also of opinion that if section 11 were construed to mean that the senatorial committee is not given the power to fix and determine the number of candidates that shall be nominated, but that the resolution adopted by it is a mere declaration of party policy, and that, notwithstanding the decision of the committee in fixing and determining that a less number than three candidates should be nominated, the electors were at liberty to nominate a greater number of candidates than had been determined by the committee, and that in all districts where three candidates were voted for by the qualified electors of each political party the names of three candidates were required to be placed upon the official ballot to be voted for at the election, it would render the act unconstitutional and void, in that it would nullify the constitutional guaranty of minority representation in the General Assembly. This is conceded to be so by the Attorney General. This question was referred to in the Strassheim Case, where we said: "If each political party were required to nominate three candidates it would render nugatory the constitutional provision for minority representation, for if each party nominated three candidates it would frequently, if not generally, happen that the dominant party in a senatorial district would elect three candidates, and the minority party would be without representation." Counsel for relators say this language was mere obiter, as that question was not of controlling importance in the decision of the case. However that may be, it was the deliberate expression of the view the court entertained of the validity of any law under the operation of which each political party might be required to nominate three candidates for representative in the General Assembly, and, whether necessary to a decision of the case or not, it was considered important, as an expression of the court's view, for the benefit of the Legislature, if that body should afterwards deal with the subject of nomination of candidates for representative in the General Assembly by the adoption of another primary election law.

In the report of the committee on electoral and representative reform of the constitutional convention of 1870, signed by Joseph Medill, chairman, (1 Debates of the Const. Convention, p. 561), will be found an exhaustive discussion of the subject of minority representation in the General Assembly. It was stated in said report: "Since 1854 one of the political parties has secured, with few exceptions, all the senators and representatives at every election in the north

half of Illinois, and the other party, with equally few exceptions, has elected all the legislators from the south half of the state. Speaking in round numbers, 100,000 Republicans living south of the state capital have been practically disfranchised in the Legislature for 16 years, and almost as many Democrats have been excluded from all voice in making laws through agents of their own selection for an equally long period of time. For half a generation the state has been thus represented by sections instead of districts. If the alternate districts were Democratic or Republican there would be some amelioration of the evil. But such is not the case, and so long as the existing system of exclusive majority representation is continued there is little hope for improvement."

The proceedings of the convention show that petitions and memorials were presented to it at different times asking the adoption of a constitutional provision for minority representation. When the convention took up consideration of the report of the committee on electoral and representative reform Mr. Medill offered a substitute for the provisions embraced in the report relating to minority representation. The substitute was adopted and became sections 7 and 8 of article 4 of the Constitution. Mr. Medill addressed the convention at considerable length, as did also other members of the convention, advocating the adoption of the proposed provision and giving their reasons for supporting the plan of minority representation. 2 Debates of the Const. Convention, p. 1726. In his address Mr. Medill said, in part: "There are thousands of young men and advanced minds in this state who think more highly of this proposition than of anything else we will have to offer them. Everything else will seem to them dry and unimportant in comparison with this great idea of equal representation of the whole people against exclusive representation of a part. The disfranchised and down-trodden minorities will everywhere rally to its support and secure to the new Constitution, for its sake, a triumphant ratification. This great measure of reform will carry out pure democratic equality and equal rights for all men in the legislative halls; secure the equal representation of every citizen, the minority with the majority, man for man; allay partisan strife, reform legislative corruption, purify the elective system, inspire good and quiet citizens to attend the polls, enable virtuous citizens to elect pure and able representatives, and to defeat bad aspirants. It will give contentment to all classes of voters, secure representation for our long-enduring Republican friends in Democratic Egypt, and give the swallowed-up and buried-under Democrats of northern Illinois a chance, also, of being heard in our legislative halls by men of their own selection. This plan will work no harm

or prejudice to either of the great parties, but will put in the Legislature Democrats from northern Illinois, Republicans, in equal numbers, from southern Illinois, and secure to both parties representation from all parts of the state. Is not this right, just, politic, and advisable?"

Whatever may be thought of the wisdom of the plan of minority representation, its adoption was highly creditable to the convention, for in adopting it the members of the convention acted entirely independently of partisan feeling and bias, and were controlled only by the desire that the people of the state should, as far as possible, be represented in the Legislature, in some measure, by members of their own choice. But it is immaterial whether or not we agree with the convention as to the wisdom of minority representation. It became a part of the organic law of the state, and so long as it remains a part of that law the Legislature cannot by any act repeal or nullify the constitutional provision.

This state and many others have constitutional provisions authorizing cumulative voting by stockholders in the election of directors or managers of corporations, and these provisions were designed to enable minority stockholders to have representation in the boards of directors or managers of corporations. In California, where cumulative voting by stockholders of a corporation is authorized, it was attempted to defeat this right by providing by by-laws that but one director of a corporation should be elected at a time. The legality of this by-law came before the Supreme Court of that state in *Wright v. Central California Water Co.*, 67 Cal. 532, 8 Pac. 70. The court said: "We think the power thus conferred upon a corporate elector can only be exercised, according to the constitutional provision, by allowing him to cast his ballot singly, cumulatively, or distributively, at one time, for the election of directors, for if but one director at a time be balloted for, a majority of the stockholders could, by combining, cumulate their votes each time upon a single candidate and elect him, and by thus shaping and controlling the manner of election it would be in the power of the majority of the stockholders to virtually cancel the votes of the minority and deprive them of their rights to representation on the board of directors."

This is unquestionably sound, for there can be no cumulative voting where there is but one officer to elect. The guaranty of minority representation by the Constitution is a prohibition against the Legislature passing a law that expressly denies that constitutional right, or any law which, though not expressly denying the constitutional right, authorizes its defeat. What it is not competent for the Legislature to do directly it cannot do indirectly, and any attempt to au-

thorize or afford a plan for the defeat of a constitutional provision by legislative enactment is as void as an act which attempts in express terms to nullify the Constitution. It is no answer to this position to say that requiring the nomination of three candidates by each political party where three are voted for at the primary election does not necessarily defeat minority representation, because, notwithstanding the nomination of three candidates by the minority party, the voters could elect one member of the House of Representatives by cumulating their votes upon one of the nominees. Unless we know less as judges than we do as men (and this court has decided that we do not), we know that effective cumulative voting under such circumstances is practically an impossibility. The Constitution guarantees the right of minority representation, and the Legislature has no power to pass any law the direct purpose or practical operation of which defeats, abridges, or restricts that right.

Counsel for relators argue that the public good would be best conserved by sustaining the validity of section 11 and construing it to require the nomination of three candidates by each political party in all districts where that number of candidates are voted for by the voters of said parties. If the law be so construed and sustained, it is said it will have the beneficent effect of taking the control of primary elections and the nomination of candidates out of the hands of party bosses and managers. Counsel say in their brief: "The independent voter does not usually take the trouble to attend party primaries, but usually indicates his choice of nominees at the election. A comparison of the total vote cast in primary elections with the total vote cast at important general elections in the city of Chicago during the recent elections shows that less than 20 per cent. of the persons who vote at the general elections cast their vote at the primary." From this it is argued that the party managers and bosses control the primary elections and select the senatorial committeemen. If this is true, it is not the fault of the law, but the fault of the voters themselves. The law authorizes every qualified elector to cast his vote for the nomination of candidates of his choice at the primary election, and the vote of the humblest and most obscure citizen counts as much as that of the party boss or manager. If voters, as counsel say, will not "take the trouble" to attend primary elections and vote for the nomination of candidates after the Legislature has afforded them the opportunity to do so, they are in no position to say that they are not satisfied with the nominations made according to law, and ought to have a larger number of candidates to select from on the day of the election than have been legally nominated by the voters who "took the trouble" to go to the polls on primary election day. And what

assurance is there that if such opportunity is afforded them on election day they would "take the trouble" to avail themselves of it any more than they would to avail themselves of the right to assist in making the nominations on primary election day? Moreover, the independent voter is not prohibited from securing the nomination, by petition, of a candidate that will meet his approval. At all events, the beneficent results that it is thought would follow from the construction of the law contended for by the relators would not justify a court in sustaining the validity of such a law, if, as we think clearly, is the case with the law under consideration, it is in violation of the Constitution.

Section 11 being unconstitutional, it invalidates the entire act, and the demurrers are sustained and the writ in each case is denied.

Writs denied.

VICKERS, C. J., and COOKE, J., concur.

HAND, J. (specially concurring). This case involves the construction and constitutionality of section 11 of "An act to provide for the holding of primary elections by political parties for the nomination of members of the General Assembly and the election of senatorial committeemen," approved March 9, 1910 (Laws Sp. Sess. 1909-10, p. 77) which section reads as follows:

"Sec. 11. At least thirty-three (33) days prior to the date of the April primary the senatorial committee of each political party shall meet and by resolution, fix and determine the number of candidates to be nominated by their party at the primary for representative in the General Assembly. A copy of said resolution, duly certified by the chairman and attested by the secretary of the committee, shall, within five days thereafter, be filed in the office of the Secretary of State, and in the office of the county clerk of each county in the senatorial district.

"In all primaries for the nomination of candidates for representatives in the General Assembly each qualified primary elector may cast three votes for one candidate, or may distribute the same or equal parts thereof among two candidates or three candidates, as he shall see fit. And the said candidate or candidates for nomination highest in votes shall be declared nominated for the office to be filled."

The opinion written by Mr. Justice FARMER, and concurred in by Mr. Chief Justice VICKERS and Mr. Justice COOKE, construes the first paragraph of this section of the statute to confer, in terms, absolute power upon the several senatorial committees of the several political parties of the 51 senatorial districts of the state to fix and determine, by resolution, the number of candidates to be nominated by their parties at the primary

for representatives in the General Assembly; while the view of the opinion of Justices CARTWRIGHT, CARTER, and DUNN is that the power conferred upon the senatorial committees by that paragraph is intended to be only suggestive, and that while the several senatorial committees of the several political parties of the state may, under said paragraph, fix and declare, by resolution, the number of candidates to be nominated for representatives in the General Assembly by their respective parties at the primary elections, such action of such committees is not binding upon the voters of such parties, and that such action does not prevent the members of the party, when voting, from voting for and nominating as many candidates, not to exceed three in number, for representatives in the General Assembly as any one voter may determine to vote for at the primary election. The difference thus far is only in the matter of the construction of said statute. I am of the opinion that said section 11 was passed with a view to confer the power upon the several senatorial committees of the several political parties in the state to absolutely fix and determine the number of candidates to be nominated by such political parties at the primary to be held for the nomination of representatives in the General Assembly. The language used is clear and unequivocal in its terms. It is so plain that it is not open to construction, and means one thing and only one thing—that is, that power is conferred upon the senatorial committees of the different political parties of the state to fix and determine the number of candidates which may be nominated. So far as the first paragraph of section 11 is concerned, the only question, therefore, which is open to debate is as to its constitutionality—that is, as to the power of the Legislature, under the Constitution, to confer upon the several senatorial committees the power to fix for their respective parties the number of candidates for representatives in the General Assembly which should be nominated at the primary election.

Justices FARMER, VICKERS, and COOKE having reached the conclusion, in their opinion, that the senatorial committees cannot be given power to fix the number of candidates which shall be nominated by their respective parties at the primary election for representatives in the General Assembly, then hold that that question is open when the voter goes to the primary election, and that the voter can then determine how he will vote—whether for one, two, or three candidates, and may cumulate his vote—the result of which would be that in every senatorial district in the state three candidates would in all probability be nominated by each party for representative in the General Assembly, the effect of which would be to destroy the scheme of minority representation found in

the Constitution, and that said section 11 is unconstitutional and void. The logical result of this course of reasoning is that no statute can be passed authorizing the nomination of candidates for representatives in the General Assembly which would be constitutional, and that candidates for representatives in the General Assembly cannot be nominated at a primary election.

The opinion of Justices CARTWRIGHT, CARTER, and DUNN holds that the voter is not bound by the resolution of the senatorial committee as to the number of candidates for representative in the General Assembly which shall be nominated by his party at the primary election, and that it was not intended by the General Assembly that he should be bound, and that a statute which seeks to foreclose him upon that question would be unconstitutional and void, and that the present statute, although its language is clear and unequivocal, should be construed so as to authorize only a suggestion by the senatorial committee to the members of their party as to the number of candidates for representative in the General Assembly for which they should vote, which suggestion the voters need not follow, but may vote for as many candidates as they see fit, not exceeding three, and if there are votes cast for three candidates at the primary election for representative in the General Assembly, as was the case here, the names of those three candidates must go upon the ballot at the general election for representatives of the General Assembly, and that although the result might be that each party would, by the action of one voter or a small number of voters in each of the political parties in each senatorial district, be forced to nominate three candidates for representative in the General Assembly, and would have three party candidates for representative in the General Assembly upon the general ticket at the fall election, such construction does not destroy minority representation, because the voter still would have the right to cumulate his vote at the general election, and, by concerted action with the other voters of his party, the majority party could elect two members of the General Assembly and the minority party could elect one member of the General Assembly from each senatorial district in the state.

This probably may be true in theory, but practically I am of the opinion if each party should, in the several senatorial districts of the state, be required to nominate three candidates for representative in the General Assembly, minority representation would be destroyed, and that any law which would require the placing of three candidates upon the ballot at the general election would for that reason be unconstitutional and void. I fully agree with the opinion of Justices FARMER, VICKERS, and COOKE upon that

question, and I do not accede to the argument contained in the opinion of Justices CARTWRIGHT, CARTER, and DUNN that such a statute is rendered constitutional by reason of the fact that the voter and his party associates may possibly agree to cumulate their votes upon some party candidate at the polls. I think the argument that the statute is thus saved from being unconstitutional is fully met by what is said by this court in *People v. Election Com'rs*, 221 Ill. 9, 22, 77 N. E. 821, 824, where it was announced that the right of the voter to write in the name of a candidate upon the primary ballot did not relieve the act then under consideration of its unconstitutional features, as the right to write in the name of a candidate furnished to the voter no practical relief. In that case a candidate could not get his name upon the primary ballot without paying money for the privilege, and it was held that that feature of the act was void, although the voter had the right to write in the name of a candidate who had paid nothing to get his name upon the ticket. It was said: "That argument does not call for much attention. It is a foregone conclusion that the candidate will be chosen from those whose names are on the primary ballot, and it is no answer to the argument, against an illegal and arbitrary discrimination in favor of one who is able and willing to make a cash contribution and against one who is unable or unwilling to do so, to say that the voters may write the name of a candidate on the ticket and make a square in front of it and put a cross in the square." It is well known to all that the voters of all parties usually vote their party ticket as it is printed, and the right of an agreeing body of voters to cumulate votes would not relieve the statute of its unconstitutional feature if every political party is required to nominate three candidates for representative in the General Assembly, whose names would appear under the party appellation upon the general ballot.

I now come to the question, Is said section 11 constitutional as it was enacted by the Legislature and now exists? The provision of the Constitution which is involved reads as follows: "The House of Representatives shall consist of three times the number of the members of the Senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit, and the candidates highest in votes shall be declared elected." Const. art. 4, §§ 7, 8; *Hurd's Rev. St.* 1909, p. 56. If this provision of the Con-

stitution be analyzed it will be found, first, that the right of the voter to cast three votes for representatives in the General Assembly, and the right to cumulate his votes by distributing them among the three candidates as he sees fit, is secured to the voter; and secondly, that the right of minority representation involved in that method of voting is established.

I think many difficulties have arisen in construing this provision of the Constitution by confusing the right of cumulative voting and the right of minority representation. The right to cumulate his vote on the question of the election of representatives in the General Assembly is a right secured to the individual voter, while the right of minority representation is a right secured to political parties, and if those two rights are severed I think the questions involved in this case will be greatly simplified.

It has been determined by this court that the nomination of candidates for representatives in the General Assembly falls within the purview of legislation governing the holding of primary elections, and it is a well-settled rule of statutory and constitutional construction that where two provisions of a statute or a Constitution are inconsistent or in apparent conflict, it is the duty of the court, in construing such statute or constitutional provisions, to harmonize such provisions, and the courts will go a long way to do so, and thereby ascertain the view of the law-making power and sustain the law, rather than to annul the provisions of a statute or of a Constitution by holding them inoperative. I think, therefore, that this court should so construe said provision of the Constitution as to hold a primary election can be held for the nomination of candidates for representatives in the General Assembly, and to determine that it may be held in such a way that no voter in the primary election or at the polls may be deprived of any of his constitutional rights, and so to construe said constitutional provision that minority representation will not be destroyed. Minority representation is based upon the idea that political parties will exist in this state. Since the Constitution of 1870, and prior to the passage of primary election legislation in this state in recent years, the several political parties in the state have solved the question of minority representation without difficulty. The majority party in each senatorial district has usually nominated two candidates and the minority party one candidate for representatives in the General Assembly, and the Australian ballot law recognizes the rights of parties so to do. I take it that the determination of the question, in any particular senatorial district, of the number of candidates a party will place in the field for representatives in the General Assembly is a mere matter of party policy, and that a political party, being a voluntary association,

has a right to decide that question for itself; and such is the doctrine of this court announced in *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109. It was clearly announced in that case that the political parties of this state have the right, through their senatorial committees, to determine how many candidates they will put in the field for representatives in the General Assembly in the several senatorial districts for which such committees act, and that so long as each voter has the right to vote for the number of candidates determined by the senatorial committee of his party to be nominated, and to cast his vote for one, two, or three of such designated number of candidates, or to cumulate his vote upon one or more of such candidates, he has been deprived of no constitutional right. If the party decides to nominate one candidate for representative in the General Assembly, and each member of such party has the right to give one candidate three votes, or if his party decides to nominate two or three candidates, and he has the right to divide his three votes between such candidates, as I understand the *Rouse Case*, he has not been deprived of any of his constitutional rights; and the doctrine on this subject laid down in that case has never been departed from. In that case the statute under consideration provided for the nomination of one candidate for representative in the General Assembly by a primary election, and the others (if more) were to be nominated by a convention, and it was held this could not be done. In the consideration of that question, on page 545 of 228 Ill., on page 1116 of 81 N. E., it was said: "It is said, however, that to hold that the voter has the right to vote at the primary election for more than one candidate for representative in the General Assembly is to hold that each party must nominate at least two candidates for representative in the General Assembly, if not three, which would in all the senatorial districts of the state defeat minority representation, which is established by the Constitution." And it was also said, on page 544 of 228 Ill., on page 1116 of 81 N. E.: "Any primary election law, to be valid, which provides for the nomination of candidates for representative in the General Assembly, must give the voter the right to participate in the selection of all the candidates of his party for representative in the General Assembly which are to be nominated by his party." And again, on page 546 of 228 Ill., on page 1117 of 81 N. E.: "No law, as we view the matter, can be constitutional which prevents the individual voter from participating in the nomination of all the candidates of his party for representative in the General Assembly which are to be nominated at a primary election, if any candidate for representative in the General Assembly is to be so nominated"—clearly holding that if the voter is given the right, by statute, to par-

ticipate in the nomination of all candidates of his party for representative in the General Assembly which are to be nominated by his party, such statute would be constitutional.

In *People v. Strassheim*, 240 Ill. 279, 298, 88 N. E. 821, 827 (22 L. R. A. [N. S.] 1135), the statute there under consideration did not give the voter the right to cumulate his vote, and the statute was held unconstitutional for that reason. The doctrine of the *Rouse Case* was not, however, departed from. No new rule was announced, but it was said in that case the statute then under consideration was not in accord with the method pointed out in the *Rouse Case* for the making of nominations at a primary election of representatives in the General Assembly. This language was used: "The *Rouse Case* contains no intimation that the voter may be deprived of his constitutional right to vote for more than one candidate at the primary election or to cumulate his vote. If, as contended by counsel for respondent, the Legislature attempted to make section 11 conform to the suggestions in that case, it failed to do so."

Section 11 of the act hereinbefore referred to is, in my judgment, a valid and constitutional law, and provides a method for making nominations of candidates for representatives in the General Assembly at a primary election which secures to the voter all his constitutional rights, and preserves the principle of minority representation, and as the relator was not nominated as a candidate for representative in the General Assembly he was not entitled to the relief prayed for in his petition for mandamus. While I do not agree to all of the reasoning of the opinion of Justices FARMER, VICKERS, and COOKE, I agree to the conclusion reached in that opinion—that is, that the writ ought not to issue.

CARTWRIGHT, CARTER, and DUNN, JJ. At the last term of the court a judgment denying a writ of mandamus was entered in this case, with a statement that the judgment was concurred in by four members of the court, and that the reasons for their conclusion would be given hereafter. The views of Mr. Justice FARMER are expressed in his opinion, and are concurred in by the CHIEF JUSTICE and Mr. Justice COOKE. Those views are that section 11 of the primary act of 1910 is in conflict with the Constitution and void because it gives power to a senatorial committee of a political party to restrict, by resolution, the number of candidates for whom the voters of the party may cast their votes at the election at which representatives in the General Assembly are elected, to a less number than three, thereby depriving such voters of their constitutional right to cast three votes for one candidate or to distribute the same among two or three candidates, as they may see fit; and that any law which would require the names of three candidates of such party to be placed on the ballot at such election, if three are voted for at the primary, would be equally unconstitutional and void, as destructive of the plan of minority representation. The section in question preserves the right of cumulative voting in the primary election and in that respect is not in violation of the Consti-

tution, and the ground of the opinion that it is void is that the names of no more candidates can be placed on the ballot at the subsequent election than the senatorial committee may determine. Mr. Justice HAND, in the opinion written by him, takes the same views as to the proper construction of the section concerning the power of the senatorial committee, and of the invalidity of any act which would require the names of three candidates to be placed upon the ballot at the general election, if that number are voted for at the primary, but holds that power may be given to the senatorial committee to limit the number of candidates for whom voters of a party may vote at the general election, and that the section is valid.

If we regarded the construction given to the section by the other members of the court as the correct one, we would have no hesitation in saying that it is unconstitutional and void. The provision of the Constitution for cumulative voting applied, when adopted, only to general elections, as primary elections were then unknown; but under the rule laid down in *People v. Election Com'rs*, 221 Ill. 9, 77 N. E. 321, that constitutional right extends to primaries when such elections are created by the General Assembly. The right of cumulative voting extends to primary elections where candidates for representatives are chosen. Accordingly, we decided in *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1100, that a primary election law which permitted the voters of a party to vote for only one candidate for representative was void, as violating the constitutional provision for cumulative voting. Again, in *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135, another act was held void because it attempted to give authority to senatorial committees to fix the number of candidates for representative for whom the voter of a party might vote at a primary election. The only reason for upholding the constitutional right of the voter in a primary election was that he had the same right as in the general election. We could not give any satisfactory reason for now reversing our construction of the Constitution and holding that while the voter cannot be deprived of his right at the primary, he may be deprived of it by a senatorial committee at the general election.

But we do not agree with the other members of the court in the construction of section 11, nor in the conclusion that a construction which will make it valid will be destructive of the constitutional provision designed to secure representation of minorities. When this act was passed, three previous primary acts had been declared void by this court in the cases above referred to, and in two of them a material reason was that the act restricted the right of cumulative voting. It is always presumed that the General Assembly is acquainted with the existing state of the law, and is informed of previous legislation and the construction it has received (*Lewis' Sutherland on Stat. Const.* § 490), and in view of the history of primary legislation in this state, the presumption becomes an absolute certainty as applied to this case. There cannot be any doubt, as it seems to us, that the General Assembly intended to obviate in the new act the objections to the previous acts and to eliminate all unconstitutional provisions. That ought to be the presumption as well on the ground of good faith as because there is always a presumption that legislative bodies do not intend to violate constitutional provisions. The act annulled by the decision in *Rouse v. Thompson*, supra, permitted the voter to cast his vote at the primary election for but one representative, and any additional candidate or candidates were to be nominated by a senatorial convention. That scheme was held void, but it was said that we saw no reason why a law might not be framed permitting senatorial committees to suggest the number of candidates to be nominated by their parties and to have the sugges-

tion placed on the ballot for the guidance of the voters. The next act, held void in *People v. Strassheim*, supra, provided in section 11 that the senatorial committee of each political party should, by resolution, fix and determine the number of candidates to be nominated by their party at the primary for representative, but the further provision of the same section was that "each qualified primary elector may cast one vote for each of as many candidates as there are to be nominated by his party as above provided. And the said candidates for nomination highest in votes shall be declared nominated." While this section apparently was intended to comply with the suggestion of the court in *Rouse v. Thompson*, its provisions amounted to more than mere suggestion, and permitted the voters to cast their votes for only the number of candidates to be nominated, as fixed by the senatorial committee. The act was therefore held to be void. When the General Assembly had under consideration the enactment of another law for holding primary elections, it is presumed they intended the act to be valid and capable of being carried into effect. *Lewis' Sutherland on Stat. Const. § 497*. We would not be justified in assuming that it was the intention to re-enact the same unconstitutional provision and thereby to do a perfectly vain and useless thing. The section was not re-enacted in the same form in the present law, but, instead of the words above quoted, the following was inserted: "Each qualified primary elector may cast three votes for one candidate, or may distribute the same or equal parts thereof among two candidates or three candidates, as he shall see fit. And the said candidate or candidates for nomination highest in votes shall be declared nominated for the office to be filled." The candidate or candidates to be declared nominated are those for whom votes are cast at the primary, and if three candidates are voted for, then by the language of the section they are to be declared nominated for the office to be filled. In solving doubts as to the meaning and intention of the General Assembly, the fact that the previous act had been held bad, and that the language was changed, requires, in our judgment, a different interpretation. The language used in the present act is susceptible of the construction which we give to it, and, so construed, the provision does not conflict with the Constitution. In case of doubtful meaning, a construction should be adopted, if possible, which will reconcile the act with the Constitution, and courts will not adjudge an act void unless its violation of the Constitution is clear and unmistakable.

Applying the rules of construction which we have stated, under which an act is to be held within the limits of legislative power if it can be done, we think the intention of the General Assembly was that the senatorial committee might adopt a resolution fixing and determining, as a question of party policy, the number of candidates to be nominated by their political party as a matter of advice or suggestion to the individual voter but which was not intended to be binding upon such voter, as this court had distinctly held it could not be. The section declares that each qualified primary elector may cast three votes for one candidate, or may distribute the same, or equal parts thereof, among two candidates or three candidates, as he shall see fit, and it seems to us unreasonable to say that the General Assembly intended to give to the voters that right, but that their votes should have no influence or effect beyond the number fixed by the senatorial committee.

The construction we give to section 11 does not, in our judgment, interfere with or destroy the plan of the Constitution for representation of minorities. Of course, it was not the view of

the framers of the Constitution, in securing a right to the voter to vote for three candidates or to cumulate his vote (which was intended to secure minority representation), that the exercise of the right, or a law securing it, would destroy such minority representation. A political party is a purely voluntary organization of individual voters having the same political beliefs, who combine for the purpose of making their principles effective in the administration of the government. The individual voter cannot be hampered or restrained in the exercise and enjoyment of his rights by the organization, but if he desires the success of his party he exercises his right to effect that object in accordance with the policies of his party and in harmony with the views of the majority. If a party is in the minority in a senatorial district and can elect but one representative, the voter would throw away all benefit of minority representation if he should vote for more than one at the general election. All arrangements governing the action of members of such a party must necessarily be determined by the party organization, and obedience to them must depend upon party loyalty and the hope for party success. The determination of a minority party to vote only for the candidate of that party which received the highest number of votes in the primary election would be observed by every loyal member of the party and accomplish the ends intended by the framers of the Constitution. Voters who would disregard the plan so determined upon would not and could not be controlled by any act forbidding them to vote at the general election for a greater number of candidates than should be specified by the senatorial committee.

In our opinion section 11 of the act under consideration is valid, and the peremptory writ ought to have been awarded.

(175 Ind. 86)

SHEDD et al. v. AMERICAN MAIZE
PRODUCTS CO. (No. 21,576.)

(Supreme Court of Indiana. Dec. 29, 1910.)

1. APPEAL AND ERROR (§ 100*)—APPEAL—INTERLOCUTORY ORDER.

An interlocutory order granting a temporary injunction is not appealable, unless such an appeal is expressly authorized by statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

2. STATUTES (§ 243*)—CONSTRUCTION—STATUTES AUTHORIZING APPEAL—APPEAL FROM INJUNCTION ORDER.

Statutes authorizing an appeal from an interlocutory order granting a temporary injunction should be strictly construed.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 324; Dec. Dig. § 243.*]

3. APPEAL AND ERROR (§ 100*)—APPEAL—INTERLOCUTORY ORDER.

Since an interlocutory order granting a temporary injunction is not appealable, unless an appeal is expressly authorized by statute, an appeal from such an order made in term is not governed by *Burns' Ann. St. 1906*, §§ 671, 672, 679, 681-683, providing for appeals from final judgments, but by sections 688, 689, and section 1392, subs. 15 and 17, providing for appeals from certain interlocutory orders, the seventeenth subdivision of which permits an appeal to the Supreme Court from an interlocutory order granting or dissolving a temporary injunction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 670-680; Dec. Dig. § 100.*]

4. APPEAL AND ERROR (§§ 339, 356*)—APPEAL—FILING OF TRANSCRIPT—TIME.

An appeal from an interlocutory order granting a temporary injunction must be perfected before the expiration of the term at which it was granted by the filing of a transcript, in order to give the Supreme Court jurisdiction of the appeal, so that an appeal from such an order made in term will be dismissed, where the transcript and assignment of errors were not filed in the Supreme Court until more than 20 days after the expiration of the term at which the order was granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887, 1926, 1927; Dec. Dig. §§ 339, 356.*]

Appeal from Superior Court, Lake County; V. S. Reiter, Judge.

Action by the American Maize Products Company against Edward A. Shedd and others. From an interlocutory order granting a temporary injunction, defendants appeal. Appeal dismissed.

H. S. McCartney and Fred Barnett, for appellants. Crumpacker & Crumpacker and C. B. Tinkham, for appellees.

MONKS, J. This is an appeal from an interlocutory order made in term granting a temporary injunction against appellants.

In this state no appeal can be taken from an interlocutory order granting a temporary injunction, unless there is a statute expressly providing therefor, and the rule is that such statute must be strictly construed. *Natcher v. Natcher*, 153 Ind. 368, 369, 55 N. E. 86, and authorities cited. "Appeals in such case must be taken as the statute especially applicable to such cases provides." *Elliott's App. Proc.* §§ 100-109. This appeal therefore is not governed by sections 671, 672, 679, 681-683, *Burns' Ann. St.* 1908, and other sections providing for appeals from final judgments, but by sections 688, 689, *Burns' Ann. St.* 1908, and the fifteenth and seventeenth subdivisions of section 1392, *Burns' Ann. St.* 1908, which provide for appeals from certain interlocutory orders.

It was held by this court in *Barney v. Elkhart County Trust Co.*, 167 Ind. 505, 79 N. E. 492, that an appeal from an interlocutory order granting a temporary injunction must be perfected before the expiration of the term of court at which it was granted by filing an appeal bond and by filing the transcript on appeal, so as to give this court jurisdiction of the appeal.

It appears from the record that the interlocutory order appealed from in this case was made in term time, and the appeal bond was filed and approved and the appeal granted by the court below at the same term of court, but the appeal was not perfected by filing the transcript and assignment of errors in this court until more than 20 days after the expiration of the term at which the interlocutory order appealed from was granted.

The appeal is therefore dismissed.

(175 Ind. 93)

WILLIAMS v. STATE. (No. 21,807.)

(Supreme Court of Indiana. Jan. 3, 1911.)

1. CRIMINAL LAW (§ 491*)—EVIDENCE—COMPARISON OF HANDWRITING.

On a question involving the handwriting of a person, the only papers that may be used in examination and in making comparison by experts are those which have been introduced into the case for a proper purpose, and papers not pertinent to the case cannot be examined and used by such witnesses, unless their genuineness is admitted by accused against whom the evidence is sought to be used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1080; Dec. Dig. § 491.*]

2. CRIMINAL LAW (§ 491*)—EVIDENCE—COMPARISON OF HANDWRITING.

On a trial for forgery of the indorsement of a railroad pay roll draft in favor of a conductor, a statement, reciting that the conductor had not put off any one from his train on a designated date, purporting to be in the handwriting of and signed by accused but not admitted by him to be genuine, is inadmissible, and it is reversible error to admit it and to permit the state's experts to use it for purposes of comparing the handwriting therein with the disputed signature on the alleged forged indorsement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1080; Dec. Dig. § 491.*]

Appeal from Criminal Court, Marion County; James A. Pritchard, Judge.

Alfred G. Williams was convicted of forgery, and he appeals. Reversed and remanded.

Ira M. Holmes, for appellant. Jas. Bingham, Alexander G. Cavins, Ed. M. White, and Wm. H. Thompson, for the State.

JORDAN, J. Appellant was indicted by a grand jury in the Marion criminal court and was charged with the commission of the crime of forgery as defined by section 2587, *Burns' Ann. St.* 1908. The plea which he entered to the indictment was "not guilty." Trial by jury, verdict returned finding him guilty of the crime of forgery as charged, and that he was 30 years old. A motion for a new trial in which 11 reasons therein were assigned was denied by the court, to which appellant reserved proper exceptions. The court then rendered a judgment against the defendant (appellant herein) that he be fined in the sum of \$10, and be imprisoned in the Indiana state prison for the indefinite term of from 2 to 14 years. From this judgment he prosecutes this appeal, and assigns as error the overruling of his motion for a new trial.

The indictment charges that the defendant had in his possession a certain bill of exchange purporting to have been made and executed by one W. S. Hill, the paymaster of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the payment in money of \$37.25 to the order of W. E. McVay. This document, which is known as a "pay roll draft," is set out in full in the

indictment. It is further alleged in the indictment that, while the defendant had this document in his possession, he did on the 13th day of November, 1908, at Marion county, Ind., unlawfully, feloniously, and falsely forge and counterfeit an indorsement on this bill of exchange in the following words, to wit, "W. E. McVay," and did then and there unlawfully, feloniously, etc., utter, publish, and pass said bill of exchange with said false, forged, and counterfeited indorsement as being true and genuine to the Indiana National Bank, a corporation, with the intent to defraud said bank, etc.

On the trial of the defendant in the lower court, the state introduced as its first witness one Lawrence P. Grady, who testified that he was the chief special agent of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and was such agent on November 12 and 17, 1908; that on the latter date he went to defendant's rooming house in the city of Indianapolis to secure from him a written statement for the purpose of obtaining defendant's handwriting. At the time this statement was signed the witness testified that defendant was sick in bed at his rooming house, that he gave the defendant a fountain pen, and that he sat up in bed and with the witness' fountain pen wrote out the following statement, which was introduced in evidence and marked "Exhibit No. 1," and as it appears in the record is as follows:

Exhibit No. 1.

Im. 1-18-1902. S.

Form L. D. 18.

The Cleveland, Cincinnati, Chicago & St. Louis
Railway Co.

In the Matter of Personal Injury to

..... at

Statement of Witness.

Taken by at Indianapolis on the
17th day of November, 1908.

My name is A. G. Williams. I reside at 1114 Fletcher Ave. My occupation is a Brakeman. On this 14th day of July, 1908, I was Brakeman on Work Extra 6323 for Conductor W. E. McVay and will say in regards to the case W. E. McVay did not kick any one off the train on that day for there was no one on there to be put off. I know positively Condr. W. E. McVay did not put any one off the train.

Yours respectfully, A. G. Williams.

Grady, the witness, did not claim that he had the defendant write this statement to be used in some claim against the railroad company, but he testified that he went to the witness' room to secure the statement for the purpose of getting his handwriting. The prosecuting attorney in offering this document in evidence stated to the court that he offered it for the purpose of showing that the name of "W. E. McVay" was written therein, and that he desired to get that name before the jury to show the handwriting of the defendant, and to show that the handwriting therein in signing "W. E. McVay" is the same handwriting that signed that same

name to the forged indorsement for which the defendant was being prosecuted.

The defendant objected to the introduction of this statement or document in evidence for the reason that it was not relevant or pertinent to any of the issues in the case, and was not a paper properly belonging therein; that he did not admit that the handwriting therein, as claimed by the state to be his, was genuine, but his objections were overruled by the court, to which he excepted, and the court, over his objections and exceptions, admitted the statement in evidence for the purpose desired, as stated by the state's attorney. After this written statement was introduced in evidence, it was exhibited to the jury by the state's attorney for their inspection, and during the trial the state used it as a specimen or standard of the defendant's handwriting for the purpose of enabling its expert witnesses to make comparisons. These witnesses, as it appears, compared the handwriting in the statement in question by which the name "W. E. McVay" was therein written with that alleged forged name upon the indorsement, and, over the objections of the defendant, were allowed by the court to testify that in their opinion the person who wrote the name "W. E. McVay" in the statement in question wrote the same name on the back of the pay roll draft which constituted the alleged forgery.

It is virtually conceded by counsel for the state that the statement, or Exhibit No. 1, in question, was neither relevant nor pertinent evidence to prove any issue in the case; that it was merely introduced or brought into the case for the sole purpose of affording a standard for comparing the disputed signature on the forged indorsement. The rule is well settled in this jurisdiction that upon a question involving the handwriting of a person the only papers that may be used in examination and in making comparisons by expert witnesses are those which have been introduced or brought into the case for some proper purpose. Papers or documents not pertinent or relevant to the cause cannot be examined and used by such witnesses for making comparisons, unless their genuineness is admitted by the party against whom the evidence is sought to be used. This rule is well sustained by the following authorities: *Chance v. Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 48 Ind. 38; *Jones v. State*, 60 Ind. 241; *Forgey v. First Nat. Bank*, 66 Ind. 123; *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500; *Shorb v. Kinzie*, 100 Ind. 429; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *White Sewing Machine Co. v. Gordon*, 124 Ind. 496, 24 N. E. 1053, 19 Am. St. Rep. 109; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Tucker v. Hyatt*, 144 Ind. 637, 41 N. E. 1047, 43 N. E. 872; *Doe ex dem. Perry v. Newton*, 5 Ad. & El. 514 (31 Eng. Com. L. 712); *Van*

Wyck v. McIntosh, 14 N. Y. 439; Bank, etc., v. Mudgett, 44 N. Y. 514; Miles v. Loomis, 75 N. Y. 238, 31 Am. Rep. 470; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Pierce v. Northey, 14 Wis. 10.

It is manifest under the circumstances the trial court erred to the prejudice of appellant in permitting the document in question to be used by the state's expert witnesses for the purpose of comparing the handwriting therein with the disputed signature upon the alleged forged indorsement, and in expressing to the jury their opinions thereon against appellant, for which error the judgment must be reversed.

Other alleged errors are discussed and urged by counsel, but some of these, however, are not properly presented and therefore cannot be considered. Others are not likely to occur again upon another trial, and are consequently dismissed without consideration.

For the error herein pointed out, the judgment below is reversed, and the cause remanded, with instructions to the lower court to grant appellant a new trial. The clerk will issue to the warden of the Indiana state prison the proper warrant for the return of the prisoner to the sheriff of Marion county.

(46 Ind. App. 577)

LAKE ERIE & W. R. CO. v. PARRISH.
(No. 6,857.)

(Appellate Court of Indiana. Division No. 1.
Dec. 14, 1910.)

1. MASTER AND SERVANT (§§ 258, 261*)—INJURY TO SERVANT—ACTION—COMPLAINT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The complaint in a brakeman's action for injuries alleged that the train on which he was employed was run on a side track, between six and eight feet south of the main track, at night; that he was ordered to uncouple the engine as soon as the cars were in the clear, which order was to be executed while the train was in motion; that to execute it properly, it was necessary for him to get off the engine on the north side and face the east in order to see when the cars cleared the main track; that on taking the proper position, he looked west and saw a switch engine on the main track about 500 yards away facing west and standing still; that while he was looking east to see when his train had cleared the main track, defendant negligently backed and coasted the switch engine to the east, without using steam or making a noise which could be heard above the noise of the other train, and negligently failed to ring the bell or to whistle or to place a headlight, or to provide a watchman on the tender to look ahead while backing, and negligently failed to discover plaintiff between the tracks or to give him any notice of the approach of such switch engine, and thus, in backing the switch engine, defendant negligently struck plaintiff with said engine and injured him. *Held*, that although the space between the passing switch engine and the train was not alleged, as it appeared that plaintiff could not have uncoupled his engine from the top of a car, and his failure to see the switch engine approaching was explained by his work requiring him to look in the opposite direction, the complaint was sufficient on appeal, as against objections that it did not show negligence by

defendant proximately causing the injury, and showed negligence of plaintiff contributing thereto.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. §§ 258, 261.*]

2. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—VERDICT—SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.

In an action by a brakeman for injuries received from a switch engine on the main track, at night, backing toward and striking him where he was standing between the main track and a side track, while executing an order to uncouple an engine on the side track, special findings showing that he was a few inches too near the main track to escape being struck by the switch engine do not so show contributory negligence from that mere fact, or in his failing to see the switch engine in time to avoid it, as to make the findings irreconcilable with a general verdict for plaintiff, where circumstances which would excuse him from looking were admissible under the pleadings, and there was no finding from which the court could say, as matter of law, that he was not so excused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.*]

3. MASTER AND SERVANT (§ 297*)—INJURY TO SERVANT—ACTION—FINDINGS.

A general verdict for an employe, in an action for damages for personal injuries, implied that the employer was guilty of actionable negligence, and that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.*]

4. TRIAL (§§ 343, 365*)—VERDICT—SPECIAL FINDINGS—PRESUMPTIONS.

All presumptions should be resolved to support the general verdict, while special findings are not aided by any presumption.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812, 871-874; Dec. Dig. §§ 343, 365.*]

5. NEGLIGENCE (§ 117*)—ACTIONS—PLEADING—CONTRIBUTORY NEGLIGENCE.

Contributory negligence is a matter of defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. § 117.*]

6. EVIDENCE (§ 89*)—PRESUMPTIONS—REBUT-TAL.

While it is presumed generally that one sees that which is within the range of his vision, such presumption may be rebutted by the particular circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 111; Dec. Dig. § 89.*]

7. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

If there is evidence to support the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by Oliver Parrish against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John B. Cockrum and R. B. Beauchamp, for appellant. L. B. Nash, for appellee.

MYERS, J. Appellee recovered a judgment against the appellant on account of at-

leged injuries received on November 7, 1906, while in the employment of the appellant as a freight brakeman. Appellee's complaint was in two paragraphs, and is challenged in this court by the assignment of error that the complaint does not state facts sufficient to constitute a cause of action. Each paragraph is claimed to be defective for the reasons: (1) It does not appear that appellant was guilty of negligence proximately causing the injury of which the appellee complained, (2) that the negligence of appellee materially contributed to his injury.

With reference to these objections, the complaint in substance shows that on November 7, 1906, appellant owned and operated a line of railway through Indiana, and into and through the town of Rankin, in the state of Illinois; that at and near said town appellant maintained a number of switches and side tracks, immediately south of its main track, which side tracks and switches extended east and west and parallel with said main track; that between 12 and 1 o'clock in the morning on said day, and while dark, when one of appellant's west-bound freight trains, and on which appellee was employed as one of the crew of said train, reached said switches and side tracks, it pulled in on what is known as track No. 1, located between six and eight feet south of the main track; that on entering said side track, appellee was ordered by the engineer operating the locomotive hauling said train to cut the locomotive loose from the train by throwing a lever, releasing the coupling between the engine and train, as soon as all the cars were in the "clear," which order was to be executed while the train was in motion; that to properly execute this order it was necessary for appellee to get off the engine onto the ground, on the north side of the train, and face the east, in order to see when the cars had cleared the main track, and away from said train moving westward, and within reach of the lever which released the locomotive; that on taking the aforesaid position in order to comply with said order, he looked west, and saw a switch engine and tender attached on the main track, about 500 yards away, facing west and standing still, otherwise the track was clear; that he then looked to the east to see when the cars had cleared the main track, and while in this position the appellant carelessly and negligently backed and coasted said switch engine and tender to the east, along the main track, without using steam or making a noise which could be heard above the noise of said switching train, and carelessly and negligently failed to place a headlight or provide a watchman on said tender to look ahead while backing said engine and tender; that appellant carelessly and negligently failed to ring the bell or sound the whistle of said switch engine as it approached toward appellee, and in the operation of said switch engine then and there negligently and carelessly failed to

discover the presence of appellee standing between said tracks, or to give him any notice whatever of its approach, and thus, in backing said switch engine, appellant negligently and carelessly struck the appellee with said engine and tender thereto attached, knocking him down, and thereby injuring him, describing his injuries.

It is conceded that if either paragraph of the complaint is good, the attack here made upon the complaint must fail. Appellant in support of the error presented argues that the complaint conclusively shows that the space between the passing switch engine and train was amply sufficient for appellee to have performed his duties safely; also that he could safely have performed his duties while on top of a car of the train until it stopped, and then descended to the ground and cut the engine from the train; that he could have seen the approach of the switch engine had he looked.

Looking to the facts as they appear in the complaint, appellee, at the time he was injured, was occupying a position reasonably necessary to perform the service required of him. When appellee took the position described, and for the time necessary to do the work, the place was not dangerous, except from the movement of the switch engine, which he alleges the appellant negligently moved, thereby injuring him. We are not advised as to the distance between the passing trains, but it does appear that he could not have performed the service from the top of a car. It does appear that he could have seen the switch engine as it approached him, had he looked in that direction, but his failure to so look is explained by the fact that his work required him to look in the opposite direction. As we see this case as made by the complaint, appellee was in a place at the direction of the appellant, performing a service requiring his attention in one direction, and while thus engaged he was, by the appellant, negligently run down by a switch engine and tender from the opposite direction. While the complaint may be subject to criticism for uncertainty, yet we cannot say that any essential fact was entirely omitted, or that it does not contain facts sufficient to bar another action for the same cause. The complaint must be regarded as sufficient to withstand the present attack. *Vandalla Coal Co. v. Indianapolis, etc., R. Co.*, 168 Ind. 144, 79 N. E. 1082; *Indianapolis, etc., Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143; *Southern R. Co. v. Roach*, 38 Ind. App. 211, 78 N. E. 201; *Indianapolis, etc., Co. v. Smith*, 38 Ind. App. 160, 77 N. E. 1140.

It is next insisted that the court erred in overruling appellant's motion for judgment on the answers of the jury to interrogatories, notwithstanding a general verdict. In this connection it is claimed that the facts, as found by the jury, show that appellant was not guilty of actionable neg-

ligence, and that appellee was guilty of contributory negligence. Appellant's contention in this regard is based upon answers 2, 4, 14, 15, and 16, which are claimed to be so antagonistic to the general verdict that the latter must give way to the former. These answers show that at the time of the injury the tender which struck appellee protruded 26 inches south of the south rail of the main track, and the distance between the south rail of the main track and the north rail of track No. 1 was eight feet, and that the appellee was about two feet south of the south rail of the main track, and about three feet north of the train on track No. 1.

The general verdict in this case amounted to a finding that the appellant was guilty of actionable negligence, and that the appellee was not guilty of contributory negligence. Under the settled law in this state, we are to resolve all reasonable presumptions and intendments in support of the general verdict, while the facts so found must be considered for what they are worth, unaided by any such presumption or intendment. The findings to which we are referred simply show the position of appellee with reference to the train, tracks, and switch engine at the time of the alleged injury.

We cannot agree that but one conclusion, that of contributory negligence on the part of the appellee, could be reached from the mere fact that in the nighttime he was a few inches too close to the main track, in view of the evidence which might have been introduced under the pleadings on that subject, or, that he was negligent in failing to see the switch engine as it approached him in time to have avoided a collision. Contributory negligence is a matter of defense, and while the law as a general proposition presumes one to have seen that which was within the range of his vision, yet this presumption will yield to the particular facts and circumstances of the case. For, while appellee might have seen the engine in time to have escaped injury had he looked, yet the circumstances may have been such that he was excused from looking. There is no finding from which the court can say, as a matter of law, that he was not excused from looking, and this being true, the findings are not in irreconcilable conflict with the general verdict. See *Grand Trunk, etc., Ry. Co. v. Reynolds* (Sup.) 92 N. E. 733; *Pittsburgh, etc., Ry. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28, 35.

It is claimed that the verdict of the jury is not sustained by sufficient evidence. After carefully reading the evidence, we are convinced that it would have supported a verdict for either of the parties. In many particulars there is positive conflict. These disputes were settled by the jury, and in overruling the motion for a new trial, the trial court affirmed the action of the jury. There

being evidence to support the verdict, we are not at liberty to disturb the judgment on that account.

Judgment affirmed.

(47 Ind. A. 331)

SHANK et al. v. TRUSTEES OF McCORDS-VILLE LODGE NO. 333, I. O. O. F.

(No. 6,229).¹

(Appellate Court of Indiana, Division No. 1.
Dec. 30, 1910.)

**APPEAL AND ERROR (§ 832*)—REHEARING—
GROUNDS—REMITTITUR.**

Where, on motion for rehearing on appeal, the only error alleged is in respect to an excessive allowance of interest, the motion will be denied on condition that the successful party file a remittitur of the excess in the lower court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3226; Dec. Dig. § 832*]

On rehearing. Petition denied.

For former opinion, see 88 N. E. 85.

Shirts & Fertig, for appellants. Gifford & Gifford and Frank L. Littleton, for appellee.

WATSON, J. The appellants in an earnest and able brief on behalf of their petition for rehearing insist that the trial court erred in the finding of facts as to the amount of interest due, and also the allowance for damages as rental, when in fact there was due the appellant Shank a sum of money which was withheld by the appellee for nearly 11 months.

We have examined this question, and find that the trial court was in error as to interest in the sum of \$45.16. In equity there should be a further allowance, by reason of said money so withheld, to the amount of \$19.86, making in all the sum of \$65.02. The petition for rehearing in all other respects is overruled.

If the appellee will file its remittitur in the Tipton circuit court for the sum of \$65.02 as the date of the judgment rendered herein, and cause a certified copy thereof to be filed with the clerk of this court within 30 days of this date, the petition will be in all things overruled. If not, petition for rehearing will be granted.

**MODERN WOODMEN OF AMERICA v.
KINCHELOE** (No. 6,972).²

(Appellate Court of Indiana, Division No. 1.
Dec. 30, 1910.)

**1. EVIDENCE (§ 33*)—"PRESUMPTIONS OF LAW"
—CONCLUSIVENESS.**

"Presumptions of law" are of two kinds, conclusive and disputable, and the former are rules determining the quantity of evidence requisite to the support of any particular averment which is not permitted to be overcome by proof, while disputable presumptions are those that may be overcome by proof; but, in the absence of opposing evidence, the law will infer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Transfer denied. ² Superseded by opinion in Supreme Court, 94 N. E. 223. Rehearing denied.

the existence of one fact from the proved existence of another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 73; Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5539-5450; vol. 8, p. 7762.]

2. EVIDENCE (§ 87*)—PRESUMPTIONS OF LAW—BURDEN OF PROOF.

Presumptions are not evidence, but they cast upon the party who contradicts the presumptions the burden of proof, and the duty of going forward in argument or evidence on the particular point to which they relate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 109; Dec. Dig. § 87.*]

3. EVIDENCE (§ 90*)—PARTY ON WHOM BURDEN OF PROOF RESTS.

The burden of proof both as to a point in issue or a fact rests upon the party who would be cast in the suit if no evidence was introduced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 112; Dec. Dig. § 90.*]

4. EVIDENCE (§ 53*)—"PRESUMPTION OF FACT."

The term "presumption of fact" is a misnomer, and amounts to no more than an inference drawn by the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 73; Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5587-5539; vol. 8, p. 7762.]

5. EVIDENCE (§§ 59, 87*)—PRESUMPTIONS—LOVE OF LIFE.

The law presumes that death results from causes that were not voluntarily brought on by deceased, as the presumption of law is against suicide, but such presumption is not evidence, and cannot be treated as evidence by the jury in reaching a verdict.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 79, 109; Dec. Dig. §§ 59, 87.*]

6. TRIAL (§ 237*)—INSTRUCTIONS—CONSTRUCTION—SUICIDE.

In an action on a benefit certificate, where the defense is that insured committed suicide, an instruction that the evidence must exclude every reasonable hypothesis except that of suicide is merely a statement that the party alleging suicide must introduce evidence to prove it, and is not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 548-551; Dec. Dig. § 237.*]

7. EVIDENCE (§ 95*)—BURDEN OF PROOF—EXTENT OF BURDEN.

Where two or more facts are necessary to make out a cause of action, they must both be proven.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 118; Dec. Dig. § 93.*]

On rehearing.

For original opinion, see 91 N. E. 976.

WATSON, J. Appellant's counsel have advanced two propositions in support of the petition for rehearing and make those propositions the basis of their assault upon the opinion heretofore handed down. Those propositions are, first: "That there is no presumption of law against suicide." Second: "That to establish the fact of suicide the evidence need not be of such character as to exclude every hypothesis of death in any other manner."

It seems to be necessary to a correct un-

derstanding that we restate some text-book law on the subject. Presumptions of law are divided into two classes, namely, conclusive and disputable. Conclusive presumptions are rules determining the quantity of evidence requisite to the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise. They are usually grounded upon public policy, social convenience, or safety, and are for the preservation of peace and quiet in the community, and therefore all opposing evidence is forbidden. Greenleaf's Evidence, §§ 14, 15. Presumptions "may be grounded on general experience or probability of any kind, or merely on policy and convenience." Thayer's Treatise, 314. Disputable presumptions are also the results of general experience, but the connection between certain facts from which they arise is not so intimate nor so nearly universal as to render it expedient that evidence to the contrary should be rejected. "But yet it is so general and so nearly universal that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of opposing evidence." Greenleaf's Evidence, § 33.

The essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other. That is to say, they throw upon the party against whom they work the duty of going forward with the evidence. 4 Wigmore's Evidence, 2487. "The exact scope and operation of presumptions are to cast upon the party against whom they operate the duty of going forward, in argument or evidence, on the particular point to which they relate. Presumptions are not evidence." Thayer's Preliminary Treatise on Evidence, pp. 814, 336, 337, 339. The burden of proof is upon the party who asserts the fact to be otherwise than the law presumes. 4 Wigmore, 86. "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." Lincoln v. French, 105 U. S. 614, 26 L. Ed. 1189; Thayer's Treatise, 346. The burden of proof, whether as to issue or fact, rests upon the party who would be cast in the suit if no evidence was introduced. Judah v. Trustees, 23 Ind. 272; Kent v. White, 27 Ind. 390. "A presumption signifies a ruling as to the duty of producing evidence." 4 Wigmore, supra.

There has been some confusion between the burden of proof created by the issues and that created as to a particular fact by a presumption of law. The subject need not be more than indicated here, and is discussed at considerable length and with his usual clearness by Prof. Wigmore in the

chapter to which reference has heretofore been made. The term "presumption of fact" is a misnomer. It amounts to no more than an inference drawn by the jury. "They are in truth but mere arguments of which the major premise is not a rule of law." *Greenleaf's Evidence*, § 44. "The distinction between presumptions 'of law' and presumptions 'of fact' is in truth the difference between things that are in reality presumptions and things that are not presumptions at all." *Wigmore*, 2491.

There is a presumption of law against suicide, as will be shown by authorities a little later in this opinion; but such presumption is not evidence and cannot be treated as evidence by the jury in reaching a verdict, and an instruction that such presumption has the effect of affirmative evidence is erroneous. *Prudential Ins. Co. v. Dolan*, 91 N. E. 970; *Lisbon v. Lyman*, 49 N. H. 563; *Befay et al. v. Wheeler*, 84 Wis. 135, 53 N. W. 1121, 1123; *Diefenthaler v. Hall*, 96 Ill. App. 639, 640; *Lincoln v. French*, supra.

When the fact of death appears, the law presumes that it must have resulted from causes that were not voluntarily brought on by the deceased, and "both in life and accident insurance law presumes, prima facie, that the death of an insured person resulted from natural causes or accident rather than from suicide." Volume 7, 552, *Ency. of Evidence*; *Keels v. Mut. Reserve Fund L. Ass'n* (C. O.) 29 Fed. 198; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 68 Sup. Ct. 1360, 32 L. Ed. 308; *Connecticut Mut. L. Ins. Co. v. McWhirter*, 44 U. S. App. 492, 73 Fed. 444, 19 O. C. A. 519; *Standard L. & Acc. Ins. Co. v. Thornton*, 40 C. C. A. 564, 100 Fed. 582, 49 L. R. A. 116; *Union Mut. L. Ins. Co. v. Payne*, 45 C. O. A. 193, 105 Fed. 172; *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 28 Pac. 762, 23 Am. St. Rep. 455; *Jenkin v. Pacific Mut. L. Ins. Co.*, 131 Cal. 121, 63 Pac. 180; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040; *Knights Templar and Masons' Life Indemnity Co. v. Crayton*, 110 Ill. App. 648, affirmed 209 Ill. 550, 70 N. E. 1066; *Supreme Tent Knights of Maccabees v. Stensland*, 206 Ill. 124, 68 N. E. 1096, 99 Am. St. Rep. 137; *Gooding v. U. S. L. Ins. Co.*, 46 Ill. App. 307; *Star Acc. Co. v. Sibley*, 57 Ill. App. 315; *Fidelity & Casualty Co. v. Weise*, 80 Ill. App. 499; *Supreme Court of Honor v. Barker*, 96 Ill. App. 490; *Grand Lodge v. Banister*, 80 Ark. 190, 96 S. W. 742; *Ross-Lewin v. Ins. Co.*, 20 Colo. App. 262, 78 Pac. 305; *Sovereign Camp v. Bridges*, 7 Ind. T. 433, 104 S. W. 672; *Tackman v. Brotherhood*, 132 Iowa, 64, 106 N. W. 350, 8 L. R. A. (N. S.) 974; *Am. Ben. Ass'n v. Stough*, 83 S. W. 126, 26 Ky. Law Rep. 1098; *Ferris v. Loyal Americans*, 152 Mich. 814, 116 N. W. 445; *Kornig v. Ind. Co.*, 102 Minn. 31, 112 N. W. 1039; *Cornell v. Ins. Co.*, 120 App. Div. 459, 104 N. Y. Supp. 999; *Thaxton v. Ins. Co.*, 143 N. C. 33, 55 S. E. 419; *Sov-*

ereign Camp v. Boehme, 44 Tex. Civ. App. 159, 97 S. W. 847; *Cady v. Cas. Co.*, 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N. S.) 260; *Rohloff v. Ass'n*, 130 Wis. 61, 109 N. W. 989; *Hale v. Life Indemnity & Invest. Co.*, 61 Minn. 516, 63 N. W. 1108, 52 Am. St. Rep. 616; *Sartell v. Royal Neighbors*, 85 Minn. 360, 88 N. W. 985; *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470, 41 Atl. 906; *Connell v. Iowa, etc., Ass'n* (1908) 139 Iowa, 444, 116 N. W. 820; *Ingersoll v. Knights of Golden Rule* (C. C.) 47 Fed. 272; *Goldschmidt v. Mut. L. Ins. Co.*, 102 N. Y. 486, 7 N. E. 408; *White v. Prudential Ins. Co.*, 120 App. Div. 260, 105 N. Y. Supp. 87; *American Home Circle v. Schneider*, 134 Ill. App. 600; *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Fidelity & Casualty Co. v. Weise*, 182 Ill. 496, 55 N. E. 540; *Masonic L. Ass'n v. Pollard*, 121 Ky. 349, 89 S. W. 219, 123 Am. St. Rep. 198; *Ins. Co. v. Akens*, 150 U. S. 463, 14 Sup. Ct. 155, 37 L. Ed. 1148; 19 Am. & Eng. Ency. of Law, p. 77; *Lawson's Law of Presumptive Evidence*, p. 241; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Meadows v. Pacific Mut. L. Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427; *Laessig v. Travelers' Protective Ass'n*, 169 Mo. 272, 69 S. W. 469; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Germain v. Brooklyn L. Ins. Co.*, 30 Hun (N. Y.) 535; *Peck v. Equitable Acc. Ass'n*, 52 Hun, 255, 5 N. Y. Supp. 215; *Whitlatch v. Fidelity & Casualty Co.*, 71 Hun, 146, 24 N. Y. Supp. 537; *Id.*, 78 Hun, 262, 28 N. Y. Supp. 951; *Guldenkirch v. U. S. Mut. Acc. Ass'n* (City Ct. N. Y.) 5 N. Y. Supp. 428; *Harms v. Metropolitan L. Ins. Co.*, 67 App. Div. 139, 73 N. Y. Supp. 513; *Mitterwallner v. Supreme Lodge Knights & Ladies of the Golden Star*, 37 Misc. Rep. 860, 76 N. Y. Supp. 1001; *Travelers' Ins. Co. v. Rosch*, 23 Ohio Cir. Ct. R. 491; *Cox v. Royal Tribe of Joseph*, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; *Chambers v. Modern Woodmen, etc.*, 18 S. D. 173, 99 N. W. 1107; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 43 N. W. 731, 77 Am. St. Rep. 184; *Agan v. Metropolitan L. Ins. Co.*, 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Union Cent. L. Ins. Co. v. Hollowell*, 20 Ind. App. 150, 50 N. E. 399; *Sovereign Camp, etc., v. Haller*, 24 Ind. App. 106, 56 N. E. 255; *Supreme Lodge, etc., v. Foster*, 26 Ind. App. 333, 59 N. E. 877; *Sovereign Camp v. Haller* (2d Appeal) 30 Ind. App. 450, 66 N. E. 186; *Equitable Life Ins. Co. v. Hebert*, 37 Ind. App. 873, 76 N. E. 1023, 117 Am. St. Rep. 324; *Prudential Ins. Co. of America v. Dolan*, 91 N. E. 970; *Jones v. U. S. Mut. Acc. Ass'n*, 92 Iowa, 652, 61 N. W. 485; *Carnes v. Iowa, etc., Ass'n*, 106 Iowa, 281, 76 N. W. 683, 68

Am. St. Rep. 306; *Stephenson v. Bankers' L. Ass'n*, 108 Iowa, 637, 79 N. W. 450; *Metzradt v. Modern Brotherhood of America*, 112 Iowa, 522, 84 N. W. 498; *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; *Union Casualty & Surety Co. v. Goddard*, 76 S. W. 832, 25 Ky. Law Rep. 1035; *Mutual Ben. L. Ins. Co. v. Davless*, 87 Ky. 541, 9 S. W. 812; *Boynton v. Equitable L. Assur. Soc.*, 105 La. 202, 29 South. 490, 52 L. R. A. 887; *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Supreme Council v. Brashears*, 89 Md. 624, 43 Atl. 868, 73 Am. St. Rep. 244; *Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 918, 117 Am. St. Rep. 668.

In view of the cases cited, of the principles upon which they rest and of the absence of anything to the contrary, we are compelled to deny appellant's first proposition.

The second proposition is equally fallacious. When the jury are told that the evidence must exclude every reasonable hypothesis except that of suicide, they are merely told that the party alleging suicide must introduce evidence to prove it. This must necessarily be so if there is a presumption casting the burden upon him who so alleges. To say that every other reasonable hypothesis must be excluded is only to say that the party having the burden must introduce evidence to support each fact necessarily material thereto. There might be ever so much evidence introduced tending to show that a given death was not the result of disease; but if there was nothing tending to show that it had not been caused by accident, the presumption against suicide would not be overcome. Where two or more facts are necessary to make out a cause of action they must both be proven (*Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613, 40 N. E. 62); and the idea that requiring evidence of both such facts, or requiring evidence to exclude each reasonable hypothesis inconsistent with suicide, is to require proof beyond a reasonable doubt, and is almost too fanciful to be seriously considered. An idea of that sort could only arise from lack of investigation. There is no question of reasonable doubt in this case. The party upon whom the burden is cast by a presumption of law which is declared by the judge from facts presented to him must introduce some evidence tending to establish the material facts involved in his claim. The evidence relevant to each hypothesis and the evidence relevant to the conclusion from them, all is to be weighed as other evidence and the truth determined as seems most probable and according to the preponderance. *Prudential Life Ins. Co. v. Dolan*, supra; *Nichols v. B. & O. S. W. R. R.*

Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

It is only fair to counsel to say that they may have been misled by some of the language used in *Modern Woodmen v. Craiger* (Sup.) 92 N. E. 113, decided since the opinion herein was filed; and also in *City of Indianapolis v. Keeley*, 167 Ind. 517, 79 N. E. 499; *Evansville R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612. In the opinions the presumption of law, with inferences of fact, seems to have been confused and this evidently was caused by the term "presumption of fact."

The language of these cases must be considered in connection with the principles above stated, and the long-continued course of decisions by the Supreme and Appellate Courts has so clearly stated the correct effect of legal presumptions in a multitude of cases, too many to cite. See *Burns' Indiana Digest*, Appellate Procedure, 75; *Id.*, Insane Persons, 1165; *Id.*, Instructions to Jury, 1186; *Id.*, Street Highway Crossings, 1295; *Id.*, Negligence, 1921; *Id.*, Injury to Passengers, 397."

We adhere to the opinion heretofore rendered herein, and the petition is therefore overruled.

(46 Ind. App. 677)

KUHN et al. v. BOWMAN. (No. 6,861.)

(Appellate Court of Indiana, Division No. 1.
Jan. 5, 1911.)

1. TRIAL (§ 191*)—INSTRUCTIONS—PROVINCE OF JURY.

In civil cases, the jury takes the law from the court, but the facts are for the jury alone, and therefore an instruction which invades the province of the jury, or assumes a controverted fact or declares it to be established, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 420; Dec. Dig. § 191.*]

2. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

In an action to recover the market price of 1,402 bushels and 16 pounds of oats, defendants' counterclaim alleged a contract with plaintiff for the purchase of 1,000 bushels of oats at a stated price, and also a contract with plaintiff's lessor, plaintiff renting a farm on shares, for the purchase of a quantity of oats, that half of the amount delivered by plaintiff as alleged was to apply on his contract and half on the lessor's contract, and alleged damages from plaintiff's failure to comply with his contract. The court instructed that a lessor may relinquish his lien on the lessee's grain, and thereby enable the lessee to sell his grain, and that, if the jury found for plaintiff, they should find that 1,000 bushels of the oats delivered by plaintiff were delivered under the contract alleged to have been made by him, and that for the balance he should be allowed the market price when delivered. The jury were also fully instructed as to the issues, and there was no conflicting evidence as to any material fact. Held, as the record affirmatively shows that the cause was fairly tried and the verdict for plaintiff was right on the evidence, defendants were not harmed by the direction that, if they found

for plaintiff, to find that 1,000 bushels of oats were delivered under the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

Appeal from Circuit Court, Benton County; James T. Sanderson, Judge.

Action by William Bowman against Paul Kuhn and others. Judgment for plaintiff and defendants appeal. Affirmed.

Lamb, Beasley & Sawyer and Elmore Barce, for appellants. Fraser & Isham, for appellee.

MYERS, C. J. This action was brought by the appellee against the appellants to recover the value of a certain quantity of oats alleged to have been sold and delivered by him to appellants. A complaint in one paragraph, answered by a general denial, a counterclaim in two paragraphs, and a reply in denial formed the issues submitted to a jury, resulting in a verdict followed by a judgment against the appellants, and in favor of appellee. Appellants' motion for a new trial was overruled, and this ruling is the only error here presented.

It appears from the complaint that the appellants were warehousemen, and that appellee on or about August 28, 1907, sold and delivered to them at their elevator in Free-land Park, and at their special instance and request 1,402 bushels and 16 pounds of oats, of the value of 45 cents a bushel, and of the aggregate value of \$633, whereby the appellants became and are now indebted to the appellee in the sum stated, together with interest thereon, etc.

Appellants' first paragraph of counterclaim in substance averred that on July 26, 1907, by a certain parol contract, appellee sold to the appellants 1,000 bushels of oats for the contract price of 34 cents per bushel, delivered at appellants' elevator within 60 days from that date; that appellants promised to pay the appellee \$340 on the delivery of the oats aforesaid; that thereafter the appellants were at all times and are now ready and willing to perform the conditions of said contract by them to be performed, but that appellee, disregarding his said contract, only delivered 701 bushels and 8 pounds of said oats, and sold the remainder of said 1,000 bushels to other persons; that at the time of the delivery of said oats and continuously thereafter the market price of the same was 45 to 49 cents per bushel; that, by reason of appellee's failure to deliver said remaining 300 bushels under said contract, appellants have lost from 11 to 15 cents per bushel, to their damage in the sum of \$50.

The second paragraph of counterclaim, in addition to the facts averred in the first paragraph, avers that appellee during the season of 1907 was a tenant of one Jane Hawkins, and as such tenant raised about

2,600 bushels of oats, one-half of which he was to pay as rental to said Hawkins. Facts are also averred purporting to show a contract between said Hawkins and these appellants, whereby the former sold to the latter 22,000 bushels of oats, and their readiness and willingness to comply with that contract; that said Hawkins failed to comply with her part of said contract. It is further averred, in effect, that the oats so delivered by appellee were upon account of both contracts—that is to say, 701 bushels and 8 pounds was delivered upon the contract of appellee—and the same number of bushels upon the contract of said Hawkins, that appellee refused to deliver to the appellants the remainder of the oats called for in his contract with them, to their damage.

The only reason here assigned in support of the motion for a new trial is that the court erred in giving to the jury upon its own motion instruction No. 1, which reads as follows: "I instruct you gentlemen that, while the law gives the landlord a lien on the crop raised by a tenant on the land of the landlord, the landlord has a right to relinquish the lien and discharge the grain from the lien in favor of the tenant, and, when so released by the landlord, the tenant has a perfect right to deliver and sell said grain in his own name, and is entitled to collect from the purchaser the proceeds therefor; and in this case, if you find for the plaintiff, you should find that 1,000 bushels of the oats in question was sold at and for the agreed price of 34 cents per bushel, and that the balance of 402 bushels and 16 pounds, you should find for the plaintiff, and allow him what the evidence showed the price of oats to be at the time the oats were delivered to the defendants." Two objections are urged against this instruction: First, that it assumed the existence of a fact in controversy upon which the evidence is conflicting; second, that it directs a verdict upon oral testimony in favor of a party having the burden of the issue.

It must be conceded that an instruction which invades the province of the jury, or assumes or declares a controverted fact or facts to be established, is erroneous. *Southern R. Co. v. Limback*, 172 Ind. 89, 85 N. E. 354; *Manion v. Lake Erie, etc., R. Co.*, 40 Ind. App. 569, 80 N. E. 166; *Sasse v. Rogers*, 40 Ind. App. 197, 81 N. E. 590. This doctrine rests upon the theory that in civil cases the jury takes the law from the court, but the facts are for the jury alone. *Siebs v. Hellman Machine Works*, 38 Ind. App. 37, 77 N. E. 300. It must also be conceded that reversible error does not necessarily follow because an instruction independent of all others appears to be erroneous, for the law is well settled in this jurisdiction that all instructions given the jury must be consid-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'y Indexes

ered together, and if, after so considering them, or if the record affirmatively shows that the challenged instruction, although incorrect, could not have misled the jury, it will be regarded as harmless. *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422; *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Morgan v. Hoadley*, 156 Ind. 320, 59 N. E. 935; *Indianapolis Street R. Co. v. Schomberg*, 164 Ind. 111, 72 N. E. 1041; *Stuck v. Yates*, 30 Ind. App. 441, 66 N. E. 177; *Bicknese v. Brandl*, 91 N. E. 41; *Morgantown Mfg. Co. v. Hicks*, 92 N. E. 199.

In the case at bar a number of instructions were given to the jury. They were instructed fully as to the issues. They were told: That by the complaint and denial they should determine whether the plaintiff delivered "to the defendants oats, and, if so, how many." "The value of such oats so far as affected by the contract as to price, and the value of any delivered outside of the contract at the market price." "Were the oats before the commencement of this action fully discharged from all claims of the landlord?" That the burden was on the plaintiff (appellee) to sustain each allegation of his complaint by a preponderance of the evidence. That they were the sole judges of the evidence. That he must not only prove the amount of oats he delivered, but that his recovery was limited to the amount delivered on his own behalf. That he must prove their value and price, whether determined by contract or otherwise. That the landowner and tenant, where the rental is a portion of the crop raised, are tenants in common of the crop until a division is made. That if no division of the oats had been made at the time of the delivery of the same to the appellants, and each owned an undivided one-half, then appellee only delivered 701 bushels and 8 pounds on his contract, and that appellants would be entitled to have damages for his failure to deliver the difference between 1,000 bushels and the amount he thus delivered. That a delivery of the oats by the appellee to the appellants would in no wise be a delivery of any part to the landlord, or on account of the landlord, without a direction on her part to that effect, and if before this action was commenced the landlord refused to consider any part of the oats so delivered as her property, and so notified the appellants, and informed them that she waived all liens and authorized them to pay the appellee, the plaintiff would be entitled to recover, unless the defendants proved "one or more paragraphs of their affirmative answers," and, "if you further find that there was a contract price of 34 cents per bushel for 1,000 bushel of said oats, the plaintiff is entitled to recover this contract price for 1,000 bushels, and, in addition thereto, the market value per bushel on the day of delivery for the other 402 bushels and 16 pounds."

Looking to the evidence, there is prac-

tically no dispute as to any material fact. Both parties agree that appellee delivered to the appellants 1,402 bushels and 16 pounds of oats. The "grain checks" issued by the appellants to the appellee also show that fact. It is true that appellants' representative testified that only 701 bushels and 8 pounds was delivered upon appellee's contract, but immediately following this answer an objection to the answer was made and sustained, and, while the objection came too late, we think it quite clear from the record that the answer was given, and the jury understood that it had reference to the question whether or not the landlord owned one-half of the oats in question. That appellee sold to the appellants 1,000 bushels of oats at 34 cents per bushel is undisputed, nor is the fact disputed that, before the commencement of this action, appellee's landlord notified appellants that she had no claim or lien on any of the oats delivered to them by appellee. There is no evidence that any part of the oats so delivered was on account of the contract between appellants and appellee's landlord. The real contested question in this case was: Did appellee's landlord have any interest in the oats in question at the time this suit was commenced? This question settled in appellee's favor, and the contract between appellee and appellants for the sale and purchase of the oats being established, the law applicable to the case was correctly stated in the questioned instruction with reference to appellee's right of recovery. By reference to the complaint, it will be seen that appellee sought to collect 45 cents a bushel for all of the oats he delivered to the appellants, and made no reference to any contract for any part of them at a less price. The contract feature of the case was brought into it by the appellants, and, as all the evidence shows that the oats at the time of delivery were worth at least 39 or 40 cents per bushel, the instruction might be regarded as favorable to the appellants, as it limited appellee's recovery to the contract price for the 1,000 bushels instead of the market price. While we do not commend that part of the instruction, "And in this case, if you find for the plaintiff, you should find that 1,000 bushels of the oats in question was sold at and for the agreed price," etc., yet under all the facts in this particular case we feel safe in saying that the appellants were not harmed by it, and that the record affirmatively shows that the merits of this cause were fairly tried and determined in the court below, and that the verdict of the jury was right upon the evidence. *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 906; *Indianapolis Street R. Co. v. Schomberg*, supra; *Terre Haute, etc., R. Co. v. Salmon*, 34 Ind. App. 564, 73 N. E. 268; *Wampler v. House*, 30 Ind. App. 513, 66 N. E. 500.

Judgment affirmed.

(50 Ind. App. 1)

HASKELL v. GARDNER. (No. 7,709.)
(Appellate Court of Indiana, Division No. 2.
Dec. 30, 1910.)

1. CORPORATIONS (§ 562*)—RECEIVERSHIP—ACTIONS BY RECEIVER—ACTIONS ON STOCK SUBSCRIPTION.

Since the receiver of a corporation represents all of the creditors upon its insolvency and his appointment, he may sue on unpaid stock subscriptions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.*]

2. CORPORATIONS (§ 562*)—RECEIVERSHIP—RIGHTS OF RECEIVER.

The receiver of a corporation may assert only such rights as belonged to the corporation before insolvency, and hence as a rule cannot compel payment of a subscription to stock which could not have been enforced by the corporation at the time of his appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2265-2279; Dec. Dig. § 562.*]

3. CORPORATIONS (§ 88*)—STOCK—PAYMENT—PAYMENT IN PROPERTY.

Subscriptions to the capital stock of a corporation need not be paid for in cash in absence of contrary statute, so that a payment for such stock in property which was necessary in the corporate business was sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 338-345; Dec. Dig. § 88.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS INSTRUCTIONS.

Where, in an action on a subscription to corporate stock, there was evidence sustaining the plea of payment, any error in an instruction as to what constituted a sufficient payment of a subscription was harmless to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Knox County; O. H. Cobb, Judge.

Action by Lamar Haskell, receiver, against George E. Gardner. From a judgment for defendant, plaintiff appeals. Affirmed.

The ninth instruction referred to in the opinion was as to what constituted a sufficient payment of a subscription to corporate stock.

W. A. Cullop, George W. Shaw, R. P. Cary, and Frank M. Rogers, for appellant. Willoughby & House, for appellee.

COMSTOCK, J. Appellant instituted this suit as receiver of Taylor & Gardner, a corporation, to recover on a subscription of capital stock subscribed by appellee. Issues were formed by a complaint, setting up the subscription, the appointment of appellant as receiver and his authority to sue and by an answer in three paragraphs—the first, a general denial, the second, a plea of payment, and, third, a set-off for various items consisting of services rendered the company, goods sold, and delivered to it—and claims paid to its creditors and reply in general denial to the second and third paragraphs of answer. A trial by jury resulted in a verdict for ap-

pellee. Over appellant's motion for a new trial judgment was rendered that he take nothing and for costs. The errors relied upon for reversal are that the verdict was not sustained by sufficient evidence, and is contrary to law, and that the court erred in giving instruction No. 9 of its own motion.

It is claimed by appellant that appellee had no right of set-off as to the various items of indebtedness claimed to be owing him by the corporation prior to the appointment of the receiver; that the stock subscription of the appellee was a part of the assets of the insolvent corporation, and constituted a trust fund in the hands of the appellant as receiver, in which fund each creditor of the corporation was entitled to receive a ratable share; and that the appellee as one of the creditors was not entitled to have his claims preferred by set-off as the court charged the jury, and that the plea of payment was not supported by the evidence. "The capital stock of a corporation is regarded, not alone as a fund for the transaction of corporate business, but also as a trust fund for the benefit of creditors. It is an essential part of this doctrine that money agreed to be paid into the treasury on account of shares is a part of the fund. 10 Cyc. 658. Upon the insolvency of a corporation and the appointment of a receiver, it is clear, in view of the fact that the capital stock constituted an asset of the corporation, and that the receiver represents all of the creditors, that he may be authorized to sue on account of unpaid stock subscriptions. *Big Creek Stone Co. v. Seward* (1896) 144 Ind. 205 [42 N. E. 464, 43 N. E. 5]; *Gainey v. Gilson* (1897) 149 Ind. 58 [48 N. E. 633]." For the purposes of litigation, the receiver takes only the rights of the corporation, such as could be asserted in its own name. "Generally speaking, a receiver cannot compel payment of a subscription that the corporation could not have enforced at the time of his appointment." *High, Receivers* (3d Ed.) § 315; *Watson, Insolvent Corporations*, § 235; 3 *Clark & Marshall, Corporations*, § 790a; *Gainey v. Gilson*, 149 Ind. 58, 48 N. E. 633; *Marion Trust Co. v. Bligh*, 79 N. E. 415, and cases cited. But upon any view which may be taken of the rights of the receiver there can be no recovery in the case at bar if the stock subscribed for has been paid as pleaded. And upon the question of payment only evidence favorable to appellee will be considered together with the reasonable inferences therefrom.

It is insisted by appellant that the resolution of the board of directors was simply to purchase the property of Taylor & Gardner at a valuation of \$7,200, and not that the property be accepted in payment of the aggregate of \$7,200 stock subscription by them. The entry in the minute book of the corporation with reference to this subject, and

which was introduced as a part of the evidence, is as follows:

"It was moved by Mr. French and seconded by Mr. Rodgers and unanimously carried, that the following equipment be purchased from the firm of Taylor & Gardner at and for the price of \$7,200, it appearing to the board that said price is a fair and reasonable one for the articles enumerated and that the purchase of them is necessary in the conduct of the corporate business:

Black car	\$1,650 00
Gray car	975 00
Wagon	300 00
Call Buggy	275 00
Ambulance	880 00
Horses	1,000 00
Harness, etc.	162 00
Mdse.	963 00
Furniture and Fixtures.....	895 00
	<hr/>
	\$7,200 00

"There being no further business the directors' meeting adjourned."

The property received in payment was necessary in the business of the corporation, and thus the stock subscribed for was paid "in money's worth," and the shares were given the status of paid-up stock. George E. Gardner testified that this equipment was turned over to the corporation in payment of the stock subscription. The evidence shows that this property was purchased by Taylor & Gardner and used by them and sold to the corporation after it was formed; that with the exception of the call buggy all was delivered to the corporation. "Whatever may have been formerly held, it is now established that subscriptions to capital stock need not in the absence of statutory provisions requiring it be paid for in cash." *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20. The claim made by counsel for appellant that this property was incumbered by the equitable lien of the vendor we do not find to be supported by the evidence. There is evidence that the appellee made payment in money and other property to said corporation for which he was entitled to credit. An itemized statement of these amounts need not be stated.

There being evidence to sustain the plea of payment, the instruction complained of, even if erroneous, which we do not concede, was harmless.

Judgment affirmed.

(46 Ind. App. 880)

BENTLE et al. v. ULAY et al. (No. 6,947.)
(Appellate Court of Indiana, Division No. 2,
Dec. 30, 1910.)

COURTS (§ 220*)—COURTS OF APPELLATE JURISDICTION—GROUNDS—INDIANA SUPREME COURT—TRANSFER OF CASES FROM APPELLATE COURT.

Where the Appellate Court is convinced that a decision of the Supreme Court is erroneous, they must under the direct provisions of the statute, transfer the case to the Supreme

Court with recommendations that it be overruled, instead of following it as a rule of decision.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 220.*]

Appeal from Superior Court, Vanderburgh County; A. Gilchrist, Judge.

Action between Jerome D. Ulay and others and William Bentle, Sr., and others. From a judgment for Jerome D. Ulay and others, William Bentle, Sr., and others appeal. Transferred to Supreme Court, with recommendations.

Wm. Reister, W. O. Caldwell, and Geo. W. Shaw, for appellants. John M. Gault, J. E. Williamson, W. H. Hill, H. D. Henkle, and C. B. Kessinger, for appellees.

ROBY, C. J. The questions involved in this appeal have been discussed at some extent by both the Appellate and Supreme Courts. *Ramsey v. Hicks*, 44 Ind. App. 490, 87 N. E. 1091, 89 N. E. 597; *Ramsey v. Hicks*, 174 Ind. —, 91 N. E. 844.

Ordinarily the conclusion announced by the Supreme Court would be followed at this time without remark, but the principles involved are so important and the last decision so revolutionary that in accordance with a mandatory legislative requirement we must transfer the case at bar to the Supreme Court, with the recommendation that its decision in the case of *Ramsey* be overruled.

The absolute separation of church and state is a fundamental principle. Religious liberty is guaranteed to the individual. There is no constitutional provision safeguarding religious denominations except through the persons composing them, and the absolute freedom of the individual to believe and worship as his conscience dictates is amply declared. No coercion of religious belief can lawfully exist. It matters not whether the means employed be torture to the body, deprivation of property, or other force, it is unlawful; nor does it matter by whom attempted, the law will not tolerate it; a religious denomination has no more right to coerce its members, or any of them, than one individual has to coerce another.

The opinion of the Supreme Court in *Ramsey v. Hicks*, supra, proceeds upon the theory that the state discharges its full duty by keeping "hands off." It would be exactly the same thing to hold that the state does its full duty if it does not itself despoil its subjects. The adoption of such a standard would leave every individual at the mercy of business or other associates. It is, however, the duty of the state not only to abstain from wrongdoing itself, but to protect each citizen from the depredation of others; so long as the difference is one of mere belief it is passive, but the moment that any combination or society, under the pretext of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
*Transferred to Supreme Court, 94 N. E. 759.

religion or religious observance, undertakes to imprison one of its members or deprive him of his property or of his share in or use of the common property, then the state becomes actively interested.

The opinion in the case under examination contains the statement that "no personal or pecuniary rights are involved in this controversy." It would be difficult for the members of the Cumberland Church to believe it. In the same connection it is said that the action taken by the general assembly "was purely ecclesiastical, and its effect upon the church property was resultant and consequential."

It is conceded that the effect was resultant. It was indeed necessarily resultant and could not fail to transfer the property of the Cumberland Church to the Presbyterian Church, U. S. A., and when the ownership to real estate is in question and such action with its resultant consequence is relied upon as a link in a chain of title, it becomes a matter for the civil courts exactly as was the case in *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838, and in *White Lick, etc., v. White Lick, etc.*, 89 Ind. 136, and in all other cases where property rights are at stake. That the question of doctrine will be determined by the civil courts when necessary to the settlement of property rights has been too often declared in this state to be now denied. See authorities cited in *Ramsey v. Hicks*, 44 Ind. App. 490, 512 to 519, 87 N. E. 1091, 89 N. E. 597. To hold otherwise would be to permit persons to be deprived of property without due process of law, and hence in violation of both state and federal Constitutions.

It was necessary to the decision in *Ramsey v. Hicks*, supra, to in terms overrule *Hatfield v. De Long*, 156 Ind. 207, 59 N. E. 483, 51 L. R. A. 751, 83 Am. St. Rep. 194. The opinion in the case overruled was prepared by a judge distinguished not only for his intellectual attainments, but for his integrity and regard for judicial properties. Three present members of the Supreme Court participated in that decision.

The decision last made is also in conflict with the following cases. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; *White Lick, etc., v. White Lick, etc.*, 89 Ind. 136; *Gaff et al. v. Greer et al.*, 88 Ind. 122, 45 Am. Rep. 449. These cases are not distinguishable upon the point in issue. They are cases in which a majority in a church possessing a congregational form of government undertook to change doctrine and hold common property over the objection of a minority, and the law was declared to be that, "the title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, prin-

ciples, and practices, which were accepted and adopted by the church before the division took place, constitute the standard for determining which of the contesting parties is in the right." An attempt is made to distinguish these cases, based upon the fact that the Cumberland Church has a system of judicature.

The case of *Watson v. Jones*, 80 U. S. 679, 20 L. Ed. 668, is a leading case upon the subject and contains a classification which has been generally adopted. An item thereof is as follows: "The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization, in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization." While this case is not cited in the opinion under consideration, those cases which are cited follow and depend upon it. Justice Miller said in the course of his opinion, that "the case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod and which appeals to the courts to determine the right to the use of the property so acquired."

It thus appears that *Watson v. Jones* does not authorize a majority to change doctrine and appropriate common property over the objection of a minority. It held that a schism which divided a congregation and had been appealed to a church court and judicially determined there would not be re-investigated by the civil courts, but that they would adopt the decision of the church court as final. Doctrine can only be changed and common property held by conforming to the strict law of the church, whatever its form of government.

The question involved in the *Ramsey Case* and in the case at bar is, whether the action of the majority of the Cumberland Church was in accordance with the law of that church. It is claimed by the Presbyterian Church, U. S. A., that such action was legal, and that it thereby acquired the property in controversy. It says that the union was legal, because the church court held it was legal, and that such decision is final. It denies the power of the state courts to go behind the action of the majority of the general assembly of the Cumberland Church, and the holding of the Supreme Court at this time sustains its position.

It has been heretofore pointed out by this court that no appeal was ever taken to the general assembly, for the reason that the schism arose in that body and that the doctrine of *Watson v. Jones*, supra, and cases following it, does not apply, there having never been either a judicial hearing or a judgment. If this is true, the appellants'

title fails, as would that of a majority of a congregational church attempting to change the doctrine and transfer property by force of numbers. Had a controversy arisen in the Cumberland Church of Monroe City, and had it been duly submitted to the general assembly, acting in its judicial capacity, and been by it determined, then the doctrine of *Watson v. Jones*, supra, would apply and the cases following it would be in point; but even then the judgment rendered would be before the state court, as any other judgment presented in evidence would be, and, of course, subject to the same tests. If the action of the general assembly is to have the effect of a judgment, it necessarily follows that it is to be received and scrutinized as the judgment of any other court.

In *Hatfield v. De Long*, supra, it was held that a member of a church who had been tried by a church court might attack its judgment for fraud in selecting its members. This was but an application of the rule that fraud vitiates judgments. "Courts of equity have inherent power to annul judgments and decrees obtained by any means amounting to fraud, if it is made to appear that the successful party to the suit did something, or caused it to be done, which prevented a real contest in the trial or hearing of the case for a new hearing upon its merits." *Pepin v. Lautman*, 28 Ind. App. 75, 62 N. E. 60; *Gorman v. Johnston*, 81 N. E. 971; *Nealis, Adm'r v. Dicks*, 72 Ind. 374.

The following excerpt from *Broom's Legal Maxims* is pertinent: "But although the judgment of a court of competent jurisdiction upon the same matter will, in general, be conclusive between the same parties, such a judgment may nevertheless be set aside on the ground of mistake, or may be impeached on the ground of fraud, for fraud, in the language of *De Grey*, 'is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice.' Lord Coke says, 'It avoids all judicial acts, ecclesiastical or temporal.' And in a modern case before the House of Lords, it was observed that the validity of a decree of a court of competent jurisdiction upon parties legally before it may be questioned, on the ground that 'it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit, or, if pronounced in a real and substantial suit, between parties who were really not in contest with each other.'" *Star* pages 341 and 342.

Ramsey v. Hicks, 174 Ind. —, 91 N. E. 344, creates an exception to this rule. Under it fraud practiced by a church court has such virtue that it not only becomes the law of the church, but the law of the state as well, leaving to the state courts no option except to secure the fruits of his fraud to the wrongdoer. It is respectfully submitted that *Hatfield v. De Long*, supra, should be rehabilitated and the later case in conflict with it be in turn overruled.

If the proceedings by which it is claimed that the property of the Cumberland Church was transferred to the Presbyterian Church were in accordance with the law of the former church, then they were effective. If they were legal, it is because the decision of the general assembly had made them so and the state court must, in determining whether the law of the church was complied with, determine whether the assembly had jurisdiction and whether a valid judgment was rendered by it. This is the point in issue. *Ramsey v. Hicks* holds that the taking of action by a majority of the general assembly forecloses inquiry. This is exactly as though the action of a majority in a congregational church was made final. The dispute in the general assembly of the Cumberland Church was never investigated by any court, ecclesiastical or otherwise, and the majority of the general assembly were disqualified from judicially determining the merit of the controversy. A faction of the Cumberland assembly desired to unite with the Presbyterian Church, U. S. A. That faction proceeded to institute a proceeding to bring about that end. Such proceeding had its inception in said general assembly, and not in the Monroe City congregation. If this body had power to both institute and decide, to be advocate and judge, then the ancient maxim must be obsolete. The maxim is, "*Nemo debet esse iudex in propria causa*"—no one man may be a judge in his own case. *Board, etc., v. Heaston*, 144 Ind. 583, 591, 41 N. E. 457, 459, 43 N. E. 651, 55 Am. St. Rep. 192.

"A leading case in illustration of this maxim is *Dimes v. The Proprietors of the Grand Junction Canal* where the facts were as under: The canal company filed a bill in equity against a landowner in a matter touching their interest as copyholders in certain land. The suit was heard before the Vice Chancellor, who granted the relief sought by the company, and the Lord Chancellor, who was a shareholder in the company, this fact being unknown to the defendant in the suit, affirmed the order of the Vice Chancellor. It was held on appeal to the House that the decree of the Lord Chancellor was under the circumstances voidable and ought to be reversed. Lord Campbell, C. J., observing: 'It is of the last importance that the maxim that "no man is to be judge in his own case" should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. * * * We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals

to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence." Broom's Legal Maxims, star page 118.

The members of neither faction were qualified to adjudicate the controversy in which they were actors.

As a matter of fact nothing in the nature of a trial or adjudication was had. It has never been asserted that the doctrine of the Presbyterian Church, U. S. A., has been changed to conform to that of the Cumberland Church, but the majority declared that it was near enough, and thereupon the meeting "broke up in a row." There was no vestige of judicial deliberation and the first opportunity offered for such a hearing is in the state court. But suppose that the general assembly was acting as a court. The effect of the proposed union would be to vest a large amount of property in the Presbyterian Church, U. S. A. Its holdings would be thereby greatly increased and its resources enlarged. Would a member of that church be competent to sit as a juror in a trial involving the legality of the union? No judge would refuse to sustain a challenge for cause based upon such fact, and a motion for a new trial based upon such disqualification, undisclosed, would never be denied. It cannot be that the standard by which the competency of a juror is measured is too high for use when the impartiality of a judge is to be settled. The disqualification does not cease with members of the Presbyterian Church, U. S. A. No one will pretend that they possess the requisite impartiality. It extends to the majority members of the Cumberland general assembly. Their interests and those of the Presbyterian Church are identical. The merger, so far as religious attitude is concerned, is as to them complete. All that remains is a question of property, and as to that they are not and never have been impartial. The disqualification that prevents them from sitting as judges or jurors in their own cases, when disregarded, amounts to fraud in the selection of the court such as was held in the Hatfield Case to invalidate the judgment. Ramsey v. Hicks, 174 Ind. —, 91 N. E. 344, as it stands is authority for the propositions that members of a church court may institute a proceeding and decide it in their own favor, and that fraud does not invalidate judgments. Under its doctrine it would be lawful and proper for a trustee and member of the Presbyterian Church, U. S. A., who happened to be a judge of the Circuit, Appellate, or Supreme Courts to sit in, hear, and decide a proceeding by which the organization whose financial and other interests were in his keeping would be reinforced and enriched. Such a judgment is not "according to law."

But it is said in the opinion that "no man can hope to receive pecuniary profit from his religious membership." He would have read history to no avail who, because of this some-

what doubtful fact, should imagine that religious prejudice is not sufficiently powerful to sway its possessor. The errors pointed out are elemental and can only be cured by overruling the case. Minor inaccuracies have therefore been ignored.

There is, however, one proposition enunciated by the opinion which is too serious to be so passed. It is as follows: "It is not accurate or correct to say that an association for religious worship is like an ordinary fraternal or beneficial society or social club, and its membership and affairs to be determined by the same legal principles, since the one is founded upon a distinctive conception of the relation and duty of man to his Maker and the other is concerned only with the relation of man to his fellows." Ramsey v. Hicks, 174 Ind. —, 91 N. E. 344.

The true rule was stated by Justice Miller in Watson v. Jones, supra: "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us." Page 714 of 80 U. S. (20 L. Ed. 666). The above quotation is taken from a case involving a church controversy.

In the Supreme Lodge, etc., v. Knight, 117 Ind. 489, 497, 20 N. E. 479, 483 (3 L. R. A. 409), a fraternal society case, Judge Elliott said: "The principle which rules here is strictly analogous to those which prevail in controversy between the officers and members of religious organizations."

It would seem that the rule is settled by these authorities. If there is a reason for disregarding them, it is to be found in the language above quoted from the Supreme Court opinion in Ramsey v. Hicks. The fact that fraternal societies are concerned "with the relation of man to his fellows" is surely not good ground for departure or distinction. The church that is not so concerned is not Christian.

The statement that fraternal societies are "concerned only" with such relation purports to be a statement of facts. It is not deducible from anything contained in the record but is an unwarranted assumption. There are many associations. The members of each one may know what the scope of the common effort is, but how can any one man set limits upon them all? As a matter of common report, it might truthfully be said that some,

at least, of these societies have a conception of the duty of man to God which is as lofty and pure as that found in the Westminster Creed. If there were such a difference between church and fraternal society as asserted, it would still not be a basis for the application of a different rule of law to them. The Mormon Church is founded upon "a distinctive conception of the relation and duty of man to his Maker." So is the religion of Mohammed, but can it be possible that this fact would entitle them to any greater privileges in the courts than are accorded to Odd Fellows, Pythians, or Masons? This would be the necessary effect of the new rule, unless "the distinctive conception" to be operative must be one that accords with the idea or belief of those who administer the law, and when thus qualified it is the rule of the fourteenth century, and out of place in Indiana.

In transferring this case, with the recommendations above stated, it may not be improper to say that if some of the language of the transferring opinion seems harsh, it is because the facts considered are harsh facts. The transfer is made with the utmost respect, and with confidence that the court to which the record goes will refuse to permit the doctrine of the Ramsey Case to longer have the sanction of its great name.

Transferred to the Supreme Court.

COMSTOCK, HADLEY, WATSON, RABB, and MYERS, JJ., concur.

(49 Ind. App. 613)

INDIANAPOLIS TELEPHONE CO. v.
SPROUL. (No. 7,119.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 30, 1910.)

1. MASTER AND SERVANT (§ 258*)—MASTER'S
LIABILITY—ACTIONS—PLEADING—SUFFI-
CIENCY—STATUTE.

In view of Burns' Ann. St. 1908, § 343, which provides that a complaint shall contain a statement of the facts constituting the cause of action in plain and concise language, etc., so as to enable a person with common understanding to know what is intended, and section 385, which requires a pleading to be liberally construed with a view to substantial justice, a complaint which charges that because of the negligence of defendant in maintaining a certain cross-arm, etc., which broke and threw plaintiff to the ground and caused plaintiff's injuries, and that, by reason of its being maintained in its exposed position for a great number of years, it had become defective and rotten, etc., whereby plaintiff was injured, is sufficient on the question of proximate cause; the averment that the negligence specified caused the injury complained of being sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

2. EVIDENCE (§ 6*)—JUDICIAL NOTICE—GRAVITATION.

The court takes judicial notice of the law of gravitation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. MASTER AND SERVANT (§ 208*)—MASTER'S
LIABILITY—RISKS ASSUMED—MASTER'S NE-
GLIGENCE.

Where a telephone lineman was injured through the breaking of a defective cross-arm, there was no assumption of risk on his part, as an incident of the business, for in this case the defective cross-arm was maintained because of the master's negligence, the risk of which a servant does not assume.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 551; Dec. Dig. § 208.*]

4. MASTER AND SERVANT (§ 155*)—MASTER'S
LIABILITY—TOOLS AND APPLIANCES—SAFE
PLACE TO WORK.

A servant is entitled to remuneration for injuries occurring through the negligence of a master in failing to point out latent defects, etc., in the place which he provided for the servant to work, or in the tools supplied.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 810; Dec. Dig. § 155.*]

Appeal from Circuit Court, Hancock County; Robert L. Mason, Judge.

Action by William E. Sproul against the Indianapolis Telephone Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elmer E. Stevenson, L. O. Walker, and Felt & Binford, for appellant. James L. Mitchell, Elam & Fessler, and Cook & Cook, for appellee.

ROBY, J. Action by appellee. Complaint in one paragraph. Demurrer for want of facts overruled. Answer in general denial. Trial by jury. Verdict \$2,500, with answer to 97 interrogatories. Motions for judgment on such answers and for a new trial were respectively overruled. Judgment on verdict.

The complaint covers four closely printed pages of appellant's brief. Its substance is that appellee was on January 23, 1906, in the employment of the appellant as a cableman; that it was his duty as ordered to repair breaks in cables of a telephone system owned and operated by it in Indianapolis, and on said day he climbed a pole 40 or 50 feet high at its order for the purpose of repairing a break in the cable, and that while so engaged a cross-arm upon which his supports depended "broke without warning, and the plaintiff was thrown from said platform to the ground, a distance of about 40 feet." Injuries caused by said fall are detailed. The charge of negligence is as follows: "The said cross-arm whose breaking in manner as before herein detailed threw the plaintiff to the ground, and caused all plaintiff's injuries; that said cross-arm was a knotty and defective piece of timber, and, by reason of its being maintained in its exposed position for a great number of years, without properly being protected or having been replaced by new and perfect timber, had become further weakened and rotted, and was unfit for use for the purposes for which it was used by the defendants; that that portion of said telephone system wherein was located the pole from

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
²Rehearing denied. Transfer to Supreme Court denied.

which the plaintiff fell, as herein stated, had been maintained for so many years since its first erection that many of the cross-arms and poles thereon had become rotted and weakened and unfit for service, and numerous reports had been made to the foreman of said defendant companies and to those of each of them, and to the superintendent of construction of said companies and each of them that the poles and cross-arms upon said 'lead' or portion of said system were rotted and dangerous, all of which was known to the defendant companies and to each of them, but was unknown to the plaintiff."

The first question presented challenges the action of the court in overruling the demurrer to the complaint. It is therefore pertinent to review the legislative enactments in the light of which the question must be considered. The Code requires that a complaint contain, "a statement of the facts constituting the cause of action in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." Section 343, Burns' Ann. St. 1908. This is the law of the land. It furnishes the test by which the averments of every complaint are to be judged. No court has lawful power to set up a different standard. Exceptional cases may no doubt be found in our reports in which pleadings are held defective for form of statement which seem to be in conflict with the plain and simple provision above quoted; but they are not to be understood as having modified or changed the statute, nor as defining the standard of intelligence of an average man. Cases may indeed be found which are valuable only as illustrating the quality of intelligence possessed by others than average men. There is another statute that cannot be properly overlooked. It is as follows: "In the construction of a pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment." Section 385, Burns' Ann. St. 1908. The right of the defendant to file a demurrer is conferred by statute. The disposition to be made of it is also fixed by statute which is as follows: "The judgment upon overruling a demurrer shall be that the party shall plead over; and the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined. If a party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default." Section 360, Burns' Ann. St. 1908. It is also

provided that "the court may, at any time in its discretion, and upon such terms as may be deemed proper for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in name, description, or legal effect, or in any other respect, to be corrected; any material allegation to be inserted, struck out, or modified—to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense." Section 405, Burns' Ann. St. 1908. And again: "No judgment shall be stayed or reversed in whole or in part by the Supreme Court, for any defect in form, variance, or imperfections contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Section 700, Burns' Ann. St. 1908.

It is not necessary in this case to invoke any of the liberal and just provisions above quoted. Measured by the most hypercritical standard, the pleading is unexceptional. Logically it is subject to criticism because of its prolixity, its particularity of detail, and the setting out of evidentiary facts and matters of common knowledge which do not need to be pleaded, but there is a reasonable excuse therefor. So far as the question of proximate cause is concerned, the averment that the negligence specified caused the injury complained of is sufficient. *Baltimore, etc., Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Chicago, etc., Co. v. Stephenson*, 33 Ind. App. 98, 69 N. E. 270; *Greenwaldt v. Lake Shore, etc.*, 165 Ind. 219, 74 N. E. 1081.

The fact that the cross-arm by which appellee was suspended in the air broke, and that he fell to the ground, leaves nothing to inference. This court takes judicial notice of the law of gravitation. Other objections urged are equally untenable.

The answers to interrogatories are too extended to summarize. They are in accord with the general verdict, and the motion for judgment upon them was not well taken. In its support, as well as in the argument relative to the sufficiency of the evidence to support the verdict, the main insistence is that the appellee assumed the risk of the defects complained of. The real question in the case was as to contributory negligence; but the finding upon that issue cannot now be disturbed. The cross-arm which broke had been in place eight years. It was a second-grade arm, known as a "cull." It had become doty and broke at a knot. It was shown both by the answer to interrogatories and by the evidence that appellee was without knowledge of these defects and conditions. The finding is that he did not see the knot because of the pin in and of the soot and sleet upon it.

It is also shown that an employé complained to appellant's superintendent of the condition of this particular part of the line and "told him he should put new cross-arms on that lead," to which the superintendent replied "that the cross-arms would last a while longer, and we would have to let them go awhile." Appellant knew how long the cross-arms had been in place. It knew what kind of material was in them. It was bound to know that the tendency of wood exposed to weather is to decay. There was no assumption of this risk as an incident to the business, for danger caused by the master's negligence is not assumed. *Barley v. Southern Ind. R. Co.*, 80 Ind. App. 406, 66 N. E. 72; *Benzing v. Steinway*, 101 N. Y. 547, 5 N. E. 449; *Stringham v. Stewart*, 100 N. Y. 516, 3 N. E. 575; *Pantzar v. Tilly Foster, etc.*, 99 N. Y. 368, 2 N. E. 24.

Neither was the risk assumed as an obvious and open one. It is shown both by the answers and evidence to have been caused by a latent or hidden defect, of which appellee had no notice, and which was not discoverable by such inspection as he was called upon to make.

If an employé, reposing confidence, as he has a right to, in the prudence and caution of the employer, relies upon the adequacy of the implements put into his hands to work with, and upon the safety of the place assigned him to work, and sustains injury in consequence of the failure and neglect of the employer to disclose latent defects or perils, which the latter knew, or which he should have known by the exercise of reasonable diligence, the employé is entitled to remuneration for his loss. *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. 302; *Krueger v. Louisville, etc.*, 111 Ind. 51, 11 N. E. 957; *Mitchell v. Robinson*, 80 Ind. 281, 41 Am. Rep. 812; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Indiana, etc., v. Parker*, 100 Ind. 181; *Louisville, etc., v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Pittsburgh, etc., v. Adams*, 105 Ind. 151, 5 N. E. 187; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Stringham v. Stewart, supra*; *Pantzar v. Tilly Foster Iron Works, supra*; *Bean v. Oceanic Steam, etc. (C. C.)* 24 Fed. 124; *Postal Tel. Cable v. Likes*, 225 Ill. 249, 80 N. E. 136.

Those established principles applied to the facts are decisive of the appeal.

Judgment affirmed.

(33 Oh. St. 50)

MERCHANTS' NAT. BANK v. COLE.
(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

1. EVIDENCE (§ 461*)—PAROL EVIDENCE—SURROUNDING CIRCUMSTANCES.

An unlimited guaranty in the absence of words showing that it was intended to be continuing is equivocal, and the surrounding cir-

cumstances may be proven, not to contradict or vary the terms of the writing, but to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

(Additional Syllabus by Editorial Staff.)

2. GUARANTY (§§ 34, 38*)—"UNLIMITED GUARANTY"—"CONTINUING GUARANTY."

An "unlimited guaranty" may be defined as one that is unlimited both as to time and amount, and a "continuing guaranty" is one that is not limited in time or to a particular transaction, or to specific transactions, but is operative until revoked.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 36, 47; Dec. Dig. §§ 34, 38.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1506; vol. 8, p. 7615.]

Error to Circuit Court, Lucas County.

Action by the Merchants' National Bank against Louis M. Cole, administrator of Lucy A. Cole. Judgment for plaintiff was reversed by the circuit court, and it brings error. Affirmed.

Swayne, Hayes, Fuller & Tyler and Brown, Geddes, Schmettau & Williams, for plaintiff in error. Alex. L. Smith and G. W. Kinney, for defendant in error.

SUMMERS, C. J. The Merchants' National Bank of Toledo, Ohio, sued the defendant, Louis M. Cole, as administrator of the estate of Lucy A. Cole, to recover upon the following guaranty: "March 29, 1898. I hereby guarantee the payment of all notes of F. E. & G. H. Cole held by the Merchants' National Bank, also all renewals of same, or any new loans made to either F. E. or G. H. Cole by the said bank. Lucy A. Cole." The answer of the defendant, with other matter, sets up the following: "That said guaranty was given by her for and on account of loans already made, and thereafter to be made, by said bank to said F. E. and G. H. Cole for and on account of work being then done and performed by them in the city of Toledo, Ohio, under contracts with the said city of Toledo, and for no other purpose whatsoever; that, at the time said paper was executed, the said F. E. and G. H. Cole were engaged in the work of paving streets and building sewers in the city of Toledo, under contracts with the said city, and had been so engaged for a long time prior thereto, and were, and had been doing business with said bank, and had borrowed money from said bank to be used in the prosecution of said work, and were at said date indebted to said bank in the sum of thirteen thousand two hundred dollars (\$13,200), as evidenced by their promissory notes, for money so borrowed, and on said day applied to said bank for a further loan, the proceeds to be used in the prosecution of said work, and thereupon the said bank demanded of them that their mother,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the said Lucy A. Cole, should guarantee the payment of said loans, and thereupon said paper was prepared by one of the officers of said bank and taken to said Lucy A. Cole by one of her sons, and signed by her, and it was not intended or contemplated, either by said bank or said Lucy A. Cole, that such guaranty should apply to any loans made by said bank to said F. E. and G. H. Cole, or either of them, other than loans made for and on account of work done under said contracts with the said city of Toledo. The said bank had full knowledge of the character of the work in which the said F. E. and G. H. Cole were engaged, and full knowledge of the place or places where said work was being carried on, and of the purposes for which said money was borrowed and used. The indebtedness from F. E. and G. H. Cole to the bank, existing on March 29, 1898, and all loans made by said bank to said F. E. and G. H. Cole, or either of them, after said date, for or on account of said contracts, or any work performed under said contracts, have all long since been paid in full. About the 1st of January, 1901, the said F. E. and G. H. Cole had substantially completed all of the work they had contracted to do in Toledo under contracts with the said city, and no contracts were ever entered into between them and the said city of Toledo thereafter. All loans made by said bank to said F. E. and G. H. Cole, or either of them, for or on account of any work done in Toledo, or any contracts with the city of Toledo, have been fully paid. In the summer of 1901 the said F. E. and G. H. Cole entered into a contract for the construction of a tunnel, or a section thereof, in Philadelphia, Pa., and in September, 1902, they entered into a contract for tunnel work in Dossett, Tenn. Defendant further says that the bank loaned the said F. E. and G. H. Cole certain sums of money for and on account of said last two above-mentioned contracts, all of which loans were evidenced by promissory notes, and that whatever notes said bank now holds against the said F. E. and G. H. Cole were given for moneys borrowed by them on account of the said Philadelphia and Dossett contracts. The said bank had full knowledge of these contracts and the nature of the work being done under them, and made the loans last above referred to, with express reference to said contracts, and with full knowledge that the money was being borrowed for the purpose of being used in the prosecution of the work under said contracts, and without consultation with or notice to said Lucy A. Cole. All the said notes now held by said bank are dated February 15, 1904, and are all renewal notes, none of them having been given for loans made at the time they were executed, but all given in lieu of prior notes. The last loan made by said bank to said F. E. and G. H. Cole or either of them was made prior to July, 1903. The notes given for the loans now represented by these notes were from time to time renewed, and the times of pay-

ment of the said loans extended by said bank without notice to the said Lucy A. Cole, and without knowledge on her part. No demand was ever made on said Lucy A. Cole for payment of any part of the indebtedness of the said F. E. and G. H. Cole to said bank, nor was any notice ever given her as to the amount or condition of said indebtedness, nor did she ever have any knowledge of any extension of the time or times of payment of any part of said indebtedness, nor did she ever have any knowledge that the said F. E. and G. H. Cole had borrowed any money from said bank for or on account of said Philadelphia or Dossett contracts, or either of them, prior, at least, to October, 1903, and she had no knowledge of the execution of the renewal notes now held by said bank, and hereinbefore referred to." Upon motion that part of the answer was stricken out, and after trial a judgment was entered for the bank. The circuit court reversed the judgment for error in sustaining the motion.

Counsel for the bank contend that this guaranty is an unlimited and continuing guaranty, that it is in no respect equivocal or ambiguous, and that to permit proof of the circumstances set up by the answer would be to permit the written contract to be modified by parol evidence. An unlimited guaranty may be defined as one that is unlimited both as to time and amount, and a continuing guaranty is one that is not limited in time or to a particular transaction or to specific transactions, but is operative until revoked. This guaranty is not limited by its terms, nor is it by its terms continuing. The courts are not in accord as to the rule to be applied in the interpretation of guaranties. In some cases it is held that a guaranty is to be strictly construed in favor of the guarantor; in others that it is to be liberally construed in favor of the creditor. *Hartwell & Richards Co. v. Moss*, 22 R. I. 583, 48 Atl. 941. In this state it is settled that "a guarantor, like a surety, is bound only by the express terms of his contract. The language used is to be understood in its plain and ordinary sense, as read in the light of the surrounding circumstances, the situation of the parties, and the object of the guaranty, and that construction given which most nearly conforms to the intention of the parties. If the language is equally capable of each construction, the one will be adopted which construes it to be limited, and not the one which construes it to be continuing." *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Hall v. Hall*, 32 Ohio St. 184; *Cambria Iron Co. v. Keynes et al.*, 56 Ohio St. 501, 47 N. E. 548.

But counsel contend that the rule adopted in these cases is applicable only when the instrument is equivocal or ambiguous, and that here the fair and natural meaning of the words clearly imports that the guaranty was intended to be continuing. We do not understand that these cases except such in-

struments from the general rule that parol evidence is inadmissible to limit or to enlarge the terms of a written instrument, but that they hold that an unlimited guaranty is equivocal or ambiguous in respect to being continuing, in the absence of words that clearly import such an intention.

In such cases the instrument is to be construed in the light of the surrounding circumstances, but this does not mean, as some cases would seem to indicate, that the written instrument is to be supplanted by a new contract evolved by the court from the parol evidence. Attention should be given to what is meant by surrounding circumstances, and it should be remembered that they may not be used to contradict or vary the terms of the instrument. In *Cambria Iron Co. v. Keynes et al.*, 56 Ohio St. 501, 47 N. E. 548, it is held: "In construing a contract of guaranty, the object should be to ascertain the intention of the parties; and, as in construing all contracts, the words employed by the parties should be construed in the light afforded by the circumstances surrounding them at the time it was made." *Monnett v. Monnett, Adm'r*, 46 Ohio St. 30, 17 N. E. 659, holds that oral testimony is not admissible to contradict or vary the terms of written agreements, but is admissible to prove the circumstances under which they were made, to enable the courts to put themselves in the place of the parties, with all the information possessed by them, the better to understand the terms employed in the contract, and to arrive at the intention of the parties.

In *Morrell v. Cowan*, 7 Ch. Div. (L. R.) 151, where the court construed a guaranty reading as follows: "In consideration of you having at my request agreed to supply and furnish goods to C. [her husband], I do hereby guarantee to you the sum of \$500. This guaranty is to continue in force for the period of six years and no longer"—it was held that the guaranty was limited to goods actually supplied to the husband after it was given. *Thesiger, L. J.*, in his opinion says: "I agree that in determining the construction of this instrument the court is entitled to look at the surrounding circumstances; that is to say, it is entitled to consider, first, who the parties were; secondly, in what position they were; and, thirdly, what the subject-matter of the agreement was. Now we find that *Morrell* was a leather factor, and that *Cowan* was a shoe manufacturer, and was indebted to him for certain goods supplied to him in the way of trade. *Cowan* was anxious to get a further supply, which *Morrell* was willing to furnish if he had a guaranty from *Mrs. Cowan*, who had separate estate. To these circumstances we may look, but we cannot go further. It is not open to the parties to show that there was a parol bargain that *Mrs. Cowan* should guarantee

her husband's past debts, or that the guaranty should be confined to future debts, that question must rest upon the written instrument alone."

It follows that the court of common pleas erred in not permitting a statement of any of the surrounding circumstances, and that the circuit court was not in error in reversing the judgment on that ground.

Judgment affirmed.

CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(38 Oh. St. 61)

STATE v. CLEVELAND.

(Supreme Court of Ohio. Oct. 25, 1910.)

(Syllabus by the Court.)

STREET RAILROADS (§ 122*) — OFFENSES — STATUTES — CONSTRUCTION — MATTERS EMBRACED BY INFERENCE.

A statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought. Thus a statute making it unlawful to willfully throw a stone at a railroad car includes an interurban or traction railway car, although such cars were not known or in use at the time the statute was enacted.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 122.*]

Exceptions from Court of Common Pleas, Champaign County.

One Cleveland was indicted for throwing a stone at a railroad car. There was a directed verdict of not guilty, and the State files exceptions. Exceptions sustained.

George Waite, Pros. Atty., for the State.
E. E. Cheney and Frank A. Zimmer, for defendant.

PER CURIAM. The Ohio Electric Railway Company operates interurban or traction railways. In April of the present year the defendant was a passenger in a car that left Urbana for Springfield. He asked to be let off the car at one of the streets in the city of Urbana. He had a controversy with the conductor in charge of the car, and the conductor ejected him at a point outside of that city. This angered the defendant and he picked up a stone about the size of a man's fist and hurled it at the car in the direction of the conductor. The stone struck on the inside of the rear vestibule and just missed striking several passengers and struck a window, breaking it.

The defendant was indicted under section 12,497, Gen. Code, which reads as follows: "Sec. 12,497. Whoever willfully throws a stone or other hard substance or shoots a missile at a railroad car, train, locomotive, cable railway car or street railway car, or at a steam vessel or water craft used for carrying passengers or freight, or both, on any of the waters within or bordering on this

state, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned in the penitentiary not more than three years or in the county jail not more than six months."

The first count in the indictment charged the defendant with throwing a stone at a railroad car, and the second count charged him with throwing a stone at a street railway car.

The court, on motion, excluded the evidence from the jury and instructed the jury to bring in a verdict of not guilty, and the prosecutor files exceptions in this court.

It is said that the court directed the verdict on the ground that an interurban car does not come within the terms of the statute.

The first act was passed in 1879 (Act January 30, 1879; 76 Ohio Laws, p. 11), and provided: "That whoever willfully throws any stone or other hard substance, or shoots any missile at any railroad car, train or locomotive, shall be fined," etc.

The law was amended in 1884 (Act April 10, 1884; 81 Ohio Laws, p. 125), by adding "steam vessels or water craft," and in 1887 (84 Ohio Laws, p. 81), by adding "or at any cable railway car or street railway car." It is contended that interurban cars were not known at the inception of the statute, and that therefore they could not have been intended to be comprised in its terms, and that under the maxim, "Exclusio unius est exclusio alterius," such cars are clearly excluded from the terms of the statute.

We do not think either contention is sound. The rule is well settled "that a statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought by a subsequent statute." The cases illustrating this rule are numerous. *People v. Kriesel*, 136 Mich. 80, 98 N. W. 850, 4 Am. & Eng. Ann. Cas. 5, note; *U. S. v. Nichols*, 4 McLean, 23, Fed. Cas. No. 15,890; *State v. Becton*, 7 Baxt. (Tenn.) 138; *Reg. v. Cottle*, 16 Q. B. 412; *Collier v. Worth*, 1 Ex. D. 464; *Taylor v. Goodwin*, 4 Q. B. D. 228; *Parkyn v. Preist*, 7 Q. B. D. 313. The rule applies also to new species that come into existence otherwise than by statute. And when the new species is clearly within the mischief intended to be prevented, the rule is not inapplicable because of the rule of strict construction of penal statutes. Endlich on Interpretation of Statutes, §§ 112 and 335.

The rule referred to is not of universal application, but is to be applied only as an aid in arriving at intention, and not to defeat the apparent intention. The statute as originally enacted unquestionably was broad enough to comprise any kind of a railroad car. The amendments were not intended to narrow the statute, but to add other things, and the subsequent enumeration of cable railway cars and street railway cars was not the

addition of new things, but was intended to remove any question as to such cars being within the terms of the statute.

Exceptions sustained.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(200 N. Y. 260)

VIELE v. McLEAN et al.

(Court of Appeals of New York. Dec. 16, 1910.)

1. EVIDENCE (§§ 220, 271*)—SELF-SERVING DECLARATIONS.

In an action to establish a partnership between plaintiff and defendants in the purchase of certain real estate, and for an accounting, in which defendants denied the partnership, plaintiff was permitted to introduce in evidence a written statement, which he sent to defendants some two years after the formation of the alleged partnership, in which it was stated that on a date given an agreement was entered into before witnesses, under which plaintiff was to have one-half of the profits on a certain building, and was to make no charge for his services for purchasing, repairing, or taking care of the same. Held, that the admission of the paper in evidence was error, as it was a self-serving declaration, and was merely a narrative of a past transaction, written nearly two years after the occurrence of that transaction, and no part of the correspondence between the parties; and it was not rendered admissible by failure of a defendant, upon the receipt of the statement, to deny its truth.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 779, 780, 1068-1104; Dec. Dig. §§ 220, 271.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of the statement was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Platt B. Viele against Hector McLean and Mary McLean. From a judgment for plaintiff, defendants appealed to the Supreme Court, Appellate Division, Fourth Department, where the judgment was affirmed (128 App. Div. 910, 112 N. Y. Supp. 1149), and defendants again appeal. Reversed.

Alton B. Parker, for appellants. Edwin A. Nash, for respondent.

CULLEN, C. J. This action was brought to have the plaintiff declared a partner of the defendants in the purchase of certain real estate, for the sale of such real estate, and for a settlement of the partnership interests. The answer of the defendants put in issue the alleged partnership.

On the trial of the action, the plaintiff was permitted, over the objection and exception of the defendants, to put in evidence the following written statement, which he sent to the defendants: "On October 14, 1904, it was agreed by Mr. McLean, before three witnesses and Viele, that Viele should have one-half

of the profits on the Haywood Building, in which case Viele was to make no charge for his services for purchasing, repairing or taking care of same. Interest to be figured at 5 per cent. per annum. Mr. McLean was asked to give a paper to that effect, and said that the witnesses understood it, and it was not necessary. Present: Mr. McLean, Mrs. McLean, Miss Mary, Miss Annie, and Viele. Copy given to McIntosh, Sept. 10, 1906." The evidence tended to show that the paper reached the defendant Hector McLean, and that he made no answer to it. It would be difficult to imagine a declaration more exclusively self-serving that that contained in this statement. It was purely a narrative of a past transaction, written nearly two years after the occurrence of that transaction, and was no part of a correspondence between the parties. The theory on which it was admitted in evidence seems to be that the defendant's failure, upon the receipt of the statement, to deny its truth was in the nature of an admission. It is well settled that this is an erroneous view of the law. "While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects. Reasons may exist why he may choose and has a right to remain silent, and to vindicate himself at some future period and on some more opportune occasion." *Talcott v. Harris*, 98 N. Y. 567, at page 571; *Learned v. Tillotson*, 97 N. Y. 1, 49 Am. Rep. 508. "One to whom a letter is written may remain silent when there is no duty to speak, and in such case silence does not operate as an admission of the matters to which the letter relates." *Thomas v. Gage*, 141 N. Y. 506, at page 510, 38 N. E. 385, at page 386.

It is not every error in the trial of a cause, and especially in the trial of a cause before the court, that justifies or requires a reversal of the judgment rendered thereon. The question is always as to the magnitude of the error. In this case the error in receiving the objectionable evidence was plain, and its effect necessarily injurious, because its admission must have proceeded on the belief by the trial judge that the defendant's failure to answer the plaintiff's statement was an admission of its truth.

The judgment should be reversed, and a new trial granted; costs to abide the event.

GRAY, HAIGHT, VANN, HISCOCK, WILLARD BARTLETT, and COLLIN, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 133.)

HAYES v. BROOKLYN HEIGHTS R. CO.

(Court of Appeals of New York. Dec. 13, 1910.)

LIMITATION OF ACTIONS (§ 31*)—INJURY FROM NEGLIGENCE—COMPLAINT.

The complaint against a street surface railroad for personal injury from a hole in the part of a street which, by Railroad Law (Consol. Laws 1910, c. 49) § 178, it is required to keep in a good and safe condition, alleging the injury was due to defendant "suffering" said hole to be and remain, states a cause of action for negligence, within the three-year limitation prescribed by Code Civ. Proc. § 383; though, if the railroad created the hole, it would be liable for the injury as the creator of a nuisance, and the six-year limitation of section 382 would apply.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 142; Dec. Dig. § 81.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Edwin A. Hayes against the Brooklyn Heights Railroad Company. From an order of the Appellate Division (184 App. Div. 812, 118 N. Y. Supp. 810), affirming an interlocutory judgment of the Special Term, sustaining a demurrer to a separate defense of the answer, defendant by permission (186 App. Div. 888, 119 N. Y. Supp. 1128) appeals. Reversed, with leave to withdraw demurrer.

D. A. Marsh, for appellant. Charles C. Clark, for respondent.

HAIGHT, J. This action was brought by the plaintiff to recover damages for a personal injury alleged to have occurred on the 12th day of March, 1902, on Second avenue, in the borough of Brooklyn, by reason of his stepping into a hole or rut while crossing the avenue. The complaint alleges that the defendant was operating a street surface railroad upon the avenue in question, and that it was its duty to keep in repair that portion thereof between the rails of its tracks and two feet in width outside of its tracks, and that for a long time prior thereto the defendant suffered that portion of Second avenue to become and continue out of repair, and a rut or hole to be formed therein, and to become rough and uneven, and, further, that the suffering and loss of earning power and income of the plaintiff by reason of his injury "were due solely to the wrongful and unlawful conduct of the defendant, its agents and servants, in suffering said hole or rut to be and remain in the street near its tracks" The separate defense interposed by the defendant, to which the plaintiff demurred, is "that the cause of action upon which a recovery is herein sought did not accrue within three years next before the commencement thereof." The Special Term sustained the demurrer, and from the interlocutory judgment entered thereon an appeal was taken to the Appellate Di-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

vision, which affirmed the same by a divided court. 134 App. Div. 912, 118 N. Y. Supp. 810. This action was commenced on the 11th day of March, 1908.

The question presented is as to whether the action is based upon a nuisance or negligence. It will be observed that the complaint fails to allege that there existed a nuisance or that the defendant was negligent. Under the statute of limitations it is provided that an action to recover damages for a personal injury, "except in a case where a different period is expressly prescribed in this chapter," shall be brought within six years; and it is further provided that an action to recover damages for a personal injury resulting from negligence shall be brought within three years. Code Civ. Proc. §§ 382, 383. If, therefore, the action alleged in the complaint resulted from negligence, the separate defense set forth in the answer was good, and the demurrer should not have been sustained. If, however, it did not result from negligence, then the demurrer was properly sustained.

A public nuisance, in so far as it applies to the case under consideration, consists in unlawfully doing an act or omitting to perform a duty, which act or omission endangers the safety of any considerable number of persons, or unlawfully interferes with, or tends to render dangerous, a public park, square, street, or highway. Under the railroad law the duty is imposed upon street surface railroads of keeping the space between their tracks and two feet on either side thereof in good and safe condition. Consol. Laws, c. 49, § 178. The duty, therefore, of municipalities of keeping their streets and highways in good and safe condition, is, to the extent specified by the statute, also devolved upon the railroad corporations, whose duty with reference thereto becomes the same as that which rests upon the municipality.

It will be observed that, under section 382, above referred to, the six-year statute of limitations has no application in a case where a different period is expressly prescribed, and under section 383 a different period is prescribed where the injury results from negligence. The question, therefore, arises as to whether the alleged injury in this case was the result of negligence on the part of the defendant. If a municipality or a railroad company should dig a pit or place a dangerous obstruction in or upon a public street, which it was obligated to keep in repair, it would be the creation of a public nuisance, and unquestionably the party creating the nuisance would be liable to a person suffering injuries by reason thereof. So, also, an individual maintaining a coal hole in the sidewalk in front of his premises with an insufficient cover, or who constructs a water pipe which receives the water collected from the roof of his building, and discharges it

on the surface of the sidewalk, from which ice forms as the water flows across it to the gutter, becomes liable therefore as the creator of the nuisance irrespective of any question of negligence. *Clifford v. Dam*, 81 N. Y. 52; *Tremblay v. Harmony Mills*, 171 N. Y. 598, 64 N. E. 501.

But where the obstruction to a public street has resulted from other causes, or from the acts of others than that of the municipality, a different rule obtains with reference to its liability. In such cases the municipality is not the creator of the nuisance; but it becomes its duty to abate and remove the same, to the end that the public may pass safely over the public street. It is not called upon to abate and remove until it has notice of the existence of the obstruction, or such time has elapsed after the existence of the obstruction as will raise a presumption that the municipality or its officers had notice, or in the exercise of due diligence should have had such notice. In such cases the failure to abate or remove the obstacle involves a question of negligence; for, if it proceeds with reasonable diligence to remove the same, no recovery can be had against the municipality. But if it unreasonably suffers the nuisance to exist, it does so by reason of its negligence, and such becomes the basis of its liability.

Accordingly, in the case of *Dickinson v. Mayor, etc.*, of N. Y., 92 N. Y. 584, where ice or snow had been suffered to remain upon a crosswalk of a street, and that by reason thereof the plaintiff sustained injuries for which he sought damages, it was held that the action was one for negligence, and not for a positive wrong committed by the defendant, and, therefore, the three-year statute of limitations ran against it.

We do not understand the case of *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, to be in conflict with our views as above expressed. True, it was held that a failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable in an action by a person who has sustained special damages by reason thereof; but that action was for negligence. It was prosecuted by the plaintiff against Chamberlain, a contractor who had undertaken to keep the state canal in repair. An injury was sustained by the plaintiff's canal boat in consequence of the defendant's neglect to perform his duties, and he was held liable for the injury by reason of his careless and negligent omission to perform his duties.

Our attention has been called to numerous other decisions bearing upon the question, but we do not deem it necessary to specifically refer to them. We do not understand them to be in conflict with the distinction which we have made with refer-

ence to the two classes of cases discussed. We have referred to the liability of municipal corporations, for the reason that such cases are more numerous and have been more generally under consideration in this court. In view of the fact, however, that the liability of a railroad company is the same as that of the municipality, they become our guide in determining the questions involved in this case.

We entertain the view that the complaint alleges a cause of action based upon negligence, and consequently the demurrer to the separate defense set forth in the answer should be overruled. It follows that the interlocutory judgment of the Appellate Division and Special Term should be reversed, and judgment ordered for defendant on demurrer, with costs in all courts, with leave to plaintiff to withdraw demurrer within 20 days on payment of such costs, and the second question certified answered in the affirmative, and the third question certified answered in the negative; the first question not answered.

CULLEN, C. J., and GRAY, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment accordingly.

(200 N. Y. 125)

PNEUMATIC SIGNAL CO. v. TEXAS & P. RY. CO.

(Court of Appeals of New York. Dec. 6, 1910.)

1. CONTRACTS (§ 289*)—BUILDING CONTRACTS—PERFORMANCE—ACCEPTANCE.

Where a contract for the installation of an interlocking railroad signal system stipulated that it should be accepted by the state railroad commission as a condition to the contractor's right to payment, and the commission, after inspection, refused to approve until several different requirements had been complied with, some of which were applicable to the contractor's work, and others related solely to matters unconnected with the installation of the system, and were not covered by the contract, the contractor having complied with all the requirements of the commission relating to the system, it was no defense to his action for the price that the commission failed to approve, because of the railroad company's failure to comply with the other requirements.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1310, 1311; Dec. Dig. § 289.*]

2. TRIAL (§ 148*)—ISSUES—SUBMISSION TO JURY—WAIVER OF RIGHT.

Since a plaintiff, in bringing his action, asks to go to the jury on every issue of fact which may arise on the pleadings, counsel, on perceiving that the court is about to direct a verdict against him, by requesting the submission of certain issues, does not waive his right to go to the jury on every other issue of fact that is really in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 331; Dec. Dig. § 148.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Pneumatic Signal Company against the Texas & Pacific Railway Company. From a judgment in favor of defendant on a directed verdict, affirmed by the Appellate Division (133 App. Div. 781, 118 N. Y. Supp. 66), plaintiff appeals. Reversed, and new trial granted.

William H. Tompkins, for appellant.
George S. Cooper, for respondent.

WILLARD BARTLETT, J. This is an action on a contract whereby the plaintiff undertook to construct and install for the defendant at Texarkana, Tex., a system of electric interlocking railroad signals for \$18,650, which was not to be paid, however, unless the plant should be accepted by the railroad commission of Texas. The plaintiff did not aver or prove such acceptance, but nevertheless claimed to recover the stipulated compensation on the ground that the failure of the railroad commission to approve the device was due solely to the omission of the defendant to make certain additions and improvements to the plant and its railroad in connection therewith, which the commission required, and which it was the duty of the defendant and not of the plaintiff to make. The trial court, however, held that proof of approval by the railroad commission was essential to the maintenance of the action, and directed a verdict in favor of the defendant. The judgment entered upon the verdict thus directed has been affirmed by the Appellate Division.

I think there was evidence in behalf of the plaintiff corporation which tended to support the allegations of the complaint and entitled the plaintiff to have the issues submitted to the jury. By a special order, dated July 7, 1904, the railroad commission of Texas approved the plaintiff's interlocking device at Texarkana temporarily, "until not after October, 1904," and ordered the companies, "party to this device," to obey eight requirements specified in such special order. Only three of these requirements (the first three) related to the construction or installation of the device, or were matters falling within the scope of the contract between the plaintiff and the defendant. Two experts in electrical construction, called as witnesses in behalf of the plaintiff, testified that all the work covered by these first three requirements of the special order of July 7, 1904, was seasonably done. "The fourth, fifth, sixth, seventh, and eighth provisions of the requirements of the order," continued one of these witnesses, "did not form a part of the plant installed by us, and had nothing to do with it. They were things that had to do purely with the railroad company."

This evidence supported the allegations of paragraph X of the complaint, which were that "the failure of said railroad commission

to finally approve of this plant and all the work of the plaintiff is not due to any default, neglect, or omission on the part of the said plaintiff, or to any failure of plaintiff to comply with the provisions of said contract, or to any failure on the part of said plaintiff to furnish proper appliances, labor and material in the erection of said plant, but was wholly due to the default, neglect, and omission on behalf of the said defendant, as hereinbefore set forth." The defendant could not insist upon the forfeiture of the purchase price provided for in the contract, if the railroad commission's non-acceptance of the device was simply and solely because of the railroad company's noncompliance with requirements concerning matters unconnected with the construction and installation of the device and not covered by the contract. Taking all the evidence together, it would have permitted a jury to infer that the Texas railroad commission was satisfied with the plaintiff's electric interlocking signal device at Texarkana, but withheld its approval thereof for the reason that the Texas & Pacific Railway Company did not make additions thereto and comply with certain specified details for managing the same which the commission deemed essential. The words "accepted by the railroad commission of Texas," in the contract, are equivalent to "approved by" or "acceptable to" the commission; and if the commission was content with the device, so far as the plaintiff had anything to do with constructing or installing the same, the refusal to accept it formally for reasons relating to the conduct of the railroad company alone could not stand in the way of the plaintiff's right to payment. Such was the state of facts which might have been found by the jury, and they should have been allowed to determine whether it existed or not.

The question was fairly raised by the plaintiff's exception to the direction of a verdict. It is true that counsel for the plaintiff subsequently asked to be allowed to go to the jury upon two other specific questions of fact, on grounds which were not tenable; but this request did not destroy his right to insist, as he does here, that he was entitled to the submission of such other issues as the case might present. A plaintiff, in bringing his action, thereby asks to go to the jury on any and every issue of fact which may arise upon the complaint and answer; and the specification by counsel of some issues which occur to him at the moment as especially proper to be submitted, when he perceives that the court is about to direct a verdict against him, does not constitute a waiver of his right to go to the jury upon every other issue of fact which is really in the case. See *Stone v. Flower*, 47 N. Y. 566; *Trustees of Easthampton v. Kirk*, 68 N. Y. 459, 464; *First National Bank of*

Springfield v. Dana, 79 N. Y. 103, 116. I think that the issue which has been discussed was fairly presented by the evidence to which I have referred, and, therefore, that the learned trial judge erred in directing a verdict for the defendant. This entitles the plaintiff to a reversal.

The judgment should be reversed, and new trial granted; costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 146.)

PEOPLE ex rel. WALKER v. AHEARN,
Borough President.

(Court of Appeals of New York. Dec. 6, 1910.)

1. MANDAMUS (§ 19*)—ACTION AGAINST OFFICIAL—RETIREMENT FROM OFFICE—EFFECT.

Where a mandamus proceeding was brought against the president of a borough to compel relator's reinstatement as superintendent of public buildings, such proceeding did not abate by the removal or retirement of the respondent from office, but might be continued against his successor.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 51, 52; Dec. Dig. § 19.*]

2. MANDAMUS (§ 187*)—APPEAL AND ERROR—INTEREST OF APPELLANT — PROCEEDING AGAINST OFFICER—TERMINATION OF OFFICIAL CHARACTER—EFFECT.

Where a mandamus proceeding was instituted against respondent as president of a borough solely, he having no personal interest therein, and he retired from office prior to appeal taken from an order granting the writ, an appeal thereafter taken in respondent's name was unsustainable; the proper practice being to substitute his successor as a party to the record and prosecute the appeal in his name.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 187.*]

Appeal from Supreme Court, Appellate Division, First Department.

Mandamus by the People, on relation of William H. Walker, against John F. Ahearn, as President of the Borough of Manhattan, City of New York, to compel relator's reinstatement as superintendent of public buildings in that borough. From an order directing the issuance of a peremptory writ for relator's reinstatement, and awarding costs against respondent, John F. Ahearn, as President of the Borough (129 App. Div. 83, 123 N. Y. Supp. 845), respondent appeals. On motion to dismiss. Granted.

At the time when the present appeal was taken John F. Ahearn had ceased to be president of the borough of Manhattan. The relator now moves to dismiss the appeal on the ground, among others, that, "the appellant having ceased to hold the office of borough president on and after the 9th day of December, 1909, the appeal taken by him on October 20, 1910, as borough president, was unauthorized."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Herbert C. Smyth, for the motion. Archibald C. Watson, Corp. Counsel (Terence Farley of counsel), opposed.

WILLARD BARTLETT, J. This is a proceeding against a municipal officer for the enforcement of a right of the relator against the municipality. Such a proceeding does not abate by the removal or retirement of the municipal officer against whom it is originally instituted, but may be continued against his successor in office. *People ex rel. La Chicotte v. Best*, 187 N. Y. 1, 7, 79 N. E. 890, 118 Am. St. Rep. 586, and cases there cited. In the case cited it was held that a mandamus proceeding for the reinstatement of an assistant engineer in the department of bridges in New York City did not abate by the resignation of the commissioner of bridges against whom the proceeding was commenced, which resignation took effect between the determination of the issues in favor of the relator, and the decision of the motion for a peremptory writ, and an order of the Special Term quashing the writ on the ground that the proceeding had thereby abated was reversed. This court expressed the opinion that the proper course under such circumstances was to substitute the original defendant's successor in office, and suggested that the correct practice in such cases was that indicated by section 1930 of the Code of Civil Procedure.

In the *La Chicotte* Case the corporation counsel took the position that the proceeding abated by the resignation of the original defendant; here he contends, not only that it did not abate by the original defendant's removal, but that the original defendant may take and prosecute an appeal therein months after he is out of office. The latter position is not tenable. The proceeding against Mr. Ahearn was solely in his official character as president of the borough. It was only the president of the borough who possessed the capacity to obey the command of the writ to reinstate the relator, and the costs awarded by the final order, as modified, were against John F. Ahearn "as president of the borough of Manhattan" only. The writ not having issued until Mr. George McAneny had become borough president, the appeal, if one was to be taken, should have been taken in his behalf and in his name as such officer. A formal substitution may not be necessary where the successor of the original defendant is the moving party, though it is preferable; but the successor must be actually substituted, and the record must show that it is the successor who invokes the action of the court. At the time when this appeal was taken in Mr. Ahearn's name as president of the borough of Manhattan, he had no official interest to protect, and the order did not aggrieve him individually; for all that part of the original order which affected him individually was stricken out by the Appellate Division.

While the costs against him as borough president are probably not enforceable against him personally, the waiver of these costs in open court by counsel for the relator takes that question also out of the case.

For these reasons, I think the motion to dismiss the appeal should be granted, without costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

Appeal dismissed.

(200 N. Y. 557)

DAVIS v. OLMSTED et al.

(Court of Appeals of New York. Dec. 16, 1910.)

1. EXECUTORS AND ADMINISTRATORS (§ 451*)—FINDINGS—VERDICT.

A finding of fact in an action by an administrator with the will annexed that testator's executor paid to defendant's intestate \$1,000 for alleged professional services, where it does not appear that there was any fraud or bad faith in procuring such payment, or that the estate was not liable for professional services in a greater amount, is not sufficient to sustain a judgment for \$1,000, where the defense was that the money in question was paid to defendant's intestate for professional services and the return of such money was never demanded by plaintiff.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1861, 1882; Dec. Dig. § 451.*]

2. APPEAL AND ERROR (§ 1140*)—DETERMINATION—MODIFICATION OF JUDGMENT.

Where it appears that a judgment of the lower court is right in all particulars save in an award of a specified amount, the judgment will not be reversed if the plaintiff will stipulate within 20 days to reduce it by an amount equal to the erroneous award.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Fitch M. Davis, as administrator with the will annexed of the estate of William Bowen, deceased, against William L. S. Olmsted, as administrator of the estate of John H. Coyne, deceased, and Edward P. Coyne. From a judgment for plaintiff, defendants appeal to the Appellate Division of the Supreme Court, where the judgment was affirmed (128 App. Div. 915, 112 N. Y. Supp. 1126), and defendants appeal. Judgment affirmed as to defendant Coyne, and affirmed as to defendant Olmsted on condition of the remission of part of the recovery.

Fletcher C. Peck, for appellants. Edwin A. Nash, for respondent.

PER CURIAM. The findings of fact in the decision of the court at Special Term are not without some evidence to support them. They sustain the conclusions of law so far as they relate to the draft issued to

John H. Coyne in his lifetime by the Society for Savings in the City of Cleveland, Ohio, for \$9,981.70, and that the defendant William L. S. Olmsted, as administrator of the estate of John H. Coyne, deceased, and the defendant Edward P. Coyne, are liable to the plaintiff for the amount thereof with interest. The findings of fact relating to the payment by the executor of the last will and testament of William Bowen, deceased, to John H. Coyne of \$1,000, do not sustain the conclusion of law that defendant William L. S. Olmsted, as the administrator of the estate of John H. Coyne, deceased, is liable to the plaintiff therefor.

It is found that the \$1,000 was paid in full or in part payment for professional services alleged to have been rendered by John H. Coyne to William Bowen in his lifetime, or to his estate after his decease. It is not found that there was any fraud or bad faith in procuring such payment, or that the estate of said Bowen was not at that time indebted to said Coyne for professional services in an amount equal to or greater than \$1,000, and it is not shown that the plaintiff ever demanded of said defendant that he return said \$1,000 to him.

The judgment as against the defendant William L. S. Olmsted, as administrator of the estate of John H. Coyne, deceased, should be reversed, and a new trial granted, with costs to abide the event, unless the plaintiff stipulates within 20 days to reduce the judgment as against William L. S. Olmsted, as administrator as aforesaid, by the amount of \$1,000, and interest thereon from October 10, 1899, in which case the judgment as so reduced is affirmed, without costs in this court to either party.

The judgment as against the defendant Edward P. Coyne should be affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur.

Judgment accordingly.

(200 N. Y. 130)

KRAUS v. BIRNBAUM.

(Court of Appeals of New York. Dec. 6, 1910.)

1. TRIAL (§ 165*) — MOTION FOR NONSUIT — SCOPE OF HEARING.

On a motion for nonsuit an issue of law only is presented, and that is whether, admitting all the facts presented, and giving to the plaintiff the advantage of every inference that can properly be drawn from the facts presented, an issue of fact is presented for the determination of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. APPEAL AND ERROR (§ 105*)—QUESTIONS REVIEWABLE—DIRECTION OF VERDICT.

A nonsuit or direction of a verdict, duly excepted to, raises a question of law reviewable

on appeal from the judgment, both in the Appellate Division and in the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 721; Dec. Dig. § 105.*]

3. EJECTMENT (§ 18*)—POSSESSION OF PLAINTIFF.

Ejectment cannot be maintained, where the possession of plaintiff continued at the commencement of the action.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 65; Dec. Dig. § 18.*]

4. PLEADING (§ 127*)—ANSWER—ADMISSIONS.

An admission in an answer, notwithstanding the denial therein, can always be taken as some evidence against the person making it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 266; Dec. Dig. § 127.*]

5. PLEADING (§ 127*)—ANSWER—ADMISSION AS TO POSSESSION.

An answer of ejectment, which denied plaintiff's title to a disputed strip of land, and asserted defendant's own title and right to possession and that as owner she was entitled to maintain her possession, should be treated as an assertion of right and not as an admission that defendant was in possession, in view of undisputed testimony that defendant was not in possession.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 127.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Anna Kraus against Louise Birnbaum. From a judgment dismissing the complaint, plaintiff appealed to the Appellate Division of the Supreme Court, where the judgment was reversed (132 App. Div. 567, 116 N. Y. Supp. 916), and defendant appeals. Reversed.

See, also, 132 App. Div. 940, 118 N. Y. Supp. 1118.

Jeremiah K. Long, for appellant. John W. Roddy, for respondent.

CHASE, J. This is an action of ejectment. Upon the trial at the close of the plaintiff's evidence the defendant moved for a nonsuit upon grounds stated at length. The motion was granted and the court said: "Upon the two grounds that the plaintiff has failed to prove that she has been ousted from the possession of said lot (the lot described in the complaint), and on the ground that the plaintiff has failed to prove that defendant was in possession of any part of said lot at the time of the commencement of this action, I grant the motion to dismiss the complaint."

The plaintiff duly excepted to the determination of the court and asked to go to the jury upon all of the issues raised by the pleadings. The motion was denied and an exception was taken to such denial. Judgment was entered, and upon appeal to the Appellate Division of the Supreme Court therefrom the judgment was reversed, the order and judgment stating it to be upon the law and the facts, and a new trial was granted, with costs to the appellant to abide the event.

It is urged that because the judgment of the Trial Term was reversed upon the facts as well as the law, this court has no jurisdiction to hear the appeal. *Tousey v. Hastings*, 194 N. Y. 79, 86 N. E. 831; *Van Slyck v. Woodruff*, 192 N. Y. 547, 84 N. E. 724; *Hirsch v. Jones*, 191 N. Y. 195, 83 N. E. 786.

Upon a motion for a nonsuit an issue of law only is presented. The question of law is, whether admitting all the facts presented, and giving to the plaintiff the advantage of every inference that can properly be drawn from the facts presented, an issue of fact is presented for the determination of the jury. *Second National Bank of Morgantown v. Weston*, 172 N. Y. 250, 64 N. E. 949; *Ware v. Dos Passos*, 162 N. Y. 281, 56 N. E. 742; *Second Nat. Bank of Elmira v. Weston*, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; *Witherow v. Slayback*, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507; *McDonald v. Met. St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 282; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 60 N. E. 632.

The case of *Collier v. Collins*, 172 N. Y. 99, 101, 64 N. E. 787, is called to our attention, and it is claimed that it is authority for the defendant's claim that without the entry of an order denying a motion by the plaintiff for a new trial and an appeal therefrom, the Appellate Division had no power to review or reverse the judgment of nonsuit. In the *Collier Case* there was no exception to the determination of the court granting the nonsuit, and the appeal was from the judgment only. The court say: "Such an appeal does not permit that court (Appellate Division) to pass upon the weight of evidence, and is in effect a waiver of any further review of the questions of fact. While Appellate Divisions have a wide latitude, which we would be glad to have them exercise more freely, in reversing upon the facts, they have no power to do so, in an action tried before a jury, unless an order is entered denying a motion for a new trial made upon the proper ground and an appeal is taken from the order."

In *Alden v. Knights of Maccabees*, 178 N. Y. 535, 542, 71 N. E. 104, 106, this court, referring to the *Collier Case*, say: "No exception was taken at the trial to the ruling of the court dismissing the complaint, and no motion for a new trial was made, but the appeal taken from the judgment only. We held that, because there was no exception, the Appellate Division was without power to reverse the judgment, though the nonsuit might have been improper."

The decision in the *Collier Case* in no way affects the other decisions of this court which hold that a nonsuit or direction of a verdict, duly excepted to, raises a question of law reviewable on appeal from the judgment both in the Appellate Division and in this court. The only question now for determination in this court is a question of law,

notwithstanding the form of the order of the Appellate Division.

The land, the possession of which is in dispute in this action, is situated in a short block on the south side of Twenty-Fourth street (formerly Utica street) in the city of Watervliet. The block is bounded on the west by Seventh avenue (formerly William street) and on the east by a 20-foot alley. The block of land is divided into four lots, known and distinguished on a certain map of a part of a farm made January 1, 1847, by George Henry Warren and copied and additions made thereto November 11, 1851, by B. Turner, civil engineer. The four lots are each described as 25 feet front and 94 feet deep running from Twenty-Fourth street to a 10-foot alley. They are numbered from Seventh avenue on said maps as 75, 76, 77, and 78. On the corner of Twenty-Fourth street and the 20-foot alley is a house that has stood there for many years. On the corner of Twenty-Fourth street and Seventh avenue is another house that has also stood there for many years. The plaintiff's husband became the owner of lots 75 and 76 by deed dated March 4, 1895, in which said lots are described as being 50 feet on Twenty-Fourth street and running to the 10-foot alley, and as being lots 75 and 76 as distinguished on said maps. The defendant became the owner of lot 77 by deed dated May 18, 1896, in which the lot is described as being 25 feet on Twenty-Fourth street and running to said alley, and as being lot 77 as distinguished on said maps. The distance from the northeast corner of the house on Twenty-Fourth street and the 20-foot alley to the northwest corner of the house on Twenty-Fourth street and Seventh avenue is 108 feet, being 8 feet more than the aggregate stated width of the four lots. It does not appear whether this excess of land arises from an error in the surveys and maps or whether it arises from one or the other or both of said houses extending over upon the alley or avenue respectively. There is a house on the defendant's lot, and measuring from the northeast corner of the house at Twenty-Fourth street and the 20-foot alley westerly 50 feet, the defendant's west line would appear to be about one foot westerly of her house; and measuring from the northwest corner of the house on Twenty-Fourth street and Seventh avenue easterly 50 feet, the plaintiff's easterly line would appear to be about nine feet west of the defendant's house. This leaves about eight feet of land over which a controversy has arisen which has resulted in this action. The plaintiff did not produce said maps or establish the true line of either Seventh avenue or the 20-foot alley, and the record wholly fails to disclose who has the record title of the eight feet of land in controversy.

A large amount of testimony was offered by the plaintiff in regard to the possession of the eight feet of land, and it is claimed

by her that she and her predecessors in title have been in possession of the eight feet of land claiming title thereto for such a length of time as to establish her ownership thereof. It is unnecessary to review such testimony, because we are of the opinion that the possession that she and her predecessors have had continued in her at the time of the commencement of this action, and for that reason this action cannot be maintained.

For years prior to about 1888 a fence had been maintained from the southwest corner of what is now the defendant's house, southerly to the alley. So far as appears, the owner of lot 76 then occupied, and for some time prior thereto had occupied, the land up to the west side of the defendant's house. A prior owner of lot 76 testified that she obtained a deed of the property in 1889 and took possession up to what is now the defendant's house. Soon thereafter a fence was built about one foot west of the defendant's known as the "spite fence." It was 15 or 16 feet in length and high enough to prevent the use of the windows in the house. A wire fence was built from the spite fence northerly to Twenty-Fourth street, and from said fence southerly to the fence from the corner of the house to the alley, making a continuous fence from Twenty-Fourth street to the alley on substantially the line claimed by the plaintiff. When the plaintiff's husband purchased lots 75 and 76 he took possession up to such fence and planted the land with vegetables, flowers, and bushes. After his purchase of lots 75 and 76, the fence from the southwest corner of the defendant's house to Twenty-Fourth street was taken down and a fence was not maintained west of the house until 1901. That fence, as then erected, was a post fence with boards nailed thereon, and it was continued from Twenty-Fourth street to the alley. It is unnecessary to refer to the details of the controversy between the parties thereafter until May, 1908. On May 4, 1908, the defendant, without going upon the land in dispute, but while standing upon land confessedly belonging to her, tore the boards off from a part of the fence next to her house. The fence was then rebuilt. The old posts were taken out and new posts were put in and boards nailed thereon, so that the fence again was continuous from Twenty-Fourth street to the alley. On May 14, 1908, plaintiff's husband deeded to her lot 76 and she testified that she went into possession up to the fence. It is only what occurred after May 14th, therefore, that can justify, if at all, the maintenance of this action to recover possession of said land.

The only acts after May 14th, so far as the defendant is concerned, took place on May 20th. On that day the fence from Twenty-Fourth street along the side of the defendant's house was torn down to the extent of removing the boards therefrom and

piling them up between the posts of the fence and the defendant's house. In doing this the defendant and her husband were present, but not upon the land in dispute, although they directed two men, who, in removing the boards from the fence, were more or less upon such land. After this occurrence the fence remained unimpaired from the alley in the rear for 40 feet towards Twenty-Fourth street, and the fence posts remained undisturbed from the end of such fence to Twenty-Fourth street. On May 22, 1908, this action was commenced. Plaintiff testified that when the action was commenced neither the plaintiff nor her husband had anything belonging to them on the land in dispute. She further testified that she was in the possession of lot 76 at the time the action was commenced, and her husband testified that he planted flowers within six inches of the fence during May, 1908, and that the flowers were growing there when the action was commenced, and he further testified that he did not know as the defendant ever came across that fence or interfered in any way with any part of the land in dispute at any time prior to the commencement of the action.

It is claimed that there is an admission in the answer which, notwithstanding the denials therein, is some evidence that the defendant was in fact in possession of the disputed land. An admission in an answer, notwithstanding a denial therein, can always be taken as some evidence against the person making the admission. *Talbot v. Laubheim*, 188 N. Y. 421, 81 N. E. 163.

Taking all of the answer in this case, however, and the undisputed testimony that we have mentioned, the statement in the answer as to the possession should be treated as an assertion of right, and not as an admission of fact. It was evidently so treated by the court without objection at the time the motion for a nonsuit was made and granted. The Trial Term was right in holding that the complaint should be dismissed. Assuming that the plaintiff is right in her claim of ownership of the eight-foot strip, the occurrences of May 20th amounted to a trespass. *Thompson v. Burhans*, 79 N. Y. 93, 99; *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 490, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563.

The defendant did not oust the plaintiff from such possession of the land as she then had, or in any way retain the possession thereof.

The order of the Appellate Division should be reversed and judgment of the Trial Term affirmed, with costs in both courts:

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Ordered accordingly.

(200 N. Y. 189)

WALDO et al. v. SCHMIDT.

(Court of Appeals of New York. Dec. 18, 1910.)

1. COURTS (§ 237*)—QUESTIONS REVIEWABLE—CERTIFIED QUESTIONS FROM APPELLATE DIVISION TO COURT OF APPEALS.

The Court of Appeals on an appeal granted by the Appellate Division, certifying a question of law, is limited to a categorical answer to the question certified.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 678-698; Dec. Dig. § 237.*]

2. COURTS (§ 50*)—SUPREME COURT—TRIAL AND SPECIAL TERMS—APPELLATE DIVISION.

The Supreme Court is divided into two parts, Trial and Special Terms, constituting one part vested under Code Civ. Proc. § 217, with general original jurisdiction in law and equity; and the Appellate Division created by Const. art. 6, § 2, to exercise appellate jurisdiction in matters arising at the trial and special terms and authorized under Code Civ. Proc. § 1281, to hear controversies on submission, constituting the other part, and the parts are courts.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 50.*]

3. APPEAL AND ERROR (§ 422*)—NOTICE OF APPEAL—AMENDMENT—JURISDICTION OF COURT.

Under Code Civ. Proc. § 190, allowing appeals only from actual determination of the Appellate Division, excepting in the cases enumerated in section 1336 and in Code Cr. Proc. § 517, and under section 1303, providing that the "court in or to which the appeal is taken" may permit an amendment to the notice of appeal, the Supreme Court at Special Term has no power to allow an amendment to a notice of appeal from an order of the Appellate Division to the Court of Appeals, but the power to amend is limited to the Appellate Division and the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. § 422.*]

4. APPEAL AND ERROR (§ 422*)—NOTICE OF APPEAL—AMENDMENT.

The court allowing an amendment to a notice of appeal as authorized by Code Civ. Proc. § 1303, allowing amendments, may supply omissions and cure defects which occur through mistake, inadvertence, or excusable neglect, where appellant has seasonably and in good faith served his notice of appeal, but the court cannot make a new notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. § 422.*]

5. APPEAL AND ERROR (§ 422*)—NOTICE OF APPEAL—AMENDMENT—POWER TO ALLOW.

Under Code Civ. Proc. § 1303, providing that the court in or to which an appeal is taken may permit an amendment to the notice of appeal, a notice of appeal to review interlocutory and final judgments of the Appellate Division, which recites that appellant intends to bring up for review the interlocutory judgment, and which correctly identifies it by the date of entry, may be amended so as to specify the intention to bring up for review the judgment of the Appellate Division affirming the interlocutory judgment so as to make the notice comply with the requirements of section 1350.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2149; Dec. Dig. § 422.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Eugene Waldo and another against Fedor Schmidt, individually, etc.

From an order of the Appellate Division (139 App. Div. 589, 124 N. Y. Supp. 189), reversing an order granting a motion for leave to amend a notice of appeal, defendant appeals pursuant to leave granted by the Appellate Division certifying a question to the Court of Appeals, and he also moves in the Court of Appeals for leave to amend the notice. Order affirmed, and motion to amend notice of appeal granted.

See, also, 198 N. Y. 193, 91 N. E. 521, 125 N. Y. Supp. 1149.

Martin L. Stover, for appellant. Clarence De Witt Rogers, for respondents.

WERNER, J. The Supreme Court at Special Term granted to the above-named appellant an order giving him leave to amend his notice of appeal. From that order the present respondents appealed to the Appellate Division, where the order was reversed upon two grounds: (1) That the court at Special Term had no power to allow the amendment. (2) That the amendment was one which had the effect of extending the appellant's time to appeal, and therefore should not have been granted. After making its decision, the Appellate Division granted to the appellant leave to appeal to this court and certified the following question of law: "Did the Supreme Court at Special Term have power to make the order herein dated April 26, 1910, amending a notice of appeal to the Court of Appeals from an order of the Appellate Division of the Supreme Court?" Since our power of review is limited to a categorical answer to the question certified (*Devlin v. Hinman*, 161 N. Y. 115, 55 N. E. 386; *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449; *Grannan v. Westchester Racing Ass'n*, 153 N. Y. 449, 47 N. E. 896), our discussion would ordinarily be confined to the considerations germane to that question and no other; but the appellant has submitted to us an original motion for leave to amend his notice of appeal which he asks us to grant if his appeal proves unsuccessful, and for the convenience of all concerned we shall consider in one opinion the appeal from the order referred to as well as the original motion.

The question which arises upon the appeal is whether a motion for leave to amend a notice of an appeal taken to the Court of Appeals from an order or judgment of the Appellate Division may be made at Special Term or must be made to the Appellate Division, where the moving party elects to address his motion to the Supreme Court instead of the Court of Appeals. The Code of Civil Procedure (section 1303) directs that such a motion must be to "the court, in or to which the appeal is taken," and we are to decide whether the words "the court in" refer only to the Appellate Division or to the Supreme Court in its entirety. The appellant contends that there is only one Su-

preme Court, of which the Special Term is as much a part as the Appellate Division; that, when an appeal is taken to the Court of Appeals from an order or judgment of the Appellate Division, it is an appeal from the Supreme Court; and that, when a motion is made at Special Term to amend the notice of such an appeal, it is made in the court from which the appeal is taken. The premise of this argument is theoretically sound, but its conclusion is not so, for it ignores several practical considerations of controlling influence. There is but one Supreme Court, it is true, but it is divided by the Constitution, the statutes, and the rules of practice into two distinct parts. The Trial and Special Terms comprise one part, vested with the general original jurisdiction in law and equity formerly possessed and exercised by the Supreme Court of the colony of New York and by the Court of Chancery in England, subject to the exceptions, additions, and limitations created by the Constitution and laws of the state. Code Civ. Proc. § 217. The Appellate Division forms another and distinct part of the same court. It is created by the Constitution (article 6, § 2) for the express purpose of exercising appellate jurisdiction in matters arising in the Trial and Special Terms of the Supreme Court and in inferior courts. The Appellate Division is given original jurisdiction in a very few matters, of which the most conspicuous illustration is the right to hear and determine real controversies upon submission (Code Civ. Proc. § 1281), but its chief function is to exercise appellate jurisdiction, which is designed to be final in certain specified cases and intermediate in many more. It is obvious, therefore, that, while there is but one Supreme Court in theory and in fact, it is divided into separate parts, which exercise distinct and dissimilar functions. For convenience and brevity, these parts are spoken of both colloquially and in the statutes as courts, and such they are in fact, although all included under the generic title of the Supreme Court. The Trial and Special Terms have many powers and duties which are not possessed by or imposed upon the Appellate Division, and which the former may exercise even after an appeal has been taken to the latter or to this court. A few familiar instances will suffice to illustrate this phase of the court's original and continuing jurisdiction. The pendency of an appeal to the Appellate Division, or to this court, is not a bar to a motion for a new trial at Special Term. *Henry v. Allen*, 147 N. Y. 346; 41 N. E. 694. Substituted attorneys may move at Special Term for the delivery to them of papers in the action after an appeal has been taken. *People ex rel. Hoffman v. Board of Education, N. Y. City*, 141 N. Y. 86, 35 N. E. 1087. And the same rule is followed in cases where, for one reason or another, the record as made in the court of original jurisdiction has to be amended for use in the ap-

pellate courts. *Peterson v. Swan*, 119 N. Y. 662, 23 N. E. 1004. There are other proceedings, notices, and orders, however, in which we find the exact antithesis of this general condition. Some records of the Appellate Division relate so exclusively to its own peculiar jurisdiction as to preclude the possibility of interference therewith by other courts. If this were not so, that court could not perform its functions with any degree of order or independence. It is a truism which has become axiomatic that all courts of record must have control of all proceedings which relate solely to their own orders and judgments. In the light of these suggestions, it is obvious that a notice of appeal to this court from an order or judgment of the Appellate Division is a proceeding in the action with which the Special Term has no concern. An application to amend such a notice, if addressed to the Supreme Court, must be made to the Appellate Division, for that is the court in which the appeal is taken. There is no such thing as an appeal to this court from an order or judgment of the Special Term or Trial Term, except (1) in the case of a final judgment at Special Term after the affirmance of an interlocutory judgment by the Appellate Division, or the refusal by the latter court of an application for a new trial made to it in the first instance, or upon appeal from an order of the Special Term denying such an application pursuant to the provisions of section 1336 of the Code of Civil Procedure; (2) in capital cases in which the statute (Code Cr. Proc. § 517) provides that appeals shall be taken directly from the courts of first instance to this court. In all other cases appeals to this court can only be taken from actual determinations made by the Appellate Division (Code Civ. Proc. § 190). The statutes provide that a notice of such an appeal may, under specified circumstances, be amended by the court "in or to which" the appeal is taken. Code Civ. Proc. § 1303. This power of amendment is distinctly limited to two courts, and the limitation necessarily excludes any other. As applied to the case at bar, these two courts are the Appellate Division, in which the appeal was taken, and the Court of Appeals, to which the appeal was taken.

The appellant cites *Mott v. Lansing*, 5 Lans. 516, as an authority holding that the court at Special Term has power to amend a notice of an appeal taken from the Appellate Division to this court, and our attention is directed to the fact that in that case the order of the General Term is said (in *Lavalle v. Skelly*, 90 N. Y. 548) to have been affirmed in this court. We have been unable to find any such record of *Mott v. Lansing* in this court. In that case the General Term, in the Third Department, reversed an order of the Special Term denying, for want of power, a motion to amend a notice of appeal to this court by inserting therein a stipulation for judgment absolute. The General Term seems to have as-

sumed that the Special Term had power to grant the amendment, for it is not discussed in the brief opinion handed down. In the later case of *Bulkley v. Whiting Mfg. Co.*, 136 App. Div. 479, 121 N. Y. Supp. 169, the Appellate Division, in the First Department, held that the Special Term had no such power. In that case the defendant procured an order at Special Term amending its notice of appeal to this court, pending the decision of a motion at Special Term to amend the judgment so as to conform it to the order of the Appellate Division. It was decided that a judgment entered upon an order of the Appellate Division was a judgment of that court, but that the act of the clerk in entering the same being purely ministerial, it was not essential that a motion to correct it should be made in the Appellate Division, and might properly be made at Special Term. A contrary conclusion was reached, however, as to the power to amend the notice of appeal, for it was distinctly held that the Special Term had no jurisdiction. To that extent we approve of the decision; but it goes a step further, and holds that this court alone has power to amend a notice of appeal from an order or judgment of the Appellate Division. That is incorrect. The statute has lodged the power in either court. It is not concurrent, but alternative, and only when one court has acted does it exclude the other.

For these reasons, we conclude that the Special Term had not the power which it assumed to exercise, that the order appealed from must be affirmed, with costs, and that the question certified to us must be answered in the negative.

The question involved in the original motion now made to this court to amend the notice of appeal is whether the amendment, if granted, will so change the notice as to extend the appellant's time to appeal beyond the period limited by the statute. We cannot make a new notice of appeal, but we have authority to supply omissions and cure defects which occur through mistake, inadvertence, or excusable neglect where an appellant has seasonably and in good faith served his notice of appeal. A few recitals from the record will focus the discussion upon the precise point at issue.

The action is in equity to set aside an account stated and the settlement made in accordance therewith, and to reopen and restate the accounts between the parties. At Special Term the court, upon the report of a referee, rendered an interlocutory judgment in favor of the plaintiff. The defendant took an appeal to the Appellate Division where the interlocutory judgment was affirmed. The case was returned to the referee upon whose report a final judgment was entered. An appeal from that judgment was taken to the Appellate Division which also resulted in an affirmance. From the affirmance of that final judgment the defendant seasonably took an appeal to this court, and in his notice of appeal he announced his intention "to bring up

for review the interlocutory judgment and every part thereof made in this action" and correctly identified the interlocutory judgment by the date of entry. In March, 1910, the respondent made a motion in this court to dismiss the appeal in so far as it related to the interlocutory judgment, because the notice of appeal did not specify the appellant's intention to appeal from the judgment of the Appellate Division affirming the interlocutory judgment of the Special Term. The motion to dismiss was denied, but the court held that the appellant's notice was defective because it did not specify the appellant's intention to bring up for review the judgment of the Appellate Division affirming the interlocutory judgment. *Waldo v. Schmidt*, 198 N. Y. 194, 91 N. E. 521. The omission there pointed out the appellant now seeks to have supplied by amendment.

The appellant, by making this motion to amend, concedes the mistake in his practice. Quite apart from that, however, the question is settled beyond dispute by the unequivocal language of the statutes and the decisions of this court. The Code of Civil Procedure (section 1350) provides that, upon an appeal to this court from a final judgment in the Appellate Division, the affirmance of an interlocutory judgment in the action may be reviewed at the election of either party, and this election, if made by the appellant, must be manifested by a distinct specification of the interlocutory judgment to be reviewed (Code Civ. Proc. § 1301). The correct practice in that regard is so clearly and succinctly set forth in the opinion written by Judge Haight upon the decision of the motion to dismiss the appeal (198 N. Y. 194, 91 N. E. 521) that nothing can be profitably added.

This motion resolves itself into the single question whether the amendment is one which we have power to grant, for we think the circumstances are such that if the power exists it should be exercised. Referring again to the language of section 1303 of the Code of Civil Procedure, we see that the court is authorized to amend a notice of appeal which has been seasonably served where the appellant has omitted through mistake, inadvertence, or excusable neglect to do any other act necessary to perfect the appeal. This provision is in harmony with sections 721 to 724, inclusive, of the Code of Civil Procedure, which give to the courts the most ample power of amendment of every process, pleading, or other proceeding, at any stage of an action, either before or after judgment in any case where the amendment will not affect the substantial rights of the adverse party.

In the case at bar, the appellant's notice of appeal to the Appellate Division from the final judgment of the Special Term contained a statement of his intention to bring up for review the interlocutory judgment which had theretofore been rendered against him. When he appealed to this court, he inserted in his notice the same statement which had been a part of his notice of appeal to the Appellate Division. He should have inserted in his no-

tice of appeal to this court a sentence signifying his intention to bring up for review the Appellate Division's affirmance of the interlocutory judgment as well as its affirmance of the final judgment. The interlocutory judgment was properly described in the notice, and, as there was only one, his adversary could not have been misled. That the omission to specify the judgment of affirmance, instead of the interlocutory judgment, was the result of inadvertence or mistake, is obvious when we consider that there was no occasion for referring to the interlocutory judgment except for the purpose of bringing it up for review. The appellant attempted to specify the subject of his appeal, but did it imperfectly because he failed to state that it was the interlocutory judgment as affirmed by the Appellate Division that he intended to bring up for review. Had he failed to mention it at all, we would be powerless to help him, because an amendment in that event would make a new notice after the time to appeal has expired. That is the precise point which differentiates the case at bar from the case of *Rich v. Manhattan Ry. Co.*, 150 N. Y. 542, 44 N. E. 1097, where it was held that the interlocutory judgment could not be the subject of review in this court, for the reason that it was not specified in the notice of appeal. As matter of fact, it appears from the original record of that case that the notice of appeal contained no reference to the interlocutory judgment, and that explains why the motion previously made to amend the notice of appeal was denied for want of power. *Hoffman v. Manhattan Ry. Co.*, 149 N. Y. 599, 44 N. E. 1124. So in *Lavalle v. Skelly*, 90 N. Y. 546, it was held that, after the time to appeal from a judgment had expired, the court could not amend a notice of appeal from an order denying a motion for a new trial, so as to make it a notice of appeal from a judgment. The judicial utterances in these cases, and in many others which might be cited, are simply reiterations in various forms of the plain language of section 784 of the Code of Civil Procedure which prohibits courts and judges from extending the time within which actions must be commenced or appeals taken. The amendment which we are now asked to make will have no such effect. It will only enable the appellant to make his notice more explicit by adding to his correct description of the interlocutory judgment a reference to the fact that it was affirmed by the Appellate Division. That will not make a new notice of appeal. It will simply cure an obvious and harmless defect.

We think the amendment is one which we have the power to make, and for that reason the application is granted upon condition that the appellant pay to the respondents the usual motion costs.

The order should be affirmed, with costs, and question certified answered in the nega-

tive, and the motion to amend notice of appeal granted on payment of \$10 costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and CHASE, JJ., concur.

Order affirmed.

(200 N. Y. 149.)

BOROUGH CONST. CO. v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 6, 1910.)

1. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUND OF REVIEW—GROUNDS OF DEFENSE.

In an action by a contractor against a municipal corporation for damages for breach of contract, where the question of notice is raised by defendant for the first time on appeal, it cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 178.*]

2. APPEAL AND ERROR (§ 1085*)—DECISIONS REVIEWABLE—UNANIMOUS AFFIRMANCE BY APPELLATE DIVISION.

Where defendant in a suit on contract has objected and taken exceptions to the admission of evidence and to the charge, and the refusal to charge, it may on appeal to the Court of Appeals attack the judgment against it on the merits, though such judgment was unanimously affirmed by the Appellate Division.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4271, 4272; Dec. Dig. § 1085.*]

3. MUNICIPAL CORPORATIONS (§ 352*)—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.

A contract for the construction of a sewer provided that, when the part to be constructed was all or partly below the city's high-water line, Portland cement must be used when directed by the engineer, and that during the progress of the work and until final acceptance the sewers and connections are to be kept clean. The engineer demanded that the contractor should use Portland cement on the part of the sewer which was above the high-water line though the lower part of the entire sewer was below such line, and also required the contractor, in order to make the sewer ready for inspection by city officials, to clean and illuminate it, and to construct a lift by which to lower automobiles into it. *Held*, that these requirements were not covered by the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 883, 884; Dec. Dig. § 352.*]

4. MUNICIPAL CORPORATIONS (§ 374*)—CONTRACTS—BREACH OF CONTRACT—RIGHTS OF CONTRACTOR.

A contractor for a public improvement, who is ordered by the city engineer to furnish material and to do work, which the contractor claims is outside the contract, may, where the construction of the contract is open to some doubt, do as directed under protest, and treat the conduct of the city, as a breach of contract for which he may recover damages, but it is otherwise if the demand of the engineer is palpably beyond the scope of the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

5. MUNICIPAL CORPORATIONS (§ 374*)—CONTRACTS—CONSTRUCTION—RIGHT AND REMEDIES OF CONTRACTOR.

A contract for the construction of a sewer provided that Portland cement should be used when directed by the city engineer in such portions of the sewer as were wholly or in part below the city's high-water line and that the contractor during the progress of the work and until final acceptance was to keep the sewers, basins, culverts, and connections clean. The city engineer demanded that the contractor should use Portland cement in portions of the sewer which were above the high-water line and, in order to facilitate inspection by city officials, that he should clean and illuminate the sewer throughout and prepare a lift by which to lower automobiles into it. *Held*, that the requirement as to cement was not so clearly outside the provisions of the contract that the contractor was required to refuse to comply therewith, and on acceding to the demand, he could treat the contract as broken and recover damages therefor, but the requirements as to illumination and automobile lift was so obviously beyond the terms of the contract that compliance would afford no cause of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 906, 910; Dec. Dig. § 374.*]

6. APPEAL AND ERROR (§ 1172*)—DISPOSITION ON APPEAL — REVERSAL — ERROR AS TO GROUNDS OF DECISION.

Where a judgment for damages might be sustained as to some of the items proved, but the jury were permitted to take into account other items which were not proper for its consideration, and where it is not possible to determine from the verdict which ones they made the measure of damages, the judgment must be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4555-4561; Dec. Dig. § 1172.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the Borough Construction Company against the city of New York. From a judgment of the Appellate Division (131 App. Div. 278, 115 N. Y. Supp. 697) affirming a judgment of the Trial Term for plaintiff, defendant appeals. Reversed, and new trial granted.

Archibald R. Watson, Corp. Counsel (Terence Farley, of counsel), for appellant. Edward M. Grout, for respondent.

HISCOCK, J. This action is brought really to recover the value of extra materials furnished and extra labor done by the respondent while constructing a large sewer under contract with the appellant in the borough of Brooklyn. It is not brought, however, on the theory of recovering on or under the contract for such extra material and services, but is instituted, and thus far has been sustained, on the theory that the appellant unjustly required the respondent to furnish materials and do work not covered by its contract, and thereby committed a breach of the contract for which damages measured by the value of such material and work may be recovered. The sewer which the respondent contracted to construct was a large one,

the price being upwards of \$800,000. The engineer was the official principally charged with the duty in behalf of the city of supervising the execution of the contract and securing the proper performance thereof by the contractor. Amongst other things, it was provided: "To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the chief engineer of sewers shall in all cases determine the amount or the quantity of the several kinds of work which are to be paid for under this contract, and he shall determine all questions in relation to said work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor."

Two provisions in the contract are directly involved in the controversy. One of these provided that when the work to be constructed "is all or partly below the city datum (meaning high water) Portland cement must be used when directed by the engineer." The other was to the effect that "during the progress of the work, and until the entire completion and final acceptance thereof, the sewers, drains, basins, culverts and connections are to be kept thoroughly cleaned throughout and left clean, and the drainage of any old sewer that may be taken up or intercepted must be provided for by the contractor." Claiming to act under the first clause, the engineer in charge demanded that the contractor should lay not only that portion of the sewer which lay below the city datum line in Portland cement, but also should lay in such cement that portion of the same section which was above the line, this cement being much more expensive than that which the contractor was otherwise allowed to use. Again, claiming authority I suppose under the second clause quoted above, if anywhere, the engineer demanded that the contractor make the sewer ready for an alleged inspection by the city officials, and to that end that he not only do various things in the way of cleaning it up, but that he prepare a lift by which to lower automobiles into the sewer and illuminate the sewer its entire length, which was done with a great number of candles. In each case the contractor in substance protested that the things thus required of him were not covered by his contract, but on the insistence of the said official finally did as he was required, and it is because of what he was thus required to do that he brings this action. There are some preliminary questions to be disposed of before we reach the main one whether he can succeed because thus required.

The first one is raised by the contention on behalf of the appellant that no sufficient notice of claim was filed in behalf of the re-

spondent. My attention has not been called to and I have been unable to find any place where this question was presented on the trial in a manner that survives the unanimous affirmance of the judgment secured at the Trial Term.

A second question is whether the appellant is in a position in view of the unanimous affirmance to attack the judgment which has been rendered against it on the merits. I think that by its objections and exceptions to the reception of evidence and to the charge and refusals to charge it has placed itself in a position to do this.

The next question is whether the respondent was required to furnish materials and do work which were not covered by its contract, for of course this claim lies at the bottom of its recovery. I think it was. It is clear that some of the things which it did in preparation for the so-called inspection trip of the city officials, such as installing an elevator and placing candles the entire length of the sewer and perhaps other things, were not required by the contract. I also think it is reasonably clear that it was not compelled to lay in Portland cement those portions of the sewer which were above the city datum. Of course the intent of the clause in the contract on this point which has been quoted was to require a higher grade of cement where the sewer was exposed to the action of water, and there would be no sense in so construing it as to require the upper part of the sewer which was never subjected to the action of water to be laid in Portland cement because the lower portion was subject to the action of water and therefore should be laid in it. It is asserted without contradiction that for its entire length some part of the lower portion of the sewer was under the line in question, and this being so, the contention of the appellant would result in requiring the entire sewer to be laid in Portland cement, a result evidently not dreamed of by the parties.

The disposition of these questions brings us to the main inquiry, whether a recovery may be allowed on the theory of a breach of contract chosen by the respondent because it was unjustifiably required to furnish these extra materials and do this extra work in spite of its protest.

The learned counsel for the appellant with considerable insistence advances arguments applicable to an action brought to recover on contract for extra services and materials and leading to the conclusion that such recovery cannot be permitted because such materials and work were not called for or authorized in the manner prescribed by the contract. Of course on the premises formulated by counsel on this theory his conclusions are unimpeachable, but the answer to the entire argument is that this action does not rest on any claim for extra services or materials under the contract, but on an alleged breach of the contract by the city and

its representatives whereby the respondent has suffered damages, and the question is whether the action can be maintained on that line. I regard it as settled that it may; that within certain limits a contractor who is ordered by the proper representatives of the municipality to furnish materials or do work which the former thinks are not called for by his contract may under protest do as directed and subsequently recover damages because he has been so required even though it should turn out that the contractor was right and that the official had no right to call on him to furnish such materials and do such labor under his contract. Decisions of this court have so conclusively established the principle that under such circumstances the contractor may treat the conduct of the municipality acting through its representative as a breach of contract and recover damages, that it is only necessary to summarize these without argument.

In *Gearty v. Mayor, etc.*, of N. Y., 171 N. Y. 61, 63 N. E. 804, a case was presented where the engineer of construction had required a contractor to take up and relay a part of a pavement on the ground that it had been improperly laid. The contractor, although protesting that the work had been properly done, and that the requirement was improper, nevertheless complied therewith and afterwards brought an action alleging two causes of action. One of them was for damages suffered by reason of certain work being unlawfully and in breach of the contract required to be done the second time. In that case as in this one the contract proper had been fully performed and the contractor had received his compensation in full thereunder, and there was no certificate for extra work as provided in the contract. Under these circumstances it was held that the action was not to be treated as one to recover extra compensation under the contract but as one to recover damages for a breach of the contract, and that plaintiff might maintain an action on that theory, and that on that theory no certificate of the engineer was necessary. The appellant seeks to distinguish that case on its facts from the present one, but in my opinion, while the nature of the thing unlawfully required of the contractor was somewhat different from what was required in this case, this difference of detail is not sufficient to decisively distinguish the two cases or to withdraw this case from the principles laid down in deciding the former one. It was, amongst other things, said: "It is insisted on behalf of the city that the plaintiff by obeying the orders of the engineer of construction requiring him to take up and relay the alleged improper work without making any claim for extra compensation at the time the changes were ordered or made or without making a new contract, has waived any claim, if he was entitled to any, to extra compensation. This proposition assumes erroneously that

the plaintiff is seeking to recover extra compensation under the contract. This action is to recover damages for breach of the contract. * * * We are of opinion that either of the remedies discussed (one being to comply with the improper direction and then bring an action for breach) was open to the plaintiff at his election." Page 72 of 171 N. Y., page 807 of 68 N. E.

In *Lentilhon v. City of New York*, 102 App. Div. 548, 92 N. Y. Supp. 897, affirmed, without opinion, 185 N. Y. 549, 77 N. E. 1190, while the plaintiff's claim to recover because extra work had been improperly required of him was defeated on the construction given the contract, it was written: "Damages as for a breach of contract may be recovered for an erroneous direction of a representative of a municipality, authorized to give directions in the premises in superintending the execution of contract work, which are insisted upon and necessitate the performance of more work than the contract, properly interpreted, requires, and the contractor has an election either to refuse to proceed and recover upon a quantum meruit for the work already done or to continue under protest and recover the value of the extra work upon a quantum meruit as the measure of damages for the breach of contract"—citing, amongst others, the *Gearty Case*, supra, at page 557 of 102 App. Div., page 902 of 92 N. Y. Supp.

In the more recent case of *People ex rel. Powers & M. Co. v. Schneider*, wherein this court affirmed, without opinion (191 N. Y. 523, 84 N. E. 1118), the judgment of the Appellate Division, which in turn affirmed the judgment below on the opinion of the referee, the question here presented was decided in favor of the contractor on practically identical facts. In that case the contractor was engaged in constructing a sewer, and the official in charge, in behalf of the municipality, contended that the contract required certain work to be done in a certain manner, and demanded that it should be so performed. The contractor, while disputing the contention of the engineer, and protesting that the contract did not compel him to do as required, nevertheless complied with the directions given to him, and subsequently brought an action to recover what amounted to the extra cost of doing work which he had been improperly instructed to do, and he was allowed to recover on the authority and theory of the *Gearty Case*, already referred to. While the referee, in his opinion and findings, uses expressions concerning a recovery of the value of the extra work required, these must be construed as relating to the measure of recovery on the fundamental facts showing a breach of contract by the municipality, and the judgment must be regarded as having been affirmed on that theory.

While it has thus been established that a party may recover damages as for a breach

of contract when he has been unlawfully required to furnish materials or do work not called for by his contract, I agree with the counsel for the appellant that the principle unless restricted in its application may be made the source of grave abuse. While such an action theoretically seeks to recover damages as for a breach of contract, its real purpose is to secure compensation for extra work and a municipal representative and contractor might by collusion make the theory a ready method of saddling the municipality with extra work and materials which it never authorized and of burdening it with liabilities which it never contemplated. Municipalities ought not to be subjected to any unlimited risk of this kind, but some such logical and reasonable limitation should be placed on the operation of this principle as will be decisive under ordinary circumstances and be a safeguard against any such unfortunate result as has been suggested.

The underlying justice of the principle is that where a municipal representative having authority to speak for it and supposed to be familiar with such matters in apparent good faith and with a show of reason requires a contractor to do certain things as covered by his contract, the contractor, although protesting against the requirement, ought not to be compelled to refuse obedience and incur the hazard of becoming a defaulter on his contract even though it shall subsequently turn out that he was right and the municipal representative wrong in the dispute. The theory involves the idea that the requirement of the municipal representative finds some reasonable basis in the contract, and that the question whether his demand is proper or improper is one which may be the subject of some doubt and debate, and in respect of which the contractor might prove to be mistaken if he should refuse to do what was required of him, and there is no justification for applying it where the municipal representative requires something which is so palpably and manifestly beyond the provisions of the contract that the contractor would not be confronted by any of the legal perils of an erroneous decision if he should refuse to obey.

These considerations seem to suggest the general rule that where the municipal representative, without collusion and against the contractor's opposition, requires the latter to do something as covered by his contract, and the question whether the thing required is embraced within the contract is fairly debatable and its determination surrounded by doubt, the contractor may comply with the demand under protest and subsequently recover damages even if it turns out that he was right and that the thing was not covered by his contract, and, on the other hand, if the thing required is clearly beyond the limits of the contract, the contractor may not even under protest do it and subsequently recover damages. While this rule is only a

general one, and may not be determinative of every conceivable case, it seems to furnish a test by which to decide phases of the question which will ordinarily present themselves, and it may both be illustrated by and applied to the facts established in this case.

The demand of the appellant's engineer that respondent should use Portland cement in laying both the portions of the sewer above the city datum line as well as those below, finds some support in the wording of the clause of the contract relating to that subject. In fact a literal interpretation of the clause would sustain the demand of the engineer, and it is only by tempering the letter of the provision by the spirit of its purpose that we reach the conclusion that it did not require the extra Portland cement demanded by the engineer. Under these circumstances the court could well say, as it has, that the contractor was justified in following the instructions of the engineer, although protesting against the justice thereof, rather than in refusing to comply with those requirements and hazarding a breach of his contract involving \$900,000, and that its supply of the extra material furnished a basis for recovery in this kind of an action.

On the other hand, if we assume that it was based on the contract, the demand that the contractor should furnish elevators by which to lower automobiles and illuminate the sewer as was done, and I use these terms as illustrations without attempting to classify on this question all of the items embraced in this branch of the case, was so preposterous that there could be no reasonable doubt that it exceeded the obligations of the contract and that a refusal to comply with it would not work a breach of contract. Under those conditions the contractor was not justified in doing the work, and cannot recover damages on the theory now invoked. Of course it is true that if it had refused compliance it might have been subjected to annoyance or even to unjust litigation, but that is a possibility which confronts every one, and in my opinion is not enough to furnish a basis for this kind of an action.

I, therefore, reach the conclusion that a judgment awarding damages measured by some of the items proved might be sustained, but that the jury were permitted to take into account other items which were not a proper subject for consideration, and inasmuch as it is not possible to determine from the verdict which ones were made the measure of damages, it seems necessary to reverse the judgment and grant a new trial, costs to abide the event.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 139)

In re KING'S ESTATE.

(Court of Appeals of New York. Dec. 13, 1910.)

1. WILLS (§ 522*)—CONSTRUCTION—"GIFT TO CLASS."

A "gift to a class" is defined as a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at future time, and who are to take in equal or in some other definite proportions; the share of each being dependent for its amount on the ultimate number of persons.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1114; Dec. Dig. § 522.*]

2. WILLS (§ 523*)—CONSTRUCTION—LAPSE.

If there is a bequest to certain persons nominatim, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then, if one of them dies in the lifetime of the testator, his share lapses.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

3. WILLS (§ 858*)—CONSTRUCTION—RIGHTS OF DEVISEES—LAPSE.

A devise to the nephews and nieces of the deceased husband of testatrix, "who were living at the time of his death," was a gift to designated persons as distinguished from a class, and the surviving nephews and nieces took only their own shares, and the shares of those who predeceased testatrix lapsed and passed into the residuary estate, under a further provision of the will disposing of the residue and remainder of property of testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.*]

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the judicial settlement of the estate of Margaret King, deceased. From a decree construing the will of said decedent and distributing the estate by the Surrogate's Court, Moses W. Taylor and Edna Odell appealed to the Appellate Division of the Supreme Court, where the decree was affirmed (135 App. Div. 781, 119 N. Y. Supp. 869), from which said parties appeal. Reversed.

One Margaret King died in July, 1906, leaving a last will and testament dated the 30th day of March, 1876, which was admitted to probate in the Surrogate's Court of Orange county on the 17th day of July, 1906. Letters testamentary were thereupon issued to Rufus King who was nominated in the will as executor. In this will the testatrix, after sundry dispositions to next of kin, made the following provision for certain nephews and nieces of her deceased husband: "Fourthly. I give and devise to my executors, herein-after named, my house and lot No. 128 Seventh Avenue, west side, third door below Twentieth street, New York City, in trust, to sell the same within eighteen months after my decease, either at public or private sale, for the best price they can obtain, and give to the purchaser or purchasers a good and sufficient deed therefor, and divide the entire proceeds of such sale equally between the nephews and nieces of my late husband, being the children of his brother, Rufus S. King, of New York, who were living at the

death of my late husband, and the children also of his sister, Margaret M. Petty, of Orient, Long Island, share and share alike, to them and their heirs." This fourth paragraph is supplemented by a general residuary clause which reads as follows: "Fifthly. I give, devise and bequeath to my sister, Elizabeth Odell, all the rest, residue and remainder of my property of whatever kind and wherever situate, not herein otherwise disposed of, to her, her heirs and assigns. But, if she shall not survive me, then the said rest and residue to go to and belong to my next of kin, as the same would descend under the statute." The will of the testatrix was made in March, 1867, and her husband died in November, 1868. At both of these dates there were living nine nephews and nieces of the deceased husband, four of whom were the children of Rufus S. King, a brother of the husband, and five of whom were the children of Margaret M. Petty, a sister of the husband. Between the date of the will and the death of the testatrix five of these nephews and nieces died, two of them being the children of said Rufus S. King, and three of them the children of said Margaret M. Petty, so that only four of these nephews and nieces survived the testatrix. The first residuary legatee, Elizabeth Odell, a sister of the testatrix, predeceased the latter, and the will provided that upon the happening of that event the residuary estate should go to the next of kin of the testatrix. Her only surviving next of kin was her brother, Dyckman Odell, who has since died, and his estate is represented by his executors. The matter in controversy is the division of the proceeds of the New York real estate described in the fourth clause of the will, and the question is, whether the four surviving nephews and nieces of the deceased husband of the testatrix take it all, or whether the shares of the five who predeceased the testatrix lapsed and fell into the residuary estate. The surrogate decided "that it was the intention of the said Margaret King to give the entire proceeds of the sale of the premises described in the fourth paragraph of her will to those nephews of her late husband who were living at the time of his death, and who survived the said Margaret King." From the decree entered upon that decision, an appeal was taken to the Appellate Division, where it was affirmed, and the case is now in this court for final disposition.

Lewis C. Platt, for appellants. William W. Scrugham, for respondents.

WERNER, J. (after stating the facts as above). It has been justly observed by some jurist possessed of philosophical perception "that no will has a twin brother." This sage epigram points directly at the difficulties encountered by courts in trying to construe wills in the light of authority. These troubles are nowhere more cogently illustrated

than in Mr. Jarman's Standard Treatise on the Law of Wills, where one may find authority for almost any proposition which the exigencies of a given case may suggest or demand. Yet, despite this confusion, which is the natural, if not the inevitable, outgrowth of efforts to apply the law to a numberless variety of wills and circumstances, there are some early rules which have survived to keep this branch of the law as uniform and certain as may be. One of these ancient and still existing rules underlies the construction to be given to the will before us. The broad question is whether the gift in the fourth clause is to a class, which is represented by those who survive the testatrix, or whether it is a gift to designated persons in being at a specified time, the death of any of whom, prior to the decease of the testatrix, caused a lapse of the gift *pro tanto*.

The gift is to the nephews and nieces of the deceased husband of the testatrix "who were living at the death" of said husband. When this husband died, in 1868, and when this will was executed, in 1867, there were nine such nephews and nieces. The testatrix died in 1906, and at that time only four of the nephews and nieces were alive. The question, more concretely stated, is whether these four survivors take the whole gift or whether the shares of the other five lapsed upon their respective deaths. The answer depends, as we have said, upon the nature of the gift, and that in turn depends upon the construction of the fourth clause of this will. If the gift made by that paragraph was to a class, the survivors are entitled to the whole; but if it was a gift to designated persons, as distinguished from a class, there was a lapse of the shares intended for those who predeceased the testatrix, and these lapsed shares fall into the residuary estate.

A gift to a class has been defined as "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." 1 Jarman on Wills (6th Ed.) 232. This definition has been approved by this court in *Matter of Kimberly*, 150 N. Y. 80, 44 N. E. 945, and in other later cases.

The exact converse of this definition is well stated by Vice Chancellor Kindersley in the English case of *Cruse v. Nowell* (4 Drew, 217): "If there is a bequest to certain persons nominatim, or so described as to be fixed at the time of the gift, so that there can be no fluctuation, then, if one of them dies in the lifetime of the testator, his share lapses."

These two antithetical definitions clearly mark the line which must be followed in construing the will now before the court. If the gift were to the nephews and nieces of the deceased husband of the testatrix gener-

ally, without designation, restriction, or limitation, it would be a gift to a class, because the ultimate number of the beneficiaries would have remained uncertain and incapable of ascertainment until the death of the testatrix. In that event the survivors would, of course, represent the class and take the whole gift. But that, as we have seen, is not this case. The gift of the testatrix was not "to a body of persons uncertain in number at the time of the gift, to be ascertained at some future time," but to certain persons "so described as to be fixed at the time of the gift." The bequest was to the nephews and nieces of the deceased husband of the testatrix who were living at the time of his death. That was as distinct a designation of the several beneficiaries as though they had been described nominatim. It was as though the testatrix had named nine persons and had added, "I give to these nine nephews and nieces of my late husband, who were living at the time of his death, the proceeds of my New York house, share and share alike." There can be no doubt, we think, that this was a gift to designated persons in being at a specified time which antedated the death of the testatrix, and that there was a lapse of the shares of those who did not survive her. It would not be difficult, as we have suggested, to find many decided cases either to support or demolish this *a priori* view of the case. To attempt to analyze or reconcile any great number of them would only make "confusion worse confounded."

The other side of the question has been most ably stated by Mr. Justice Miller, in the Appellate Division, in an opinion which frankly discloses the author's hesitation in reaching the conclusion adopted by his court. It is apparent that he reluctantly yielded his own impressions to what he supposed to be the trend of authority, for in one place he argues: "If the testatrix had in mind a class, i. e., the nephews and nieces of her husband, and not particular individuals of the class, so that she might be presumed to have intended to benefit all of the class living at the time of her death, it is difficult to understand why she restricted the number by the clause, 'who were living at the death of my late husband.' Had the gift been to 'the nine nephews and nieces of my late husband,' there would have been no doubt according to the cases hereinbefore cited that the gift was to particular individuals; and it seems to me that, standing alone, the expression used by the testatrix amounts to the same thing." And again, in an earlier paragraph of the opinion the learned justice says: "It would seem that, where the testator fixes a point of time for ascertaining the donees, which is prior to the making of the gift, they should be considered as *personæ designatæ* the same as though the gift were to them nominatim; for, in either case, the descrip-

tion would tend to indicate that the testator had individuals, not a fluctuating class, in mind." To this extent the argument is precisely in accord with our views, and so clearly stated that we have been able to do little more than to paraphrase it. Certain cases are cited, however, as tending to establish the contrary rule, and we shall briefly analyze them for the purpose of showing that they are so variable, in fact, as to render some of them inapplicable as authorities to the facts before us, and when that is done it will be perceived, we think, that the few which are really pertinent tend to sustain our views.

In *Vinor v. Francis* (2 Cox, 190) the gift was to the children of a deceased sister, without describing or naming them, and without any mention of the time when they were to be ascertained. This was clearly a gift to a class, and the death of the testator was the time for ascertaining who comprised the class, because there was nothing in the will to indicate a different intent. *Campbell v. Rawdon*, 18 N. Y. 412. In the will before us there is a plain statement fixing the time when the objects of the gift are to be ascertained, and that is one of the reasons why the cases, in which there is an unmistakable gift to a class, are not controlling of the case at bar. In *Leigh v. Leigh* (17 Beav. 606) the gift was to A. B. for life, and after his death to "all the present-born children of A. B." That was held to be a legacy to a class, evidently upon the theory that it was liable to fluctuation by diminution, if not by addition, but the short opinion of Sir John Romilly, Master of the Rolls, makes no mention of the much more conclusive fact that the will contained no direction as to the time when the class was to be ascertained, and that is a point which differentiates that case from this. Then we are referred to *Cruse v. Nowell* (4 Drew, 215), from which we have quoted what we regard as a fair definition of a gift *personæ designatæ*, where it was held that a gift to take effect upon the death of A., one of his children, in favor of such of the testator's other children who should be living at the death of A., was a gift to a class. This is another illustration showing that when, as in that case, the beneficiaries are to be ascertained at some future time after the testator's death, there are elements of a gift to a class which we do not find in the case at bar. To the same effect is the case of *Magaw v. Field*, 48 N. Y. 668, where there was a devise to the children of M. without limitation under a will made in 1833, where the testator lived until 1864. In *Smith's Trusts* (L. R. [9 Ch. Div.] 117) the bequest was that the residue of the estate should be equally divided between the five daughters of Samuel and Mary L. This was held to be a bequest *personæ designatæ*, because there was a distinct limitation as to the number of daughters to

five, so that after-born daughters could not participate in the gift.

The case which seems to have been most influential in determining the decision in the court below is *Hopcock v. Tucker*, 59 N. Y. 202, 210, in which it was held that a bequest to J. H. and W., children of A. M., a deceased daughter of the testator, was a gift to a class. The learned judge who wrote the opinion in that case conceded that the clause containing this bequest, taken alone, would be construed as a bequest to the persons named as individuals, but concluded that the general scheme of the will, and certain specific provisions thereof, indicated an intent to regard these legatees as members of a class, rather than as individuals. The will in that case was long and involved, and even its most salient features are too extended for reproduction here, but the point upon which the question turned was that the will as a whole indicated that the testator intended that the issue of his children, where they took under the will, should take by representation, and that is emphasized by the following sentences from the opinion: "We cannot suppose that the testator intended that these children should take a comparatively small legacy as a class, while the principal legacy was given to them as individuals. If any reason can be imagined for a distinction between these children and the issue of his other children, no possible reason can be supposed for prescribing a different rule for these children in taking different legacies. These provisions and the general scheme of the will, that the issue of all his children should take by representation, satisfies me, not that the omission to prescribe the rule in the eleventh clause was intended to make the bequest personal, but that the language employed was not designed to have that effect, and that the description of the persons as the children of his deceased daughter was intended to be controlling." Quite apart from the reasons given for that decision, there is another, which is not mentioned in the opinion. In section 29 of the decedent estate law, which was taken from the Revised Statutes, we find that "whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate." *Consol. Law*, c. 18. That provision which seems to have been applicable to *Hopcock v. Tucker* is not pertinent here, because this will contains no devise or bequest to children of the testatrix. In following *Hopcock v. Tucker* the court below

sought for indications in the will before us, of an intent to regard the nephews and nieces referred to in the fourth paragraph, as members of a class rather than as individuals. The fact that there are no words of gift to the nephews and nieces was regarded as significant, and the disposition of the second, third, and fifth clauses of the will, making provision for the brothers and sister of the testatrix, are cited as affording some evidence that in the fourth clause the testatrix was speaking of a class. We think otherwise. Neither the nature nor the extent of the bequests made in the second and third clauses of the will seem to suggest any reason to support that conclusion.

This discussion of the cases cited by the court below in support of its decision is but a preface to the volume that would have to be written if we should consider, *seriatim*, the many cases set forth in the exhaustive brief of the respondent's counsel. That we shall not attempt, for we deem it sufficient to say that the authorities cited in the briefs of both counsel for appellant and respondent, when closely examined, will disclose some special reason for classifying them into one or the other of the two groups representing the opposite sides of the question, which is decisive of this case.

Campbell v. Rawdon, *supra*, *Magaw v. Field*, *supra*, *Downing v. Marshall*, 23 N. Y. 386, 80 Am. Dec. 290; *Hopcock v. Tucker*, *supra*, and *Ferrer v. Pyne*, 81 N. Y. 281, are examples of gifts to classes as distinguished from individuals; and *Matter of Kimberly*, 150 N. Y. 90, 44 N. E. 945, and *Herzog v. Title Guaranty & Trust Co.*, 177 N. Y. 88, 97, 69 N. E. 283, 87 L. R. A. 146, are illustrations of gifts to individuals as distinguished from members of a class. Then there is an intermediate line of cases, of which *Matter of Russell*, 168 N. Y. 169, 61 N. E. 166, is fairly typical, which may be regarded as neutral ground, because they were so obviously decided upon their own special circumstances as to render them authoritative only in identical cases.

Our conclusion, therefore, is that the surviving nephews and nieces take only their own shares, that there was a lapse of the shares of the five who predeceased the testatrix, and that these five shares passed into the residuary estate by virtue of the fifth clause of the will. The order of the Appellate Division and the decree of the surrogate must therefore be reversed, with costs to appellant in all courts, and the case remitted to the Surrogate's Court for disposition in accordance with our decision.

CULLEN, C. J., and GRAY, HAIGHT, VANN, CHASE, and WILLARD BARTLETT, JJ., concur.

Order reversed, etc.

(200 N. Y. 139)

ROBINSON v. MARTIN et al.

(Court of Appeals of New York. Dec. 6, 1910.)

1. WILLS (§ 453*)—CONSTRUCTION.

The court should give to a will that construction which has in its favor the balance of reasons and probabilities.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 971; Dec. Dig. § 453.*]

2. WILLS (§ 439*)—CONSTRUCTION—INTENT.

Where, on inspection of the will and on a consideration of relevant facts, an intent is apparent, all rules of construction to the contrary must yield, provided such intent does not offend against public policy, or some positive rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 955; Dec. Dig. § 439.*]

3. WILLS (§ 524*)—CONSTRUCTION—"UNMARRIED DAUGHTERS."

Testatrix, on making her will, had five unmarried daughters, one married daughter, and an incompetent son. In her will she expressed a wish that her unmarried daughters, or such of them as desired to live together, with her son, should live in one household, and directed that the house wherein they had been living be kept in repair, etc., so long as any of her daughters remaining single might choose to make it their home. She further directed that a share of the estate held in trust for her son's benefit should on his death go to her "unmarried daughters." Before the execution of the will the word "unmarried" was substituted by testatrix in the draft for "surviving." Held, that only those daughters unmarried at the date of the son's death were included.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1125; Dec. Dig. § 524.*]

Cullen, C. J., and Haight and Willard Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Caroline M. Robinson against Katharine T. Martin and others for the construction of a will. From an interlocutory judgment construing the will and for an accounting, plaintiff appealed. The judgment was reversed and judgment directed (see 138 App. Div. 310, 123 N. Y. Supp. 146), and thereafter the Appellate Division certified a question as to the construction. Question answered.

See, also, 139 App. Div. 909, 124 N. Y. Supp. 1123.

Charles H. Beckett, for appellant. Thomas Thacher, for respondents.

GRAY, J. This action was brought to have a clause of the will of Mary J. Martin judicially construed, by which a share of her estate upon the decease of a child, for whose benefit during his life it was to be held in trust, was given to testatrix's "unmarried daughters in equal shares." The Appellate Division has certified the question for our review whether the clause should be construed "to include all of the daughters of the testatrix, who were unmarried at the date of her death, or only such of them as were unmarried at the date of the death of her son,

the life beneficiary." Upon this question the learned justices of that court have divided in opinion; the majority holding that only the daughters unmarried at the time of the death of her son were intended and reversing, thereby, a decision of the court at Special Term, sustaining the other contention. It must be conceded, therefore, that the question is one which admits of serious argument for the one, or the other, view.

As the will is constructed, I think it is quite possible to discover strong evidences of a testamentary intent, which becomes clear, when we consider, in connection with the provisions of the will, the situation of the family. At the time of making her will, in 1894, the testatrix was a widow. She had several children, a son, who was feeble-minded and unable to take care of himself, and six daughters, the oldest of whom was married. The ages of the five unmarried ones ranged from 19 to 31 years. Two years after executing the will, the testatrix died, leaving a large estate, and, at that time, there had been no change in the family relations by other marriages. The son died in 1908 and intermediate the mother's death and that event three daughters had married. If the contention of the plaintiff, appellant here, is correct, then the distribution of the son's share should be made to and among her four sisters and herself, who were unmarried at her mother's death, and that contention, as it is claimed, is supported upon the theory that the gift of the share to them was immediate and its enjoyment in possession merely postponed. The plan of the will is not involved in any obscurity. After providing for the payment of debts, by the second paragraph the testatrix gives all of her property to her executors and trustees upon certain trusts. In the first subdivision of the paragraph, she declares it to be her "wish that her unmarried daughters, or such of them as desire to live together, with my son John C. Martin, shall live in one household, whether at my present home, or elsewhere." She directs the house in which they had been living to be kept in repair and the taxes and insurance to be paid, during the lives of the two youngest of her surviving daughters, "but only so long as any of my daughters remaining single may choose to make it their home." A trust fund of \$20,000 is to be reserved; the net income of which is to meet those expenses. She further provides, if her "unmarried daughters, or such of them as desire to live together with my son," prefer to live elsewhere, that her house and the fund for its maintenance, if already reserved, should fall into the residuary estate. Thereupon, "for the purpose of providing a suitable residence" for them, a fund of \$50,000 was to be set apart from the residuary estate, or, if after its distribution, from the proceeds of the sale of the house, during the lives of the

two youngest of her daughters, which was to be applied to the purchase of a satisfactory residence; the balance, unexpended, to be invested and the income to be used in meeting the expenses of keeping the house in good order and in paying the taxes, insurance, etc. Upon the death of the survivor of her two youngest daughters, the house and the trust fund were to be "divided in the same manner as her residuary estate." The contents of the "home," thus provided, were to be divided among her surviving children equally. In the second subdivision of the paragraph, she creates a trust for the benefit of her son, during his life, in one share, "which share shall be the proportionate part which he would receive of my estate, in view of the number of my children who may survive me and of my children who may have died before me leaving lawful issue me surviving." She directs the net income of the share so held in trust to be applied to her son's use and for his proper support, and then follows the clause under consideration, which reads: "And upon the death of my said son I give, devise and bequeath the said share to my unmarried daughters in equal shares." Before the execution of the will, the word "unmarried" was substituted by the testatrix in the draft for "surviving." Finally, in the third subdivision of the second paragraph, she provides that the residue of her estate should be held in trust during the lives of the two youngest of her surviving daughters, but not beyond the period of 10 years, and that the net income should be paid in equal shares to her children, "except her son John"; the share of any deceased child to be applied to the use and support of her issue, if any, surviving. Upon the expiration of this trust, the trust estate is given to her "children (other than her son John), in equal shares, per stirpes."

From this review of the testamentary provision made for the children of the testatrix, it appears that in two respects, only, does she make any distinction between them in disposing of her estate. Her son's share is to be held in trust and she makes the disposition of it upon his death. For him and her unmarried daughters she provides for the maintenance of a common home, and the unmarried daughters are to have the son's share upon his death. The reason in each case would seem to be clear. The son was unable to take care of himself and the daughters, who were unmarried, would not have that protection and the additional means for support, which marriage is usually presumed to bring. These cases, evidently, appealed to the mother's mind in making her will and her provisions should be read in that light. That she carefully considered her words appears from the erasure in the draft of the word "surviving," in the clause which disposes of the son's share in favor of her daughters, and the substitution of "unmar-

ried." I think the circumstance has its significance. "Surviving daughters" might have comprehended all of her daughters who outlived her son, and that, evidently, she did not intend. In changing the expression to "unmarried daughters," she limited the number of those who were to take and the question of the case arises: To what time did the word "unmarried" refer? In my opinion, the plan of the will, its language, and the situation point to the son's death as the event in time, which was to determine what daughters should take; that is to say, those at that time unmarried. In the work of judicial construction, we cannot, of course, predicate certainty of our conclusions as to intent. At the most, we can, and we should, give that construction to a will, which has "in its favor the balance of reasons and probabilities." *Weeks v. Cornwell*, 104 N. Y. 325, 336, 10 N. E. 431, 433. Precedents and rules, frequently, have but slight value in interpreting wills; for those instruments are rarely, and, in the nature of things, are not likely to be, similar in terms. When the testator's intention is obscure, resort to them may be helpful in ascertaining it. Where, upon inspection of the will and upon a consideration of relevant facts and circumstances, an intent is apparent, all rules to the contrary must yield, provided that intent does not offend against public policy, or some positive rule of law. It may well be that some of the rules of construction require a greater force of intention to control them; but if it be found in the instrument, it should be followed. This will furnish, in my judgment, a case of such force of intention as to make it more probable, if not certain, that, in the clause under consideration, testatrix was referring to the son's death as the period for ascertaining the persons who should be entitled to take his share. The words "upon the death of my son" are, of themselves, not controlling; but when read with the context of the whole second paragraph of the will, they appear to have a determinative power of definition.

As it has been suggested, perfect equality was intended between the testatrix's children, except as to the restriction upon the son's possession of his share, the eventual right thereto of the unmarried daughters, and the provision for a home for them. The distinction in favor of unmarried daughters must be carefully noted. They were of marriageable age and their mother shows her appreciation of the fact; for, in providing for the maintenance of the home, it is to be "only so long as any of my daughters remaining single may choose," etc. When any one of them married, she ceased to be entitled to the benefit of that provision. During the trust period, the unmarried condition of the daughter determined her right to share in the provision for the home. They and the incompetent son were to live together in the

house and that situation is carried along in the mother's mind, by clear inference from the language, and influences her in preferring those of her daughters who are still unmarried upon his death as donees of his share. It is very significant that, while the trust provision for the maintenance of a home ceases with the termination of the trust period, the testatrix contemplates that the son and unmarried daughters will continue to live together. In directing an equal division of the proceeds of the sale of the house and trust fund, she adds a direction that "all the contents of such house shall be at the disposal of my said daughters, so long as they, or any of them, have a home together (with my son John C., if still living)." This bears strongly upon the probability of her intending only those unmarried daughters to take the son's share, who remained single at his death, as an exceptional provision in their behalf.

The appellant's argument that the clause in question should be construed as giving his share to the daughters unmarried at the time of the testatrix's death suggests conclusions which are inharmonious with her general plan for equality of division, and these have been well illustrated by counsel for the respondents. The testatrix contemplated that her unmarried daughters might marry and that might be, of course, either before or after her death. Adopting the appellant's contention, she must have meant to exclude a daughter who might marry a month before her death and to include one who might marry the month after. I cannot think that she intended to make so unreasonable a distinction; it is too improbable. Again, adopting the appellant's contention, where is the reasonableness of cutting off testatrix's oldest daughter who was married when she made her will? Nothing was proved, which would justify inferring an intention to deprive her of the right to share with her sisters upon the falling in of the son's trust estate, if those marrying before his death were to share in it. Assuming the testatrix to have supposed that no other daughter would marry before she died, would she then have intended her son's share to go to her daughters who were unmarried at her death and to cut off the married daughter? Why should daughters marrying after her death be entitled to the son's share and not the previously married daughter? When tested by the results possible under the appellant's contention, I am brought to the conclusion that it is unsound and that it is opposed to the general plan of the will.

It is not necessary to hold that a bequest was intended to a class, whose members existing at the time of the happening of the event specified, alone, may take; it is only necessary to decide that the intention of the testatrix, in disposing of the son's share, is

manifest to make an exception to the general plan of equality upon which she had distributed her estate, in favor of those daughters surviving their brother, who had remained single. She gives his share upon his death to her daughters then unmarried, because the same need would still exist for exceptional consideration that appears to have moved her previous provisions. It would be difficult to find a reason having any support in the testamentary plan for construing the gift as one to the daughters unmarried at her death, and, as it has been suggested, it would create a distinction against her previously married daughter not warranted by any facts proved with reference to her, or to her family and worldly relations. She was married and that is all we know. There is no need to have resort to any rules of construction; for the rule of intention overrides all such. It is only where the will fails to express or to disclose an intention that we must resort to the rules, which the decisions have established. *Matter of James*, 146 N. Y. 78, 100, 40 N. E. 876, 48 Am. St. Rep. 774.

It is quite immaterial that there may have been a vesting of the remainder in the son's share in the daughters unmarried at the death of the testatrix. As vested interests, they would, nevertheless, be subject to be divested by marriage before the son's death. If the particular form of words was to be considered, I should find no great difficulty in finding the intention to be to give the share to the daughters unmarried at the death of the life beneficiary, to which conclusion the fact of the substitution of the word "unmarried" for "surviving" in the clause comes in aid. See *Teed v. Morton*, 60 N. Y. 502; *Matter of Smith*, 131 N. Y. 239, 30 N. E. 130, 27 Am. St. Rep. 586; *Lyons v. Ostrander*, 167 N. Y. 135, 140, 60 N. E. 834.

Nor does the suggestion that there was any condition in general restraint of marriage appear to me to have any force. I find no condition, directly or indirectly, imposing any absolute injunction to celibacy. I cannot discover any condition in terrorem, any purpose to impose any restraint on a daughter's marriage. There is no bequest upon condition that her daughters should not marry, or condition subsequent, the breach of which might work a forfeiture of interest. If the bequest had been "upon the death of her son to her unmarried daughters, or, in the event of any one marrying, then to those remaining unmarried," we would have a different case. Such a case would show an intention that those unmarried at the death of the testatrix were to take their brother's share; provided none married meanwhile. We have no such case; but merely one where the testatrix, in disposing of her son's share, at his death, made a distinction between her daughters, as conditions existed at the time, and gave it to those then unmarried—a dis-

tion, as before discussed, influencing her previous provisions. There is no evidence of an intention to prevent their marrying, and, unless such an intention shall clearly appear, a will should not be construed as imposing any such condition upon reasoning as to the possible effect of a gift, made as was the one in question.

In a note on page 276 of the thirteenth edition of Story's Equity Jurisprudence, the learned editor discusses, with considerable elaboration, this rule which was taken from the civil law by the ecclesiastical courts. He reasons that when the law and chancery courts came to look into the intention of the testator, the virtual abandonment of the Roman rule was reached. I quote: "When at last English judges reached the point of declaring that the real question in a particular case was whether a testator intended to discourage marrying or not (*Jones v. Jones*, 1 Q. B. D. 279, 281, *Blackburn*, J.), and to decide the case as in *Jones v. Jones*, upon the answer to that question, a step only remained to declaring that the donor's intention should govern." He finds in the American cases a disposition "against adopting broadly the doctrine that conditions in restraint of marriage are void," and continues: "The result is that where the courts can discover in the written instrument any other intention than that of a clearly designed discouragement of marriage, they will respect that intention."

* * * When it has come to this, that nothing is left of the Roman rule except where a clear design to discourage marrying is expressed, as held in *Jones v. Jones*, where, though the obvious and natural effect of a particular gift is to prevent marriage, that fact is disregarded, unless there is a plain and real intent, it seems quite time to drop a rule altogether which never had a sufficient reason for its existence in the English law, and to permit the case to stand on the donor's intention, whatever it may be. Indeed, the reasoning of the better authorities comes quite to this result. *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Commonwealth v. Stauffer*, 10 Pa. 350, 51 Am. Dec. 489. * * * When, however, the intention is found, it is submitted as a legitimate conclusion of the reasoning of the judges against the Roman rule, if not as the natural effect of the cases themselves, that the intention should be allowed to prevail." I think the view taken of the rule commends itself to the judgment, as having the weight of reasoning in its favor.

For these reasons, I think the order should be affirmed, and that the answer to the question certified should be that the gift to the unmarried daughters included only such as were unmarried at the date of the death of the life beneficiary.

CULLEN, C. J. (dissenting). The controversy in this case is over the disposition of a

fund of about \$70,000 held in trust for the support of a son during life, under the second paragraph of the second clause of the testatrix's will. The clause concludes: "Upon the death of my said son I give, devise and bequeath the said share to my unmarried daughters in equal shares." I concur in the opinion of the Special Term and in the dissenting opinion of Ingraham, P. J., in the Appellate Division, that the persons who constituted the "unmarried daughters" were to be ascertained at the death of the testatrix (if not at an earlier time), and not at the death of the son, the equitable life tenant. The general rule is that the law favors vested remainders, rather than contingent ones. *Livingston v. Greene*, 52 N. Y. 118; *Matter of Brown*, 154 N. Y. 813, 48 N. E. 537. Where there is no immediate gift, but only a direction to pay, divide, or distribute at a future period, the bequest is contingent; not so, however, where there is such a bequest as is found in this case. This rule and the exception are both stated in *Matter of Orane*, 164 N. Y. 71, at page 77, 58 N. E. 47, and the rule readily yields to the exception where its effect would be to divest the share of any issue of a testator. Such was the case in *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 888, 10 Am. St. Rep. 464; *Matter of Tienken*, 131 N. Y. 391, 30 N. E. 100; *Matter of Young*, 145 N. Y. 535, 40 N. E. 226, and *Matter of Brown* (supra), in none of which was there even an immediate gift, yet in each it was held that death before distribution did not divest. I shall not pursue the discussion further, because it is very clear to me that if we assume the construction of the will adopted by the Appellate Division to be the correct one, the judgment below is erroneous for another reason.

The majority of the Appellate Division held that the remainders vested at the time of the testatrix's death in her then unmarried daughters, subject as to any of them to be divested by her marriage previous to the death of the son, and therefore awarded the fund to those daughters, exclusively, who remained unmarried at the son's death. The result reached was erroneous, because the condition that a daughter should by marriage forfeit the remainder was void. The text-writers agree that conditions in general restraint of marriage, except that of widows or widowers, are void as against public policy. 1 Story's Eq. Juris. §§ 274-290; 2 Pomeroy's Eq. Juris. § 993; 2 Jarman on Wills, *p. 44 et seq.; 2 Williams on Executors, p. 1275. This doctrine seems to prevail everywhere, and as formulated by Judge Story has been accepted by this court as the law of the state in *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244. There is some difference between the text-writers as to the effect of the doctrine on devisees of real estate, but none as to its effect on bequests of personality. The doctrine is tersely stated by Professor Pomeroy (2 Pomeroy's Eq. Juris. [3d Ed.] p. 1683): "If

a condition is precedent and annexed to a gift of land, it operates as at the common law; when broken, it prevents the estate from vesting, whatever be its nature; when annexed to a gift of personal property, if general or unreasonable, it is wholly void, and the gift takes effect; if partial and reasonable, it is operative. When a condition is subsequent and annexed to a gift of land, if general, it is void, and, although broken, the estate of the donee continues; if partial and reasonable, it is operative, and on its breach the estate of the donee is defeated. When a subsequent condition is annexed to a gift of personal property, if general, it is void; if partial and reasonable, and there is a gift over, it is operative, and upon its breach the interest of the first donee ceases and the gift over takes effect; but, if there is no gift over, then the condition is said to be in *terrorem* merely, and is inoperative." This accords with the view taken by Judge Story, but Mr. Jarman seems to be of opinion that in a devise of real estate a condition precedent will not prevent the devise from taking effect. In regard to the proposition that as to personalty, illegal conditions in restraint of marriage, whether precedent or subsequent, are void and inoperative, all are in accord. Judge Story says (section 289): "If the condition regard real estate, and be in general restraint of marriage there, although it is void, as we have seen, if there is not a compliance with it, the estate will never arise in the devisee. But if it be a legacy of personal estate under like circumstances, the legacy will be held good and absolute as if no condition whatsoever had been annexed to it."

To constitute a condition in general restraint of marriage, it is not necessary that the restraint should be absolute, universal, and continue during the whole lifetime of the legatee. If the restraint is unreasonable, it is in general restraint within the rule. Many special restraints have been upheld, such as an inhibition against marrying a particular individual, or one of a particular race. These are not necessary to consider, as in the case before us, as long as the restraint continues it is unqualified, forbidding any marriage. But it is also well settled that a condition in restraint of marriage must be reasonable in point of time. Thus, Judge Story says (section 283): "It is obvious that restraints as to time, place and person may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects. As for instance a condition that a child should not marry until 50 years of age; or should not marry any person inhabiting in the same town, county, or state; or should not marry any person who was a clergyman, a physician, or a lawyer, or any person except of a particular trade or employment; for these would be deemed a mere evasion or fraud upon the law." In *Hogan v. Curtin*, *supra*, An-

draws, C. J., said: "It is otherwise of conditions in general restraint of marriage; they being regarded as contrary to public policy, and the 'common weal and good order of society.' But reasonable conditions designed to prevent hasty or imprudent marriages, and to subject a child, or other object of a testator's bounty, to the just restraint of parents or friends during infancy, or other reasonable period, are upheld by the common law." Page 170, 88 N. Y. (42 Am. Rep. 244). In the case in hand the inhibition against marriage was to continue during the lifetime of the testatrix's son. It was entirely possible that he might survive all the daughters and thus each be restrained during life. As matter of fact, he survived his mother 12 years. At the time of her death the eldest of the unmarried daughters was 33; the youngest 21 years of age. Therefore, when the eldest daughter first became relieved from the requirement of celibacy, she had reached an age at which the great majority of women become incapable of childbearing (Taylor's Med. Juris. pp. 736, 737; 2 Woodhouse & Becker's Med. Juris. 649), and other daughters were closely following her. A restraint until such a period is plainly inconsistent with public policy, as one of the great objects of matrimony is the birth of offspring.

I have not discussed the so-called doctrine of "*in terrorem*" as it is not necessary to the disposition of the case. There is evidently a misunderstanding of that doctrine. It has no application to invalid restraints on marriage which, as already said, in the case of personalty are inoperative, whether precedent or subsequent. The doctrine applies only to valid subsequent conditions, and is to the effect that even such a valid condition will not operate to defeat a bequest, unless there is a gift over in case of breach of condition. In other words, it is a doctrine of the courts to prevent the operation of even valid conditions. *Hogan v. Curtin*, *supra*. It might be argued that as the legacies vested subject only to be divested by marriage, the gift to the class who should be unmarried at the time was not a sufficient gift over, and therefore the condition was inoperative, even if good. But this is unnecessary to pass upon. The statement of Mr. Jarman that a bequest during celibacy, if "for the purpose of immediate maintenance, will not be interpreted maliciously to a charge of restraining marriage" (2 Wills, *886) is misapprehended. It is quoted from the leading case of *Scott v. Tyler*, 2 Dickens, 712, decided by Lord Thurlow. There the chancellor said, citing *Godolphin*: "That the use of a thing may be given during celibacy for the purpose of immediate maintenance and will not be interpreted maliciously to a charge of restraining marriage." This doctrine still prevails, certainly in England, and in at least some of our states, if not generally. *Estate of Bruch*, 185 Pa. 194, 39 Atl. 813. But, again, this rule

has no application whatever to a gift of the principal, but simply to the use or income of the bequest. This distinction is clearly pointed out in the last case cited. Not a penny is here given to any of the legatees for their support and maintenance during celibacy, but the whole fund is bequeathed absolutely, if they remain unmarried until the death of the son.

We are now brought to the final argument, that the bequest to the daughters who may be unmarried at the time of the son's death is not a condition at all that any who may marry before that time shall not receive her share. I cannot understand this reasoning. It is said that this is not a gift to a class. I am inclined to that opinion myself. But it is certainly either a bequest to a class or to designated legatees, for I know of no other character of bequest, and the result in either case is the same. If the respondents here had not married, they would have shared at the son's death in the fund held in trust for him. By their marriage they have forfeited their shares. Surely a bequest to any one, if she be unmarried at a certain time, is the same as a bequest if she shall not have married before that time. Otherwise the validity or invalidity of a restraint on marriage depends on the mere form of a phrase, as pointed out by Lord Thurlow in *Scott v. Tyler*, *supra*. The question, however, has been the subject of express decision. *Sterling v. Sinnickson*, 5 N. J. Law, 756, was an action on a bond under seal to pay \$1,000 in case the obligee was not married in six months from date. It was held that this was a condition in restraint of marriage, and hence void. It was there argued that the obligation was simply to pay money on a subsequent contingency which a man had the right to make. To this the court said: "I think this is not a correct view of the case. Where the event, upon which the obligation became payable, is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot be so properly called a contingency; it is rather the condition meritorious, upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not, therefore, to be considered a mere contingency." Let us see what results the doctrine contended for would lead to. Suppose a testator having a single daughter (and such might have been the case of this testatrix, as all but one of the daughters might have died intermediate the will and her own death), it would follow that by marriage that daughter could not share in the trust fund upon the decease of her brother and the fund might have been given over to strangers. While if the phraseology of the will had been changed, and the will had provided, if any daughter married before the death of the son, then she should not take the fund, it would be void. Is there

the slightest difference in effect between these two testamentary provisions, and is it not a mere question of phraseology? Does it make any difference that instead of her leaving a single unmarried child surviving, she left several? If the testatrix could not provide in the case of a single child for its forfeiture of the remainder by marriage, would she have any greater power from the fact that there were several children? If all the daughters had married prior to the son's death, not one of them could have shared in the trust fund. Such a provision is necessarily a condition in restraint of marriage upon each. If we assume that the bequest was contingent, it would be of no importance, for, as already said, it is settled law as to bequests of personality that invalid conditions precedent equally with those subsequent are inoperative.

In a note by the editor of the last edition (18th) of *Story's Equity Jurisprudence* (page 276) it is suggested that little is left of the doctrine of conditions in restraint of marriage. This suggestion, which is in opposition to the text as written by Judge Story, I think is not justified by the decisions. The general doctrine as stated by the judge seems to be generally accepted throughout the country. *Vaugh v. Lovejoy*, 34 Ala. 437; *Shackelford v. Hall*, 19 Ill. 212; *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Pringle v. Dunkley*, 14 Smedes & M. (Miss.) 16, 53 Am. Dec. 110; *Dumey v. Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422; *Williams v. Cowden*, 13 Mo. 211, 53 Am. Dec. 143; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Otis v. Prince*, 10 Gray (Mass.) 581; *McIlvaine v. Gethen*, 3 Whart. (Pa.) 575; *Hogan v. Cortin*, 88 N. Y. 162, 42 Am. Rep. 544; *Graydon v. Graydon*, 23 N. J. Eq. 230, 236; *Hughes v. Boyd*, 2 Sneed (Tenn.) 512; *Phillips v. Ferguson*, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78; *Webster v. Morris*, 66 Wis. 366, 386, 28 N. W. 353, 57 Am. Rep. 257. I can find only one state in which it has been questioned, Georgia. *Snider v. Newsom*, 24 Ga. 139. Nor can I find any English authority to the contrary of the doctrine that a condition in general restraint of marriage is invalid, except in the case of the second marriage of widows or widowers. The authority on which the learned editor seems to principally rest the rule which he favors is *Jones v. Jones* (1 Q. B. Div. 279). He says, referring to the case cited, that the "English judges reached the point of declaring that the real question in a particular case was whether a testator intended to discourage marrying or not." The devise under consideration in that case was to two women, the testator's sister *Jemima* and her daughter *Mary*, during their lifetime, with the proviso that if *Mary* married she should lose her share and the same should be passed to other parties. The remark of the judge quoted

above was clearly justified by the rule that has always prevailed and which, as before said, Thurlow quotes from Godolphin, that a bequest of the use of a thing during celibacy will be regarded as a provision for maintenance, and not necessarily as a condition in restraint of marriage. This is made clear by reading the opinions, but the case has no application to a devise in fee or an absolute bequest.

In conclusion I should state what seems to me the true interpretation of the will. It is urged in support of the decision of the Appellate Division that it is unreasonable to suppose that the testatrix intended to cut off any of her daughters who might marry intermediate the date of the will and her death, leaving those who might marry subsequent to her death to share in the fund. I concede this; but it seems to me equally hard to believe that the testatrix intended to cut off those who might marry possibly a few days before her son's death, while leaving the others at liberty to marry thereafter, for it appears on the face of the will in the first subdivision of this clause that the testatrix contemplated the possibility of some of her unmarried daughters not continuing to live with her son, and the bequest is made not at all on the condition that they take care of the son, but that they remain unmarried, and though any of them should desert the son, if she remained unmarried, still she would be entitled to a share in the gift. There is, however, another construction of the will. As a general rule, a will speaks as of the time of the death of the testator, but a will may speak from the date of its execution. *Van Alstyne v. Van Alstyne*, 28 N. Y. 375. A class is defined in *Matter of Kimberly*, 150 N. Y. 90, 93, 44 N. E. 945, 946: "In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number." I think that the bequest is not to be considered as given to a class within this definition, or if to a class, that the class was to be ascertained at the date of the will. In my judgment, the use of the expression "my unmarried daughters" was merely to save a recital of each of them separately by name. In other words, it was a bequest to designated persons. *Matter of King*, 93 N. E. 484. So considered, the will is not only reasonable but lawful. It is unnecessary to dwell longer on this question, as the result is the same whatever construction of the will be adopted; the condition in restraint of marriage being void, and none of the daughters having married intermediate the date of the will and the death of the testatrix.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed.

VANN, WERNER, and OHASE, JJ., concur with GRAY, J.; HAIGHT and WILLARD BARTLETT, JJ., concur with CULLEN, C. J.

Judgment affirmed, with costs.

(200 N. Y. 105)

FULTON v. KRULL

(Court of Appeals of New York. Nov. 29, 1910.)

1. TAXATION (§ 327*)—ASSESSMENT—SPECIAL AND GENERAL LAW.

A complete provision for the taxation of real estate, from the assessment to the sale thereof, being made by the charter of a city, a special act (Laws 1892, c. 143), there is no repeal or modification by implication of section 68 thereof, providing how in assessing lots they shall be described, by Gen. Tax Law (Laws 1896, c. 908) § 29, making a more elaborate provision for assessment of property of non-residents.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 327.*]

2. TAXATION (§ 421*)—ASSESSMENT ROLL—AIDS TO DESCRIPTION OF PROPERTY.

The description of lots in an assessment roll cannot be helped out by additional details of description in the deed given on a sale for the tax, or by a map of the lots on file in the county clerk's office, not referred to in said roll.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

3. TAXATION (§ 421*)—ASSESSMENT ROLL—DESCRIPTION OF PROPERTY.

The description of property in an assessment roll must fairly advise the owner that his property is being assessed, and enable a purchaser at tax sale to determine what property is being offered and acquired on the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

4. TAXATION (§ 421*)—ASSESSMENT ROLL—DESCRIPTION OF LOTS.

A description in the assessment roll of lots assessed under the charter of a city (Laws 1892, c. 143) § 68, fairly complying with the express requirements of the statute, and in each case giving the number of the lot, the frontage on a designated street, and the correct side of the streets, the correct frontage, and the distance thereof from the nearest corner of two streets, the depth of the lot, and, by reason of the presumption that the side lines are at right angles to the street, their courses, is sufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

5. TAXATION (§ 421*)—ASSESSMENT ROLL—DESCRIPTION OF LOTS—VARIANCE FROM TRUE DESCRIPTION.

That the description of lots in an assessment roll varies from the description in the map thereof, not referred to in the roll, in that in most cases there is a difference of a fraction of a foot in the depth thereof as given in the roll and shown on the map, is immaterial, the lot in most cases lying between two streets, and in other cases running to a general boundary line parallel with the street, and in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

each case lot stakes having been set marking out the lot, so that the inaccuracy can be the cause of no uncertainty as to the lot intended to be assessed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

6. TAXATION (§ 421*)—ASSESSMENT ROLL—DESCRIPTION OF LOTS—"FRONTAGE."

A description in an assessment roll of property as the east half of a certain lot having 38 "feet front" and a depth of 66 feet, and situate on the east side of a certain street and north of the cross street, is misleading and inadequate, being made without reference to the map of the lots; the statement that the lot has a frontage suggesting that it is bounded on a street or some other open space, whereas the portion of the lot sought to be assessed abutted on the side of another lot, and not on a street; and there being nothing in the description of the assessment roll sufficiently apprising one of the location of the frontage, and therefore from what point the line of depth is to be measured.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 2992.]

7. APPEAL AND ERROR (§ 1176*)—REVERSAL AND DIRECTION OF JUDGMENT.

The trial court having fully found the facts, and it being apparent that they cannot be changed on a new trial, the court in reversing will direct judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Celinda A. Fulton against Fred H. Krull. From a judgment of the Appellate Division (125 App. Div. 901, 111 N. Y. Supp. 111) affirming a judgment for defendant on the report of a referee, plaintiff appeals. Affirmed in part, and in part reversed and directed.

George Clinton, Jr., for appellant. Daniel E. Brong, for respondent.

HISCOCK, J. This action was brought under section 1638 of the Code of Civil Procedure to determine the question of title to real estate situate in the city of Niagara Falls. The appellant sufficiently alleged and established her original ownership and possession of the premises in controversy, and the respondent sought to establish his title and right to possession under tax sales, and the ultimate and substantial question in the case is whether the lands which were in fact sold and conveyed to respondent upon a tax sale were sufficiently described in the assessment roll on which said sale was founded.

Some time prior to the assessment the appellant and others, who were owners of what seems to have been a tract of unimproved and vacant property in the city of Niagara Falls, adopted and caused to be filed in the county clerk's office a map whereon said

tract was subdivided into many different lots and whereon various streets were laid out. The lands in question consisted of a large number of said lots, but although the assessment roll attempted to describe them by and in accordance with the map, no reference was made to the latter in the roll. The lots were assessed as vacant to nonresident owners and were sold separately.

The appellant has argued one or two minor questions relating to the pleadings and lack of sufficient evidence, which we do not deem it necessary to discuss, especially in view of the unanimous affirmance of the findings made by the referee, and we, therefore, come directly to the consideration of the substantial question which is involved.

As preliminary to the determination whether the description in the assessment roll was sufficient, it is important to determine whether such assessment was governed by the provisions of the charter of Niagara Falls, being chapter 143 of the Laws of 1892, or by the provisions of the general tax law, being chapter 908 of the Laws of 1896.

Section 68 of the former statute provides, so far as applicable to this case, that the city assessors "shall assess each lot or parcel of land separately, giving the name of the owner if known, or if not, the name of the occupant, if occupied, the part of the lot assessed, the number thereof, the street, side of street and number of feet fronting on street, or such other brief description as will enable the land intended to be known and located."

Section 29 of the general tax law provides that in the case of the assessment of property of nonresidents, "if it be a tract subdivided into lots or parts of a tract so subdivided, the assessors shall:

"1. Designate it by its name, if known by one, or if not distinguished by a name or the name is unknown, state by what lands it is bounded.

"2. Place in the first column the numbers of all unoccupied lots of any subdivided tract, without the names of the owner, beginning at the lowest number and proceeding in numerical order to the highest, but the entry of the name of the owner shall not affect the validity of the assessment.

"3. In the second column and opposite the number of each lot, the quantity of land therein.

"4. In third column and opposite the quantity, the full value thereof.

"5. If it be a part of a lot, the part must be distinguished by boundaries or in some other way by which it may be identified. If any such real property be a tract not subdivided or whose subdivisions cannot be ascertained by the assessors, they shall certify in the roll that such tract is not subdivided, or that they cannot obtain correct

information of the subdivisions and shall set down in the proper column the quantity and valuation as herein directed. If the quantity to be assessed is a part only of a tract, that part, or the part not liable must be particularly described."

It will readily be perceived that the requirements of the provisions last quoted, if not in actual conflict with those first set forth, are more elaborate and complex and require various things to be done which are not essential under the former to a description of property sufficient for the purposes of taxation. It is insisted by the appellant that the latter provisions so modified the former that the assessors should have complied with all the requirements of both statutes. We do not agree with this contention. An examination of the charter of the city of Niagara Falls shows complete provision for the taxation of real property from the assessment to the sale thereof, and it expressly provides that the assessors shall "be subject to all the obligations and perform all the duties specified in this act in reference to the assessment of property within said city." The general tax law does not purport, specifically or directly, to repeal or modify the former statute, and this being so, we think it is the rule that an intent will not be presumed on the part of the Legislature so to do in the case of a special act completely covering and providing for the matters in question. *Welstead v. Jennings*, 104 App. Div. 179, 93 N. Y. Supp. 839, affirmed 185 N. Y. 588, 78 N. E. 1114; *Matter of Wood*, 35 App. Div. 363, 54 N. Y. Supp. 978, affirmed 163 N. Y. 605, 57 N. E. 1128; *Buffalo Cemetery Ass'n v. City of Buffalo*, 118 N. Y. 61, 22 N. E. 962.

Thus we come to the question originally suggested, whether, tested by the provisions of the charter, the assessors sufficiently described the property. It was essential that the statute should require and that the assessors should make a description which would fairly advise the person assessed that his property was being assessed, and which would enable a purchaser at a tax sale to determine what property was being offered and acquired on the sale. There is no question that the statute is sufficient; the only doubt is as to the acts of the assessors under it. In passing on the latter, we, of course, agree with the appellant that the description employed in the assessment roll cannot be helped out by additional details of description incorporated into the deed. We also hold that no reference having been made in the roll to the map which had been filed in the clerk's office, resort cannot be had to that for the purposes of description and identification of the lands attempted to be assessed.

Applying the necessary test, we reach the conclusion that the assessment roll did con-

tain a sufficient description of all the lots which were indicated by numerals as distinguished from letters. In the cases of these lots, the assessors fairly complied in terms with the express requirements of the statutes and in each case gave the number of the lot, the frontage on a designated street, and the correct side of the street, the extent of the frontage, and the distance thereof from the nearest corner of two streets, the depth of the lot, and the course thereof. In the absence of some evidence to the contrary, the frontage of a lot on a street and its depth being given, we should assume that the side lines of the lot were parallel and of equal length and extended in a direction at right angles with the frontage, thus forming a lot of regular and parallelogram shape. Doing this, we have in the assessment roll what is equivalent to a description commencing on a given side of a street at a certain distance from a cross street, and thence proceeding by boundaries of definite lengths and directions, and enabling any person to locate the land. And it appears in this case that such description of the lot intended to be assessed does accord with the description on the map made and filed by the appellant and her associates, except in one respect. In the case of all or nearly all of the lots the depth varies by the fraction of a foot from the correct depth as given on the map. But in some cases the lot lies between two streets and in other cases it runs to a general boundary line parallel with the street, and in the case of each lot stakes had been set marking out the lot, so that, in our opinion, this slight inaccuracy in description could be the cause of no uncertainty as to the lot intended to be assessed and should be disregarded.

One case, that of *Matter of Application of N. Y. C. & H. R. R. Co.*, 90 N. Y. 342, cited by the appellant, perhaps requires a brief word of comment. In that case the assessment roll which was involved in the chain of title contained a description on its face quite similar to the one presented here, and it was held that the description was insufficient. In that case, however, evidence was offered and allowed showing that for some reason it was impossible to locate the lots from the descriptions which had been employed and the court so found, and this court in its opinion expressly refers to and bases its conclusion on this testimony and finding.

When we consider the descriptions given to the lots indicated by letters, we reach a different conclusion as to their sufficiency. In the case of each of these lots the assessment roll described the premises intended to be assessed as the east part of said lot having 38 "feet front" and a depth of 66 feet, and situate on the east side of a given street and north of the cross street. This description given as above summarized, without ref-

erence to the map, is wholly misleading and inadequate. The statement that the lot has a frontage naturally suggests that it is bounded on a street or some other open space, whereas, as a matter of fact, the portion of these lots sought to be assessed abutted on the sides of other lots, and not on any street. In the next place, there is nothing in the description of the assessment roll which would sufficiently apprise any person where this alleged frontage was located, and therefore from what point the line of depth of 66 feet was to be measured. A person having nothing to guide him except this description, and being prohibited from making any use of the map referred to, would be utterly unable to locate the premises assessed and for which he might bid on a tax sale. It would only be by reference to a map showing the location and boundaries of one of these lots that a person would be able to determine where the portion thereof attempted to be assessed was located and the boundaries between which the frontage and depth should be measured. While, as we indicated in the case of the lots denoted by numerals, an error of a few inches in the depth of a lot might be disregarded or corrected by reference to the surveyor's stakes in connection with the other accurate data given in the assessment roll, we do not think that a description so utterly deficient as the one given for the lots now being considered would be sufficiently helped out by such stakes. The description is so wholly vague that it would not convey a fair indication of the pertinency of the stakes as indicating applicable boundary lines.

In accordance with these views, we think that the judgment appealed from should be affirmed, without costs to either party, so far as it relates to lots 2, 4, 6, 8, 10, 12, 14, 16, and 18 on the north side of Whitney avenue, and lots 5, 7, 9, 11, 13, 15, and 17 on the north side of Washington place, and that it should not only be reversed, without costs, so far as it relates to what is described as the east part of lots D, E, and F on the east side of Whirlpool street; but that, inasmuch as the trial court has fully found the facts which determine the rights of the parties, and these facts apparently could not be changed on a new trial, judgment should be directed and entered in favor of the plaintiff as to said latter lots, in accordance with our views hereinbefore expressed, on the authority of *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment accordingly.

(200 N. Y. 515)

CLINTON v. KRULL.

(Court of Appeals of New York. Nov. 29, 1910.)

TAXATION (§ 421*)—ASSESSMENT ROLL—DESCRIPTION OF LOT.

The description in an assessment roll of a lot by frontage and depth, which would not enable one to accurately determine the location of the premises intended to be assessed, is inadequate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 720-735; Dec. Dig. § 421.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by George Clinton against Fred H. Krull. From a judgment of the Appellate Division (125 App. Div. 157, 111 N. Y. Supp. 105) affirming a judgment for defendant on the report of a referee, plaintiff appeals. Affirmed in part, and in part reversed and directed.

George Clinton, Jr., for appellant. Daniel E. Brong, for respondent.

HISCOCK, J. The decision of this appeal is largely determined by our decision in the case of *Fulton v. Krull*, 93 N. E. 494, which is handed down at this time, and the description of the lots purporting to be assessed against appellant should be held sufficient, so far as it relates to lot 1 described in the assessment roll, and should be held insufficient, so far as it relates to portions of the lots described respectively by the letters A, B, C, D, E, and F.

These letter lots are all described in the assessment roll as fronting on Whirlpool street. Whirlpool street does not run at right angles with the cross streets affecting these lots and referred to in the assessors' description thereof, nor at right angles with the side lines of the lots as intended to be assessed. The lines bounding the lots in the rear do run at right angles with said cross streets, and not parallel with Whirlpool street, so that said lots respectively are not of uniform depth on each side thereof. In the case of lots indicated as lots A, B, C, an attempt was made to describe the entire lots, whereas, in case of lots indicated as D, E, and F, the intent was to describe the westerly part of the lots, but in each case the rear boundary was intended to be at right angles with the cross street, and not parallel with Whirlpool street on which the lots fronted. The only basis for the side boundary lines, or by which to fix the rear boundary line, is a statement in effect that the lot is a given number of feet in depth. The frontage and depth as thus given would not enable one accurately to determine the location of the premises intended to be assessed. If, taking the frontage and the depth as given in the roll, the lot should be given a uniform depth on each side, it would then extend at right

angles with Whirlpool street and form an entirely different plot than is formed by the lot intended to be assessed, and covered by the deed subsequently executed. On the other hand, if the side boundary lines should be extended parallel with the cross streets, each one for the distance given as the depth of the lot in the assessment roll, an entirely different rear boundary line would be secured from that which was intended. The assessment roll does not indicate which course should be pursued, and no accurate location of the lots could be made from the description employed in it. For these reasons the judgment should be affirmed, so far as it relates to what was described as lot 1 on the north side of Whitney avenue, and should be reversed and judgment ordered for plaintiff, so far as it affects all of the other lots, without costs to either party.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment accordingly.

(200 N. Y. 536)

In re OPENING AVENUE D IN CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 13, 1910.)

1. EMINENT DOMAIN (§ 75*)—ACQUISITION OF LAND FOR STREETS—FILING OF MAP—STATUTES.

The filing of a map of a permanent plan of streets under Laws 1869, c. 670, authorizing the appointment of commissioners with exclusive power to lay out streets, does not, before payment of compensation, restrict the use by the owner of land within streets as laid out on the map.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199; Dec. Dig. § 75.*]

2. EMINENT DOMAIN (§ 320*)—PROCEEDINGS TO CONDEMN—EFFECT.

The mere commencement of a proceeding by a city to acquire land for a street without obligating it to take the land and to make compensation therefor does not affect the absolute fee in the owner.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 851, 852; Dec. Dig. § 320.*]

3. EMINENT DOMAIN (§ 149*)—COMPENSATION—SUBSTANTIAL DAMAGES.

A tract 160 feet wide and 3,000 feet long, extending from a street, was used as a farm. Commissioners appointed under Laws 1869, c. 670, to lay out streets filed a map of a plan of streets showing a street through the farm. Thereafter the owner conveyed part of the farm, reserving the part within the boundary of the street as shown on the map. The parcels conveyed adjoined public streets and the purchaser could sell the same in separate lots facing on public streets. It was as convenient for the purchaser to go to either of the public streets from any part of the parcels purchased by him as to pass therefrom over the land retained by the owner. Held, that the owner did not by implication grant to the purchaser an ease-

ment of right of way over the part reserved, and the city, on condemning the land for a street, must make substantial compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 327-331; Dec. Dig. § 149.*]

4. EMINENT DOMAIN (§ 149*)—COMPENSATION.

Where a city sought to condemn an 80-foot strip between public streets 300 feet apart and an 80-foot strip between other streets about 720 feet apart at a time the owner could use the strip facing on the public streets for building or other purposes, he was entitled to substantial compensation, and the value of the middle of the tracts for anything other than yards in connection with the lots facing on the streets was a matter for consideration of the commissioners of estimate and assessment.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 327-331; Dec. Dig. § 149.*]

5. APPEAL AND ERROR (§ 1063*)—DECISIONS REVIEWABLE—QUESTIONS OF LAW OR FACT.

Where the commissioners in proceedings to acquire land for a street erroneously fixed an arbitrary and nominal compensation, and did not assess damages for the absolute fee of the land as required, the award was based on an erroneous theory and the decision of the Appellate Division unanimously affirming the judgment of the Special Term confirming the report of commissioners was reviewable, though the Court of Appeals has no jurisdiction to pass on the question of damages as a question of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4273-4279; Dec. Dig. § 1063.*]

6. APPEAL AND ERROR (§ 1094*)—REVIEW—DECISION OF INTERMEDIATE COURT—UNANIMOUS AFFIRMANCE.

Under Const. art. 6, § 9, providing that no unanimous decision of the Appellate Division that there is evidence sustaining a finding of fact shall be reviewed by the Court of Appeals, a unanimous affirmance by the Appellate Division of a judgment based on findings of fact imports a unanimous determination that the findings of fact are supported by the evidence, and the Court of Appeals cannot review it, but the constitutional provision cannot extend to a case where the decision has proceeded on questions of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

7. APPEAL AND ERROR (§ 1094*)—REVIEW—DECISION OF INTERMEDIATE COURT—UNANIMOUS AFFIRMANCE.

Const. art. 6, § 9, providing that no unanimous decision of the Appellate Division that there is evidence sustaining a finding of fact shall be reviewed by the Court of Appeals, applies to special proceedings as well as to actions, and, in any special proceeding where there are findings of fact, such findings are conclusive on the Court of Appeals when there is a unanimous affirmance by the Appellate Division.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4324; Dec. Dig. § 1094.*]

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the City of New York to acquire title to land for the opening of Avenue D from Flatbush avenue to Rogers avenue in the Twenty-Ninth ward of the borough of Brooklyn. From an order of the Appellate Division (125 N. Y. Supp. 1111) unanimously affirming an order of the Special

Term confirming a report of commissioners of estimate and assessment, the party aggrieved appeals. Reversed, and proceedings remitted to commissioners for a new appraisal.

Benjamin Trapnell, for appellant. Archibald R. Watson, Corp. Counsel (Edward Riegelmann, of counsel), for respondent City of New York. Robert H. Haskell, for certain other respondents.

CHASE, J. This proceeding was instituted on the 23d day of December, 1904, by the board of estimate and apportionment of the city of New York passing a resolution pursuant to the provisions of the Greater New York charter (Laws 1901, c. 486), by which it declared "it for the public interest that the title to the lands and premises required for the opening and extending of Avenue D from Flatbush avenue to Rogers avenue in the borough of Brooklyn, city of New York, should be acquired by the city of New York." The said board by its resolution requested the corporation counsel of the city to make application at a Special Term of the Supreme Court for the appointment of commissioners of estimate and assessment and to take the necessary proceedings in the name of the city of New York to acquire title for the use of the public to the lands required for the purpose of opening and extending said Avenue D as stated. Commissioners of estimate and assessment were thereafter duly appointed, and the oaths of said commissioners were duly filed as required by law on the 14th day of June, 1905. On the 17th day of November, 1905, the board of estimate and apportionment, pursuant to the provisions of the Greater New York charter, by resolution directed "that upon the 15th day of December, 1905, the title to each and every piece or parcel of land lying within the lines of said Avenue D from Flatbush avenue to Rogers avenue in the borough of Brooklyn, city of New York so acquired shall be vested in the city of New York."

It is not claimed that the city of New York became vested with the title to said lands prior to December 15, 1905, and it is conceded that the city did become vested with the title on that day. The commissioners of estimate and assessment proceeded to take testimony as to the value of the land affected by the proceeding in behalf of the property owners and the city, and on June 2, 1908, they adopted and signed their then final report, by which they found and assessed the damages for parcel No. 1, which will be hereafter further described, at \$28,780, and for parcel No. 3, which will also be hereafter further described, at \$28,330. A motion was made at a Special Term of the Supreme Court to confirm their report, but it was denied, and the report was remitted to the commissioners for revision and correction. The judge presiding at the Special Term wrote

an opinion which is made a part of the record. Subsequently the commissioners, pursuant to the order directing a revision and correction of their report, met and heard further testimony on behalf of the appellant and the adjoining property owners. The city did not offer any further testimony, but its counsel addressed the commission as follows: "In behalf of the city of New York I will say that I believe there will be no necessity of the city offering any evidence in this case in view of the decision of Mr. Justice Kelly, and the city originally had presented proof as to values assuming that this property in question was unincumbered, and that the city in acquiring the fee to same should be compelled to pay the market value. In view of the fact that the town survey commissioners' map has been offered in evidence and that the property known as Avenue D, from Rogers avenue to Flatbush avenue, is shown on said map as a proposed street to be laid out in Kings county, and without making any claim that this property is subject to easements by reason of said map, but in view of the dictum laid down by Judge Kelly to the effect that the land in Avenue D, between the points indicated, is in an ownership entirely distinct from the ownership of the abutting land, and that it is of no use other than for street purposes, the commissioners would be justified in making an award for such land which would be a value in accordance with said conditions and circumstances. I believe that there have been cases of this character in the city of New York in some one of the boroughs where similar conditions existed where the commissioners have made an award of \$1 a front foot, and I will later submit any information about that case that I can obtain to the commissioners. If the commissioners believe that they need any proof in behalf of the city to show any different value in this proceeding other than its full market value as indicated by the testimony in the case (I mean when I speak about testimony in the case, the original case), why, I would respectfully suggest that a day be set in the near future on which the city may introduce such proof, but I personally believe that in cases of this character, in cases where land is subject to easements, that there is really no necessity for any proof; that the commissioners may take the facts into consideration and award an arbitrary nominal value for land of this character." An adjournment was then taken by the commissioners for a few days when they again met and gave instructions for the preparation of an amended preliminary report wherein the award of damages for the different parcels was to be made at the rate of \$1 per running foot measured along the center line of the street. The amended preliminary report and subsequently a final report were signed and filed accordingly in each of which the sum awarded for damages by reason of taking

parcel No. 1 is \$289.97 and for parcel No. 3, \$720, being \$1 per running foot of the street as stated. The final report was thereafter in all things confirmed by the court at Special Term. An appeal was taken from the order confirming said report to the Appellate Division, where it was unanimously affirmed, without opinion. This appeal is taken from such order of affirmance.

It is necessary briefly to trace the history of the property taken by this proceeding. It was formerly a part of what was well known for many years as the Pope farm. The Pope farm was a strip of land only about 160 feet in width, and it extended easterly from Flatbush avenue in a straight line about 3,000 feet. In 1869, the Legislature by chapter 670 of the laws of that year passed an act entitled "An act for the appointment of commissioners to lay out a plan for roads and streets in the towns of Kings county." By that act commissioners were named for the purposes stated in the title of the act. It was provided by said act that the commissioners should have "exclusive power to lay out streets, avenues and public places, of such width, extent and direction as they shall decide, and after the passage of this act, until the adoption of such permanent plan, no person or persons, or officers, shall lay out streets or roads in said towns, without the consent of said commissioners first obtained, except in cases where streets, avenues or roads have been or shall be authorized by special acts of the Legislature, in which cases such acts shall have full power and effect, anything in this act to the contrary notwithstanding."

It was further provided that, after the adoption of such permanent plan, "no street or avenue shall be laid out in said towns, or either of them, except in accordance with said plan so adopted, and all streets or avenues afterwards opened, widened or improved, shall be made to conform to such permanent plan and the lines thereof. If any buildings shall be erected on the line of any avenue or street, as laid out on said plan after the filing of said map, no compensation shall be paid to the owner thereof on the opening of said street." Section 5. The commissioners so appointed adopted a permanent plan for laying out streets, avenues, and public places, which was duly filed June 13, 1874, and upon such permanent plan Avenue D as laid out by them passed through the Pope farm so as to leave on the north side thereof a strip of land substantially 60 feet in width, and on the south side thereof another strip of land substantially 20 feet in width. Nothing further was done so far as the lands acquired in this proceeding are concerned until the commencement of the proceeding. Rogers avenue and Bedford avenue each cross said Pope farm. The lands acquired in this proceeding are the lands described as Avenue D, from Flatbush avenue on the west to Rogers avenue on the east, and they are

crossed by Bedford avenue. The distance on the center line from Flatbush avenue to Bedford avenue is 289.97 feet, and the land acquired in this proceeding lying between said avenues is known as parcel No. 1. The distance on the center line from Bedford avenue to Rogers avenue is 720 feet, and the land acquired in this proceeding lying between said avenues is known as parcel No. 3.

On August 1, 1904, the title to the lands for the purpose of opening Avenue D east of Rogers avenue had vested in the city of New York. On September 2, 1904, before the commencement of this proceeding, the appellant herein purchased with other lands all that part of the Pope farm situated west of Rogers avenue and between Flatbush avenue and Rogers avenue from the then owners thereof. On the 28th day of June, 1906, the appellant conveyed to one Steers that part of the Pope farm lying between Flatbush avenue and Rogers avenue with the following exceptions and covenants: "Excepting however from the above described premises so much thereof as lies within the lines of Bedford avenue, title to which has already been vested in the city of New York. Also excepting however from the above described premises so much thereof as lies within the lines of Avenue D as the same is laid down on the town survey commissioners' map of Kings county between the easterly line of Flatbush Avenue and the westerly line of Rogers Avenue. Also excepting and reserving any and all awards heretofore made or hereafter to be made in the proceeding to open Avenue D from the easterly side of Flatbush Avenue to the westerly side of Rogers Avenue. Subject, however, to the assessments for acquiring title by the City of New York for that portion of the premises lying in Avenue D as laid down on the Town Survey Commissioners' Map of Kings county and lying between the easterly line of Flatbush Avenue and the westerly line of Rogers Avenue, and the purchaser hereby agrees not to oppose or seek to reduce the awards made or to be made in the matter of opening Avenue D between Flatbush Avenue and Rogers Avenue for land lying adjacent to the property hereby contracted to be sold. Nothing contained in this deed shall be construed as dedicating to public use Avenue D or any portion thereof nor to subject the same to any easement in favor of the party of the second part, it being the intention of the party of the first part to retain the bed of said Avenue D in fee simple absolute. The above covenant shall run with the land."

The conveyances mentioned were intended to and did pass the title to the lands described therein. There is no claim of collusion or bad faith between the parties to such conveyances, but it is asserted, and not denied, that the appellant held the title to the lands acquired in this proceeding for the benefit of one Joseph A. Flannery, the equitable owner

thereof. It is also asserted that the appellant has, according to his claim, avoided granting a public or private easement or allowing such an easement to be acquired over said lands for the express purpose of making it necessary for the municipality to pay a large sum as damages in acquiring the lands. The alleged effort to enhance the damages to be paid to the appellant by the city and the property owners to be assessed for the improvement is severely condemned, but we are of the opinion that the question of law for our determination in this case arises from a few undisputed facts that are not affected by the purpose or intention of the appellant in asserting and maintaining his claim for damages. The history of the title to the lands, conveniently described as Avenue D, between Flatbush avenue and Rogers avenue, does not disclose any impairment of the absolute fee vested in the appellant immediately before the date of its vesting in the city of New York in this proceeding. The filing of the map of the permanent plan by said commissioners on June 13, 1874, did not restrict its use by the owner. It was substantially so held in the proceeding to lay out Rogers avenue in 1885. *Matter of Opening Rogers Avenue*, 29 Abb. N. C. 361, 22 N. Y. Supp. 27. The chief judge of this court then sitting at Special Term, referring specially to that part of the act of 1869 which provides that no compensation shall be paid to the owner on the opening of a street as laid out on said plan for a building erected therein after the filing of the map, says: "So the right to property includes the right to use that property for any lawful purpose of profit to the owner. * * * Whenever that right is restricted, property is taken within the meaning of the Constitution. * * * But, palpably, an enactment that one shall not improve his property, in order that in case the public should acquire it, it may purchase it cheap, is no exercise of the police power. There is no provision in the act of 1869 for compensating the owner for this deprivation of the right to use his land. In my opinion, therefore, the direction contained in that act, that he shall receive nothing for his building, is void. I do not say that when a highway is laid out, and provision made for its speedy and certain opening, buildings could be erected to enhance the damages. But there is no direction to open the streets laid out under the act of 1869. The opening of such streets is entirely discretionary with the various town authorities. Decades not only may, but doubtless will, elapse before the majority of such streets are opened. Even in the case of One Hundred and Twenty-Seventh street, New York, cited above, over 60 years intervened between the laying out of the street and the compensation to the owners of the land." Page 365 of 29 Abb. N. C., page 30 of 22 N. Y. Supp. The mere filing of a map

or commencement of a proceeding without obligating the municipality to take the lands described and pay to the owners just compensation therefor does not affect the absolute fee in the owners thereof. *Mott v. Eno*, 181 N. Y. 346, 376, 74 N. E. 229; *Forster v. Scott*, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; *Roddy v. Brooklyn City & Newtown R. R. Co.*, 32 App. Div. 311, 314, 52 N. Y. Supp. 1025; *Matter of Mayor, etc., of N. Y. (Mount Vernon Ave.)* 127 App. Div. 650, 111 N. Y. Supp. 895; *Bauman v. Ross*, 167 U. S. 548, 597, 17 Sup. Ct. 966, 42 L. Ed. 270; *Matter of City of New York (Briggs Ave.)*, 196 N. Y. 255, 89 N. E. 814.

The appellant, being the owner of that part of the Pope farm between Flatbush avenue and Rogers avenue at the time of the commencement of the proceeding, was entitled to just compensation for such part of said lands as the city should take for the purpose of opening Avenue D. It was all then used together as farm land. It does not appear from the record that he at any time by express grant conveyed a public or private easement over the lands acquired in this proceeding. It is claimed by the respondents that the appellant, by selling the lands of the Pope farm between Flatbush avenue and Rogers avenue other than that part thereof within the boundaries of Avenue D as laid out on said map, conveyed for the use of the lands so sold a private right of way over said Avenue D, because such right of way is necessary to the lands so sold to Steers. After the deed by the appellant to Steers, he was the owner of four separate pieces of land. Two pieces were between Flatbush avenue and Bedford avenue. One about 20 by 250 feet situated on the south side of Avenue D, and one about 40 by 330 feet situated on the north side of Avenue D, and two pieces were between Bedford avenue and Rogers avenue, one about 20 by 720 feet situated on the south side of Avenue D, and one about 40 by 720 feet situated on the north side of Avenue D. Each of these four pieces of land at each end thereof adjoins a public avenue. The pieces of land so sold to Steers were not entirely surrounded by the lands which the appellant retained. Steers as a witness testified that he was familiar with the covenants in the deed by which he purchased. It was as convenient for Steers to go to either of said avenues from any part of the lands purchased by him over the lands so purchased, as to pass therefrom over the lands retained by the appellant; but, even if it would be convenient for Steers to pass over the land of the appellant, mere convenience is not enough on which to base an easement by implication. The covenants in the grant to Steers are plain, and, in any event, prevent the possibility of a grant of easements in Avenue D by implication. There was nothing to prevent Steers from selling the lands purchased by him in

separate lots facing upon the avenues respectively to suit prospective purchasers. If he should desire to sell a lot in the middle of one of the blocks of a size and at a point where no part of such lot would adjoin an avenue, the question of an outlet therefrom would not affect the appellant.

The appellant in the sale to Steers retained two pieces of land, one the 80-foot strip between Flatbush avenue and Bedford avenue, which is about 300 feet long, and the other the 80-foot strip between Bedford avenue and Rogers avenue, which is 720 feet long. Each of these two pieces of land fronts at either end on a public avenue. After the sale to Steers and up to the time that title vested in the city of New York, there was nothing to prevent the appellant from using the land facing upon the avenues, respectively, for building or other purposes. The value of the middle of said blocks for anything other than yards in connection with the lots facing on the avenue is a question for the consideration of the commissioners. It is not the purpose of this court to discuss the question of damages. We agree with the contention of the respondents that as the confirmation of the report of the commissioners has been unanimously affirmed by the Appellate Division this court has no jurisdiction to examine or pass upon the question of damages as a question of fact. It is claimed by the respondents that there is no question of law for the consideration of this court.

We have quoted the language of the corporation counsel in addressing the commission at the close of the evidence in the proceeding, in which he assumed that the commission is bound in accordance with his interpretation of the opinion delivered at the Special Term when the first report was before that court for confirmation to treat the lands acquired in the proceeding as of no use to the owner other than for street purposes, and suggested to the commission that they "award an arbitrary nominal value for the lands." He also suggested that such value be fixed at \$1 per running foot of the lands taken. The commissioners accepted his suggestion and made such award, and, while it is not nominal in that it is more than 6 cents or \$1 for all the lands taken, it was clearly intended to be an arbitrary and nominal value and not an assessment of damages for the absolute fee of the lands acquired. The respondents claimed before the commission, and claim now, that the appellant should be treated as the owner of the naked fee of the lands acquired in this proceeding and only entitled to nominal damages as held by us in *Matter of City of New York* (Decatur Street), 196 N. Y. 286, 89 N. E. 829.

The appellant presented his position clearly before the commission and was overruled, and he filed objections to the final report in which he said:

"(2) That the award of the commissioners of two hundred and eighty nine and $\frac{97}{100}$ dollars (\$289.97) made for damage parcel number one (1) and the award of seven hundred and twenty dollars (\$720) made for damage parcel number three (3) are grossly inadequate and improper and based upon an erroneous theory.

"(3) Said awards are meant to be practically nominal and not to represent the intrinsic value of the land taken in this proceeding upon the theory that said land was subject at the date of vesting of title to some form of easement or incumbrance, whereas such was not the fact.

"(4) Said awards represent simply an arbitrary determination made by the commissioners in accordance with supposed instructions of the Supreme Court but contrary to the intent of said court and to the equity and justice of the case.

"(5) That the awards made for said damage parcels one (1) and three (3) constitute a taking of private property without just compensation, contrary to article 1, section 6 of the Constitution of the state of New York, and a taking of private property without due process of law contrary to the 14th amendment of the Constitution of the United States of America."

We are of the opinion that the award for damages made to the appellant by the commissioners is based upon an erroneous theory of the appellant's title to the lands acquired and for that reason the orders of the Appellate Division and of the Special Term should be reversed, with costs to the appellant, and the proceedings remitted to the commissioners for a new appraisal.

CULLEN, C. J. I think that in reversing the orders in this case our action in no way conflicts with the provisions of the Constitution. The constitutional provision is (article 6, § 9): "No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court shall be reviewed by the Court of Appeals." We hold that a unanimous affirmance by the Appellate Division of a judgment based on findings of fact imports a unanimous determination that the findings of fact are supported by the evidence. We also hold that the constitutional provision applies to special proceedings as well as to actions, and, therefore, in any special proceeding where there are findings of fact those findings are conclusive upon this court. But there are many special proceedings in which no findings of fact are made, but a mere decision is found. If we construe the constitutional provision as strictly limited to its language, the cases last mentioned would not fall within the provision at all. We have not, however, so construed it, but have applied the constitutional rule to

special proceedings where an examination of the case showed that the order was based on the decision of questions of fact. It cannot, however, be extended to cases where it is apparent the decisions have proceeded on questions of law. Otherwise it would be impossible to review final orders in special proceedings where no findings of fact were made, because in nearly all such cases it is theoretically possible to imagine facts which justified the decisions below, although it is apparent that the decisions proceeded solely on questions of law. An inspection of the record in this case shows that the award was not based on any determination as to the value of the land taken free and clear from incumbrance, but on the theory that the conveyances of the plaintiff had incumbered the land so as to practically destroy its value. Whether those conveyances had the effect given them presents a question of law.

Holding this view as to what the appeal presents, I concur in the opinion of CHASE, J.

VANN, J. (dissenting). The industry and ingenuity of some landowners and their legal advisers in making crafty preparation for the condemnation of land by public authority should meet with repression instead of encouragement. While just compensation must be paid even to such a landowner, when furtive preparation has been made in order to take advantage of the city or of the adjoining property owners, courts and commissioners should be astute to see that no more is awarded than the land is justly worth under all the circumstances. If the preparation made, as in this case, through the conveyance of all the land on either side of a strip, which it was known was presently to be taken for a street, leaves a long narrow parcel, just wide enough for a street and good for little else, protected by cunning covenants against easements and even from opposition to any award made, as well as from assessment on any part thereof by the fact that the entire strip is needed for a street, the owner should receive just what such an awkward and nearly useless strip of land is worth and no more. The first award in this case was so extravagant if not extortionate as to meet with stern condemnation upon the motion to confirm, and the opinion of Mr. Justice Kelly proved that it was wrong in principle and the result of a deliberate plan to unjustly mulct the city and the adjoining property owners.

The second award is now before us for review, and, as the affirmance was unanimous, we cannot look into the evidence to discover error, except in admission or exclusion, and there is no error of that character. The award is not nominal, but, although moderate, is substantial. A nominal award is a merely nominal sum, such as 6 cents or \$1, or an amount so trifling that payment

thereof would not be exacted. This award is for more than \$1,000, or nearly as much as any person in the state would have if all the property therein were equally distributed among the inhabitants thereof. There is nothing on the face of the award, or in any action, declaration, or ruling by the commissioners to show that the award is nominal, or that they regarded it as nominal. Under the rule of unanimous affirmance, so far as the question of damages is concerned, the case comes before us with the same effect as if no evidence whatever appeared in the record.

The sole issue in this proceeding is what was the fair market value of the land when taken, and a question of valuation is always a question of fact. We have repeatedly declared that the rule of unanimous affirmance applies to special proceedings as well as actions, to final orders as well as judgments, and to implied findings as well as to those written out in full.

In *People ex rel. Manhattan R. R. Co. v. Barker*, 152 N. Y. 417, 435, 48 N. E. 875, 880, we said: "The phrase 'a finding of fact' may mean simply a finding expressed in words, or, also, a finding implied from the nature of the decision. *Amherst College Case*, 151 N. Y. 321 [45 N. E. 876, 37 L. R. A. 305]. Both kinds were known to the law when the convention sat, for section 1022 of the Code, which was then in force, provided that the decision, upon a trial of the whole issues of fact, might separately state the facts found and the conclusions of law, or it might state concisely the grounds upon which the issues were decided, and direct the judgment to be entered thereon. The latter kind was similar, both in form and effect, to the general verdict of a jury, and commingled fact and law in the same way. We have recently held that all the facts warranted by the evidence and necessary to support the judgment are presumed to have been found by a decision that does not state the facts. *Amherst College Case*, supra. The Legislature, as the convention is presumed to have known, had done away with findings of fact absolutely, as formerly made upon request, and in all cases as a matter of right, yet, with this knowledge, it used language that applies with equal force to all findings of fact made by courts or referees, whether written out in words or not, the same as it applies to all findings of fact made by a jury, whether general, without expressing the facts, or special, by expressing them in full. It cannot be, that the Legislature by prohibiting express findings of fact, could practically abolish the constitutional provision in question, yet this would be possible, unless it applies to implied findings, as well as those written out in extenso. In view of the primary object of the judicial article to confine this court to the great duty of settling the law, and to give it time to do the work

well, I think that the convention used the phrase 'finding of fact' in no narrow or technical sense, but with the broad and liberal meaning which, alone, would accomplish its important purpose. * * * A unanimous affirmance of the judgment or order appealed from necessarily affirms all the findings of fact, whether expressed or not, that are essential to support the decision made below, the same as the affirmance of a general verdict."

While the opinion in that case is broader than the question presented for decision, it was so written in order to announce the position of the court on a new and important question of practice. The principles laid down in that opinion apply directly to this appeal and should control our decision. We have uniformly and consistently followed it ever since, as a multitude of decisions show, of which I cite a few as examples. *People ex rel. Broadway Improvement Co. v. Barker*, 155 N. Y. 322, 49 N. E. 884; *Matter of Chapman*, 162 N. Y. 456, 460, 461, 56 N. E. 994; *Reed v. McCord*, 160 N. Y. 330, 334, 54 N. E. 737; *People ex rel. Sands v. Feltner*, 173 N. Y. 647, 649, 66 N. E. 626; *Matter of Fitzsimons*, 174 N. Y. 15, 25, 66 N. E. 554; *People ex rel. Loughran v. Board of R. R. Com'rs*, 158 N. Y. 421, 430, 53 N. E. 163. In the case last cited the facts were not written out, for the decision was simply an order "that the application be and it is hereby granted." In *People ex rel. Broadway Improvement Co. v. Barker*, *supra*, we held that the rule of unanimous affirmance "applies to special proceedings as well as to actions, and to implied findings as well as to those written out in extenso." Page 324 of 155 N. Y., page 884 of 49 N. E.

Attention is called to the multitude of cases arising on certiorari, involving the deter-

mination of commissioners in removing policemen and firemen, in which we have always applied the rule when the affirmance was unanimous, although the findings were rarely written out and were necessarily implied. Moreover, in this case the findings were express, not implied, as an examination of the record shows. The commissioners found "that the sums of money awarded by us for the damage sustained by reason of this proceeding with interest thereon from the date of vesting of title in this proceeding to the date of this our report amount to the sum of one thousand two hundred and forty-two dollars and twenty-six cents (\$1,242.26)." In the list of "Awards for Damage," signed by the commissioners and annexed to their report as a part thereof, is the following: "Map No. 1, Fernando Wood, land, \$289.97; interest, \$66.69 * * *. Map No. 3, Fernando Wood, land, \$720; interest, \$165.60. Total, \$1,242.26." These are express findings, made after an issue joined and evidence taken through the medium of witnesses. We cannot reverse the order appealed from without disregarding the constitutional amendment of 1895, as well as repeated announcements by this court of its position in construing it.

I think that the adroit effort to manipulate real estate in this case, so as to injure innocent third persons, has thus far met the fate it deserves, and that the order appealed from should be affirmed, with costs.

GRAY, HAIGHT, WERNER, and WILLARD BARTLETT, JJ., concur with CHASE, J., and CULLEN, C. J. VANN, J., reads dissenting opinion.

Orders reversed, etc.

(200 N. Y. 93.)

**PEOPLE ex rel. INTERBOROUGH RAPID
TRANSIT CO. v. WILLIAMS,
State Comptroller.**

(Court of Appeals of New York. Nov. 29,
1910.)

**1. TAXATION (§ 231*)—STREET RAILROADS—
FRANCHISE TAX—EXEMPTION—STATUTES.**

Rapid Transit Act (Laws 1891, c. 4) § 35, as amended by Laws 1900, c. 616, § 4, provides that the equipment to be supplied by a corporation operating any subway railroad, including all rolling stock, motors, boilers, engines, wires, ways, conduits, mechanism, machinery, tools, implements, and devices, of every nature whatsoever, used for the generation or transmission of motive power, all power houses, apparatus, and devices for signaling and ventilation, should be exempt from taxation in respect to its interest under a contract executed under such act, and in respect to the rolling stock and equipment of the road, but that such exemption should not extend to any real property which might be owned or employed by the corporation in connection with such road. *Held*, that such section did not exempt relator from the payment of franchise taxes leviable on its subway operations.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 231.*]

**2. TAXATION (§ 153*)—STREET RAILROADS—
SUBWAY—FRANCHISE TAX—STATUTES—CON-
STRUCTION—OPERATION OF ELEVATED ROAD.**

Tax Law (Consol. Laws, c. 60) § 185, provides that every corporation owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the state, for the privilege of exercising its franchise, an annual tax of 1 per cent. on its gross earnings from all sources within the state, and 3 per cent. on the amount of dividends declared or paid in excess of 4 per cent. on the actual amount of paid-up capital employed by such corporation, etc. *Held*, that such section did not impose a franchise tax of one per cent. on the gross earnings on a subway railroad company operating an elevated railroad as merely incidental to its main purpose, and hence where relator, organized to operate subways in New York using its entire capital in that work, also operated certain elevated railroads under a lease, it did not by that fact alone become subject to a franchise tax on its receipts from both roads.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 153.*]

**3. TAXATION (§ 153*)—CORPORATE DIVIDEND—
OPERATION OF RAILROAD BY LESSEE.**

Tax Law (Consol. Laws, c. 60) § 185, provides that any corporation owning or operating any elevated or surface railroads by power other than steam shall pay a franchise tax of 3 per cent. on the amount of dividends declared or paid in excess of 4 per cent. on the actual amount of paid-up capital employed by such corporation, and that any such railroad corporation whose property is leased to another corporation shall only be required to pay a tax of 3 per cent. on the dividends declared and paid in excess of 4 per cent. on the amount of its capital stock. *Held* that where relator, organized to own and operate subways in New York City, leased certain elevated and surface railroads and operated the same, and all of relator's capital was invested and utilized in the subway operation, it was not assessable, under such section, for dividends declared on its own capital, so invested.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 153.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari by the People, on relation of the Interborough Rapid Transit Company, against Clark Williams, as Comptroller of the State of New York, to review the Comptroller's determination assessing a franchise tax against relator for the years ending June 30, 1907, 1908, 1909, under Tax Law (Consol. Laws, c. 60) § 185. From a determination of the Appellate Division modifying the assessment (138 App. Div. 612, 123 N. Y. Supp. 137), both parties appeal. Order of Appellate Division reversed, and determination of Comptroller annulled.

See, also, 138 App. Div. 924, 123 N. Y. Supp. 1135.

These are cross-appeals from an order of the Appellate Division, Third Department, entered on or about May 3, 1910, in part confirming and in part reversing the determination of the defendant comptroller in assessing franchise taxes against the relator under section 185 of the tax law for the years June 30, 1907, to June 30, 1909, both inclusive. Said comptroller held that for the privilege of exercising its corporate franchise in operating an elevated street railroad under lease the relator should pay an annual tax of 1 per cent. upon the gross earnings derived not only from the operation of said road, but also from the operation of its independent subway railroad, and also 3 per cent. upon the amount of dividends declared or paid in excess of 4 per cent. upon the actual amount of paid-up capital employed by such corporation in the operation of said subway road as well as, if any, in the operation of said elevated railway. The gross receipts from the operation of each road amounted to several million dollars each year, and there is no opposition by relator to the imposition of the tax upon the gross receipts derived from the operation of the elevated road. The Appellate Division affirmed the former part of the comptroller's determination, but overruled the latter part relating to tax on dividends.

Under the so-called rapid transit act (chapter 4, Laws 1891), the city of New York entered into what were known as rapid transit contracts No. 1 and No. 2, respectively, with one McDonald and the Rapid Transit Subway Construction Company dated, respectively, June 10, 1902, and August 10, 1905, for the construction, equipment, and operation of a subway railroad in the boroughs of Manhattan and Brooklyn. The relator was organized under the provisions of the railroad law and of said rapid transit act, and its certificate of incorporation provided that it should have the power to undertake the construction, equipment, operation, and maintenance of the railroad then constructed and in process of construction under the McDonald con-

tract and also the power to enter into and perform any contract for the construction and operation of any other rapid transit railway authorized or which might be authorized to be constructed under the provisions of said rapid transit act. Thereafter said relator acquired the right and assumed the duty of equipping and operating the subway railroad constructed under the two contracts hereinbefore referred to under assignments or agreements dated June 10, 1902, and August 10, 1905. In addition to this, on or about April 1, 1903, it made a lease with the Manhattan Railroad Company, whereby it undertook the operation of various elevated railroads in the boroughs of Manhattan and the Bronx owned or controlled by said company, and during all of the years involved in this controversy it was engaged in operating both subway railroads and elevated railroads under the contracts and leases referred to.

James L. Quackenbush, for relator. Edward R. O'Malley, Atty. Gen. (Edward H. Letchworth, of counsel), for defendant.

HISCOCK, J. (after stating the facts as above). Originally the relator alone complained of the assessment made by the comptroller of the franchise tax against it. On appeal to the Appellate Division, this determination was in part affirmed and in part reversed, with the result that each side now appeals.

The relator is engaged in the operation in the boroughs of Manhattan and the Bronx of both subway and elevated street railroad systems, which are assumed to be distinct from one another.

Section 185 of the tax law provides as follows: "Franchise tax on elevated railroads or surface railroads not operated by steam. Every corporation, joint stock company or association owning or operating any elevated railroad or surface railroad not operated by steam shall pay to the state for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity within this state, an annual tax which shall be one per centum upon its gross earnings from all sources within this state, and three per centum upon the amount of dividends declared or paid in excess of four per centum upon the actual amount of paid-up capital employed by such corporation, joint stock company or association. Any such railroad corporation whose property is leased to another railroad corporation shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid in excess of four per centum upon the amount of its capital stock." Consol. Laws, c. 60.

The comptroller took the view that under this statute the relator, because of its operation as lessee of the elevated railroads, should be assessed in an amount of 1 per

cent., not only on its gross earnings derived from the operation of said roads, but also upon its gross earnings derived from the operation of its subway roads, and 3 per cent. upon the amount of dividends declared in excess of 4 per cent. upon all of its paid-up capital employed in the equipment and operation of said latter roads, and the Appellate Division sustained him as to the tax on gross receipts. We have been unable to agree in full with the contentions of either party on the appeal, and therefore we shall be compelled to consider these views singly rather than in any general classification.

The relator in the first instance urges that it is expressly exempted from the imposition of any tax whatever on its franchise as employed or enjoyed in the operation of the subway roads. This claim is based on the provisions of section 35 of the rapid transit act (chapter 4, Laws 1891), as modified in subsequent years, and which section provides as follows: "The equipment to be supplied by the person, firm or corporation operating any such (subway) road, shall include all rolling stock, motors, boilers, engines, wires, ways, conduits and mechanisms, machinery, tools, implements and devices of every nature whatsoever used for the generation or transmission of motive power and including all power houses, and all apparatus and all devices for signaling and ventilation. Such person, firm or corporation shall be exempt from taxation in respect to his, their or its interest under said contract and in respect to the rolling stock and all other equipment of said road, but this exemption shall not extend to any real property which may be owned or employed by said person, firm or corporation in connection with the said road." Laws 1900, c. 616, § 4.

We do not believe that this provision is broad enough to sustain relator's claim and exempt it from the payment of any franchise tax in its subway operation. The preceding sections of the rapid transit act provided in detail for the construction, equipment, and operation of subway roads, and for the execution of a contract with such person, firm, or corporation as in the opinion of the board of rapid transit commissioners should be best qualified to carry out the contracts to be made. They likewise provided for the payment of rentals by the contracting party, and in effect for an assignment of contracts entered into under the authority of the act with the written consent of such commissioners. These provisions thus very completely covered the execution of contracts for the construction and operation of said roads, and fixed the benefits and obligations to be derived from and incurred under such contracts. The Legislature then enacted the provision in question, whereby "the person, firm or corporation" operating such roads should be exempt from taxation in respect to his, their, or its "interest under said con-

tract" and in respect to rolling stock and equipment. It seems very clear to us that this exemption covered just what is plainly implied by the natural meaning of the language, namely, the interest acquired and property used under and in carrying out the contracts for the equipment and operation of the road, and that it did not extend beyond that.

Two steps were necessary before the relator could enter upon the equipment and operation of the railroad. The first of these was its creation through incorporation, and the second was the procuring and execution of the contracts for equipment and operation, with resulting rights and obligations thereunder. While doubtless the first was taken with express reference to the second, the two were entirely separable and distinct, and there was no difficulty if the Legislature saw fit in exempting relator from taxation "in respect to * * * its interest under said contract and in respect to the rolling stock and all other equipment of said road" without exempting it from taxation, because of privileges and advantages which it enjoyed through corporate existence in securing and carrying out the contracts under which it enjoyed the "interest" mentioned, and this is what it did.

Counsel has vigorously contended that the importance and difficulties of the rapid transit situation in New York and the desirability of effecting some such arrangement as was secured by relator's incorporation required substantial inducements, and that the spirit of the situation makes present assessment of the relator on its franchise a breach of good faith if not an impairment of contractual rights which we should avoid by broad interpretation of the statute. While we are unable to find in the language of the statute a requirement, as claimed by relator's counsel, that the equipment and operation of the road must be undertaken by a corporation, still, if we concede for present purposes that the general argument of counsel for exemption has force, it was one to be addressed to the Legislature, and it is possible that, if the present statutes providing for assessments of franchises had been fully foreseen and considered, the exemption clause would have been made broader. But, however this may be, and whatever the cause may have been, the language of the statute which actually was passed by the Legislature is not broad enough under any proper rules of interpretation fairly to include the exemption now claimed, and, this being so, we cannot substitute what would be equivalent to an amendment for judicial construction.

While it is not desirable to review at length and in detail the authorities cited in behalf of the relator, it may be stated generally that they do not sustain his position under the language of this statute, and this statement will be fortified by brief analysis

of the leading authorities cited on this point.

In *Wilmington R. R. v. Reid*, 13 Wall. 264, 20 L. Ed. 568, the court had before it for construction a statute providing that "the property of said company (plaintiff in error) and the shares therein shall be exempt from any public charge or tax whatsoever." Here was a statute broadly exempting all of the property of the company from taxation, and the only question was whether a tax on the franchise of the corporation was a violation of this statute. The court held that nothing was better settled than that the franchise of a private corporation was property, and, this being so, of course it was exempt.

In *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86, the charter of the plaintiff railroad company declared "that said company, its stock, its railroads and appurtenances and all its property in this state, necessary or incident to the full exercise of all powers herein granted, shall be exempt from taxation," etc. Again, the only question was whether a privilege tax was a tax on the property of said company, and therefore a violation of the statute, and it was again held that a franchise was property, and that therefore the proposed tax was invalid.

In *Wright, Comptroller, etc., v. Georgia R. R. & Banking Co.*, 216 U. S. 420, 422, 30 Sup. Ct. 242, 243, 54 L. Ed. —, the court was called on to interpret a statute providing that "the stock of the said company * * * shall be exempt from taxation for and during the term of seven years." It was held that the capital stock of a corporation is the capital upon which the business is to be undertaken and is represented by property of every kind acquired by the company, while the shares are mere certificates representing a subscriber's contribution to the capital stock and measuring his interest in the company, and, further, that the stock exempted in this case was the capital or property of the corporation; that a law which sought to impose a tax on the franchise of a railroad company whose property is exempt from taxation was a violation of the exemption contract.

It will thus be seen that each one of these cases dealt with the construction of a law granting a general exemption to a corporation of its property from taxation, and the question was whether a franchise was property within the meaning of the statute before the court for interpretation.

In this respect, the facts in each case differed from those of the present one, where the exemption by its terms extends only to the interest under a given contract and certain specified property.

But, holding that there is no such general exemption as is claimed by relator, we are nevertheless unable to agree with the views adopted by the comptroller and the Appellate Division that the relator, because operating

an elevated road under a lease, was subject under section 185 of the tax law to a franchise assessment measured by a percentage on the gross receipts from its subway as well as on those from the elevated road.

This contention and decision has been based upon a literal interpretation of the statute that every corporation operating an elevated railroad shall pay for the privilege of exercising its corporate franchise an annual tax which shall be one per centum upon its gross earnings "from all sources within this state," etc., and, of course, such literal interpretation would support the conclusion which has been reached. We do not think, however, that such interpretation is justifiable under the circumstances of this case.

On the facts set forth in the preliminary statement and appearing in the record, we think that fairly it must be stated that the primary and controlling purpose which led to the incorporation of relator was that of equipping and operating the subway roads then being and thereafter constructed in the city of New York. Other facilities for the transportation of passengers, including the elevated railroads, were already in existence when it was organized, and its organization entered into the general scheme which was then being perfected of adding subway roads as an important factor in solving the difficult question of transportation facilities which for a long time had perplexed the city of New York. If this assumption and statement be correct, then it quite naturally follows that the lease by relator of the Manhattan elevated railroads was in a certain sense an incidental and secondary step undertaken by it doubtless for the purpose of supplementing the operation of the subway roads and making more perfect and satisfactory the accommodations which it would be able to offer to the traveling public. It is stated without substantial dispute that relator's capital of \$35,000,000 is wholly invested in the equipment and operation of the subway roads for which it was organized, and its gross receipts exclusively from the operation of said roads and by a percentage upon which it is proposed to increase the tax upon the franchise enjoyed in the operation of the elevated railroads aggregate many million dollars each year.

It seems apparent that there is no particular propriety or justice in compelling a corporation utilizing its corporate franchise to operate an elevated road, aimed at by the statute, to pay as a tax for such enjoyment a percentage not only on its receipts derived from such employment of its franchise, but also on its receipts derived from the employment of its franchise in carrying on an entirely distinct and different business, and in respect whereof it is not otherwise subject to assessment under this section. The application of such a rule even to the facts of this case would produce results

which we cannot believe to have been anticipated at the enactment of the statute, and it is easy to imagine how the rule might produce even more inequitable results than would appear here. A corporation operating very many miles of railroad not elevated might be compelled or deem it advisable to construct a fraction of a mile of elevated road at a terminal or leading to a pleasure resort, and thus on this interpretation become subject to an assessment as the operator of an elevated road measured by its receipts from its entire main road, although the proportion of elevated road to the main road was so insignificant as to render such a result absurd and grossly unjust.

We do not think that the words "from all sources," used in describing the gross receipts made the basis for fixing the amount of the assessment, have a meaning so unqualified and inflexible under all circumstances as the comptroller and the court below have given them. They should be so interpreted as to carry out what must have been the intention of the Legislature. It was doubtless assumed, and ordinarily would be the case, that a corporation operating an elevated road would not be engaged in operating another road of equal or perhaps superior importance, and that whatever other projects it carried on would be of minor importance and incidental to and largely comprehended within the scope of its principal undertaking as the operator of an elevated road. In such a case it would not be at all unreasonable to make it pay a tax for the exercise of its franchise in carrying on its primary and important undertaking which included a percentage on its receipts from these secondary and minor sources which were more or less the results of and dependent on its main enterprise. But we think that the intent and enactment of the Legislature should be regarded as limited by some such just and pertinent boundary as this, and that it was not the purpose to make the statute so all-comprehensive as to include the receipts from the employment of the franchise in ways which could in no sense be viewed as merely incidental to or a result of the operation of the elevated road.

It is also insisted in behalf of the comptroller with perfect consistency that, under the dividend clause of the section in question, which provides that the franchise tax shall include a tax of 3 per cent. upon the amount of dividends declared or paid in excess of 4 per cent. upon "the actual amount of paid-up capital employed," the relator because operating an elevated road must pay the tax in question upon all dividends in excess of 4 per cent. declared on its capital exclusively devoted to the equipment, maintenance, and operation of the subway road. We think, on the other hand, that reasons analogous to those already set forth in the discussion of the prior provisions of the stat-

ute lead to a different conclusion, and that was the view adopted by the Appellate Division on this question. The language used in this clause of the statute is, it must be conceded, somewhat ambiguous and uncertain, and it is perhaps more difficult to apply it satisfactorily to the facts disclosed on this appeal. But, without repeating at length reasons already stated, it does not seem to us that because of its operation of an elevated railroad the relator should be assessed for dividends declared upon its capital invested in the subway roads, and it is claimed on this argument that all of its capital is so invested and utilized. If it should be established that a portion of its paid-up capital was employed in the operation of the elevated road, there would seem to be some propriety in making dividends of the kind described declared upon such capital so employed subject to the tax in question.

The views which have thus been expressed do not in our judgment lead to the final conclusion that relator, although not assessable in respect to its subway roads under section 185 of the tax law, does not come within any of the provisions of the law relating to the assessment of a franchise tax. While that specific question has not been fully discussed on this appeal and, therefore, perhaps should be regarded as subject to further consideration if necessary, we now see no reason to doubt that within sections 182 and 184 of the tax law are provisions broad enough to provide for a franchise tax against the relator in respect of its equipment, maintenance, and operation of the subway roads.

The order of the Appellate Division should be reversed, and the determination of the comptroller annulled, with costs to relator in both courts and a new assessment ordered.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Order reversed, etc.

(200 N. Y. 203.)

PEOPLE v. FORD.

(Court of Appeals of New York. Dec. 13, 1910.)

1. CRIMINAL LAW (§ 406*)—STATEMENTS BY ACCUSED.

In a prosecution for murder, evidence of statements made by accused in the presence of or to the men who arrested him, voluntarily and in the course of conversations, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-927; Dec. Dig. § 406.*]

2. WITNESSES (§ 277*)—CROSS-EXAMINATION—ACCUSED IN CRIMINAL PROSECUTION.

In a criminal prosecution, there was no error in permitting the prosecuting attorney, when cross-examining defendant, to refer to the testimony of witnesses which conflicted with that

given by accused, and to ask him whether it was true or false.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979-984; Dec. Dig. § 277.*]

3. WITNESSES (§ 277*)—CROSS-EXAMINATION—ACCUSED IN CRIMINAL PROSECUTION.

It was improper for the district attorney, in cross-examining accused, to ask him whether he meant the jury to understand that the statement of certain witnesses was a lie.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979-984; Dec. Dig. § 277.*]

4. CRIMINAL LAW (§ 1170½*)—APPEAL—HARMLESS ERROR—CROSS-EXAMINATION.

Improper cross-examination of accused on a criminal prosecution, by asking him whether he meant the jury to understand that a statement of certain witnesses was a lie, was not prejudicial, where his answer contained no such characterization.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

Appeal from Supreme Court, Trial Term, Ulster County.

Sam Ford was convicted of murder, and he appeals. Affirmed.

William D. Brinnier, for appellant. William D. Cunningham, for the People.

GRAY, J. The defendant was charged with the crime of murder in the first degree, committed upon Captora Ashe by striking and cutting her with a razor. Her death by violent means was not disputed; but the defendant denied that he was guilty. The trial, which followed upon his indictment, resulted in a verdict of guilty, and the defendant now appeals to this court.

Captora Ashe, for whose murder the defendant has been held responsible, had been known as Katie Ashe, or Ford. The evidence is such as to leave it somewhat in doubt whether she was his wife or mistress; but it is more probable upon his evidence, as well as that of other witnesses, that she stood in the latter relation to him. In the evening of March 27, 1909, the deceased came to the hospital at Brown's Station, in Ulster county, and died within 20 or 25 minutes after her admission. Upon her person were found five wounds, which had been inflicted by a sharp instrument. One wound extended from a point behind the left ear, at the mastoid portion of the skull, downwards and across the throat, for over five inches, severing all of the blood vessels and muscles down to the bone. Another wound was from above the left eye down to the ear; another was from above the right eye to, and through, the right ear; another was upon the right forearm; and another upon and across the left shoulder. The first wound was sufficient to cause death.

The evidence connecting the defendant with the commission of the crime charged was wholly circumstantial; but the nature of the facts disclosed and the order of succession of events, preceding and following the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

homicide, were such as to compel the conclusion that the verdict of the jury was fully justified. However reluctant the mind to conclude upon such evidence ordinarily, there was in this case no such weakness in any link of the chain of circumstances, which, by affecting its strength, would warrant the entertaining of a reasonable doubt of the defendant's guilt.

The defendant and the deceased were colored persons, and came from New York to Ulster county, where Ford found employment under the contractors who were constructing the dams and reservoirs for the new aqueduct. On Saturday, March 27, 1909, the defendant was discharged from his employment. He and the deceased were then residing at Brown's Station, in a house occupied by a colored couple named Parish. In the afternoon of that day, he quarreled with the deceased upon her demand for a pair of shoes and for some money, denying that he had drawn his wages. Refusing to pay Parish what was due for their lodging, he was told to leave. When, that evening, about to do so, the deceased told him that she did not want to go with him, that "she did not belong to him, and that she did not want to go with him any further." She was heard to say to him: "Go on, Sam, and leave me alone. I don't want to go. I am barefooted, and I have no shoes, and I'm hungry and tired of following you. I'm not you wife." He said that she must go, and, taking her by the arm, he pulled, or led, her out. This occurred a few minutes after 8 o'clock. They proceeded a short distance, to the neighboring house of another colored couple, named Cunningham, where he asked to be lodged for the night. When admitted, the deceased, at first, was unwilling to enter with the defendant, but finally consented to do so, saying: "In the morning I will go back to New York, and that will settle it all." Within a few minutes the deceased came out of the room prepared for them, saying that she was not going to stay, and insisting upon leaving the house. The defendant wished the Cunninghams to keep her in the house; but they refused, and the defendant, who had previously locked the door, was obliged by them to open it. The defendant first left the house, and as he did so deceased quickly closed and locked the door upon him. She wanted to go out by another (the back) door, and possibly, had she been permitted to do so, she had escaped the tragedy in which she lost her life. The Cunninghams made her leave by the front door.

Within 15 or 20 minutes from the time they left, the Cunninghams, as did other witnesses residing in the neighborhood, heard screams, seemingly from some point on the road to the hospital. The hospital was distant about a quarter of a mile, and residents of houses along the road heard, and were awakened by, these screams. The wife of one of them testified to the coming of the

deceased to their door, and to her calling for her and asking that her husband should go with her, that she was "hurt"; but he was ill in bed. The next morning the witness found a "lot of blood" on the stones in front of the door. The deceased went on to the hospital. As she entered, she was bleeding profusely, and, falling into a chair, became unconscious within 5 minutes, and within 20 or 25 minutes was dead. Sunday morning a watchman and a police officer followed up the traces of blood from the hospital to a point upon the road where the ground was much disturbed by the trampling of feet and was splashed with blood. One of them picked up from the muddy ground a thin piece of steel, peculiar in shape and with an edge. On Monday, a suit case of the defendant, which he had with him when leaving the Cunninghams' house, was found in some bushes along their fence. After noon of the day after the homicide, the defendant was arrested, at a point on the Ulster and Delaware railroad, some 30 or more miles from Brown's Station, and was taken to the office of a justice of the peace at Margaretville, where, his person being searched, there was found, among other things, a blue-handled razor with a piece broken from the blade. A smear, or discoloration, upon the blade, subsequent chemical tests showed to be from human blood. Spots upon the hat of the defendant, also, upon subsequent tests, proved to be human blood. The piece of steel, which had been picked up from the road at Brown's Station, fitted with exactness into the broken portion of the razor blade. At the time of his arrest, he at first gave a false name, denied that he had come from Brown's Station, and said that he had broken his razor in mending his shoe, and that the blood came upon it while he was doing so. The person who arrested him had done so at the request of, and upon the description by, the sheriff, given through the telephone. The next morning he was taken to Kingston, where the indictment was found against him.

The record does not disclose that there was any prior arraignment of the defendant, and nothing seems to have taken place at the office of the justice of the peace beyond the search of his person. After being taken into custody, in conversation with the man who arrested him and with the driver of the vehicle in which he was driven to Margaretville, the defendant admitted that he had been at Brown's Station. He stated to them that he had had trouble with a woman there, who was not his wife; that he had walked from Brown's Station, starting about 9 o'clock the night before; and that he was going to the coal fields of Pennsylvania. It was shown that he left Brown's Station with \$9 of his wages owing to him. Witnesses testified to quarrels between the defendant and the deceased, to his maltreatment of her, and to threats against her life. On the Sun-

day morning previous to the homicide, the defendant had asked Mrs. Parish to give him his razors, which had been in her possession. There were two of them; one being black and the other blue in color. The black one he put into his suit case, and the blue one he placed in his pocket. Mrs. Parish identified the broken razor found upon his person as the one given to him that Sunday morning. On Sunday evening the defendant had left Parish's house with the deceased, and in about an hour returned alone, stating that Katie had run away from him. A few minutes later she came in and said that the defendant had taken her over to a part of the works, that he had his razor in his pocket and that he had threatened to kill her. All that he appears to have said to this was to the effect that, if he had said so, he did not do it, to which she replied, "No, because I ran away and left you—you didn't get the chance to do it."

The defendant was examined in his own behalf, and denied having killed the deceased. He testified that he had no knowledge of her movements after they went out of Cunningham's house, and that he first knew of her death from the officer who arrested him. He admitted having left Brown's Station at about 9 o'clock Saturday evening, and that he had walked all that night and the next day to the place where he was arrested, except that during the night he had slept for about an hour and a half in the depot of a station upon the railroad. He said that he had intended to leave the deceased with some one and to find work in the Pennsylvania coal fields; that the blade of the razor was broken when he received it from Mrs. Parish; that he had kept it, as it might be useful some day or other; that he had left his suit case in Cunningham's porch; and that he could get the money owing him for wages by writing. He denied having made threats to the deceased, though admitting that they were not "on the best of terms." He said the deceased was in the habit of drinking, and that upon several occasions she had threatened to commit suicide and in such a manner as to induce others to believe that he had killed her.

In substance, his evidence amounted to this: That they had lived inharmoniously together, and that, in leaving Brown's Station that evening, he was but carrying out an intention, already formed, to leave her and to find work at some other place; that he had no part in her death, and knew nothing of what happened to her after they separated at Cunningham's door. His story was unsatisfactory in essential particulars, and it insufficiently explained his departure from Brown's Station, within a few minutes after they had gone out of Cunningham's house, and his walking through the night and the next day, leaving behind him the suit case concealed in the bushes and the wages owing

him. It had the appearance of a flight prompted by the apprehension of a guilty mind. It is improbable that he should not have known where the deceased was going, or that he should not have heard the screams, which aroused the neighborhood which he was then leaving.

Upon this somewhat extended review of the evidence, I think the conclusion to be clear that the defendant killed the deceased by striking her with a razor blade, within a few minutes after they left the house of Cunningham. From the nature and location of her wounds, it is altogether improbable that they could have been self-inflicted, and the theory of suicide is quite inadmissible. It is inconceivable that a person intending suicide would slash himself in such extraordinary places, or that he could have inflicted the wounds upon the right forearm and back of the left shoulder. While, therefore, the evidence was such as to make it incredible that the woman had killed herself, nevertheless that question, as one of fact, was submitted by the trial court to the jurors, and it was determined by them. That any third person could have killed her is not a reasonable supposition upon this record. It does not appear that any other person had any motive for assaulting her. If the jurors believed that the defendant had killed the deceased, it was unnecessary that the existence of any motive should have been proved. They could, readily, have found a motive in the woman's determination to leave him and to return to New York the next day. His determination to prevent her, if not jealousy, may have been mere brutish unwillingness to have her go. The evidence sufficiently warranted the finding that he killed her deliberately and with premeditation. The possession and the use of a razor, and the nature of the several wounds upon her body, would justify such a conclusion.

The case was submitted to the jurors upon a charge so full and so impartial in its tenor that it was not excepted to; nor was there any request for further instruction. I do not think that the jury could have rendered any other verdict than they did, which would have been consistent with the evidence. The facts and circumstances, taken together, point with irresistible force to the one conclusion of the defendant's guilt, and exclude any other hypothesis. When the combination of the facts is such as to establish the one conclusion as the only reasonably possible one, it should be as fully satisfactory to the mind as the direct testimony of eye-witnesses, dependent as that must so often be for its conclusiveness upon their character for truthfulness, bias, or accuracy. So far as certainty may be predicated of the administration of human justice, I think it was attained in the verdict of this jury.

The objection to the sufficiency of the evidence to support the verdict has been cover-

ed by what I have said. It is argued that it was error to receive, over the defendant's objections, the evidence of the men who arrested him as to his statements to them, or in their presence. Although the defendant was in custody, none was made as the result of any promises or threats, nor was any induced by fear. There is no evidence to show what, if anything, took place in the justice's office at Margaretville beyond the search of his person. Whatever the defendant did say, that was at all material, appears to have been voluntary and in the course of conversations elsewhere. There were no confessions, and I find no violation of the rules regulating the admissibility of a prisoner's statements.

The only other objection which I need refer to is that made by the defendant to the form of certain questions asked by the district attorney, when cross-examining the defendant. It is argued that they were improper, as requiring him to characterize the evidence of witnesses for the people, and, therefore, tending to prejudice him before the jurors. The district attorney, in directing the attention of the defendant to the testimony of witnesses which conflicted with that which he had given, in several instances,

sought to have him state whether it was true or false. I can perceive no ground for holding that that constituted legal error. In one instance, however, I think that the district attorney exceeded the proper bounds of examination in asking the defendant to state whether he meant the jury to understand that a statement of certain witnesses was a "lie." The answer contained no such characterization, and, therefore, no prejudice could have accrued to the defendant's case. While not legal error, to pursue such an inquiry is as objectionable, as it is unnecessary, because affecting the atmosphere of the trial. The fairness of the defendant's trial, in a capital case, must be considered by this court.

After a careful consideration of the record on this appeal, I find no ground upon which a reversal of the judgment of conviction would be justified, and I advise that the judgment be affirmed.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment of conviction affirmed.

(200 N. Y. 218)

O'LEARY v. CITY OF GLENS FALLS.

(Court of Appeals of New York. Dec. 13, 1910.)

1. MUNICIPAL CORPORATIONS (§ 470*)—STREET PAVING—LIABILITY FOR COST—"IN FRONT OF" LOTS.

The intersection of streets is not "in front of" a corner lot thereon, within the village law (Consol. Laws, c. 64) § 166, providing that in case of paving of a village street, no landowner shall be liable for the expense of paving any portion of the street not in front of such land.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1118; Dec. Dig. § 470.*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3473.]

2. MUNICIPAL CORPORATIONS (§ 470*)—STREET PAVING—APPORTIONING COST.

Where a village, empowered by village law (Consol. Laws, c. 64) § 166, to apportion, between itself and the landowners, the cost of paving a street, assumed half the expense of paving the entire street, its half being in excess of the cost of paving street intersections, which such section prohibits being imposed on the landowners, should be deducted from the total cost of paving the street, and the balance should be assessed pro rata on the lands of the abutting owners according to the feet frontage of their respective lots.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1118; Dec. Dig. § 470.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Submission of a controversy on an agreed statement of facts between Daniel O'Leary, Jr., as plaintiff, and the city of Glens Falls, as defendant. From a judgment for plaintiff (128 App. Div. 683, 112 N. Y. Supp. 932), defendant appeals. Affirmed.

J. Edward Singleton, for appellant. Edwin R. Safford, for respondent.

HAIGHT, J. In the year 1907 the village of Glens Falls adopted an ordinance under which Grove avenue was graded and paved, one-half at the expense of the village and the other half by an assessment upon the owners of lands adjoining upon the street. The assessment of the owners was made upon the basis of the feet frontage of their respective lots. The plaintiff was the owner of a lot fronting upon the street at the corner of Grove avenue and Davis street, and in addition to being assessed for the number of feet frontage upon Grove avenue was also assessed for one-quarter of the space of the paving of the intersection of Grove and Davis streets, amounting to \$72.64. The assessment, however, was for the gross sum of \$185.25, which left \$112.61 as the assessment of his feet frontage. This amount he paid, but refused to pay the other amount, \$72.64, which is the subject of this controversy.

The village of Glens Falls was incorporated under the general village law (Laws 1897, c. 414), but by chapter 29 of the Laws of 1908 the village was changed into the city

of Glens Falls, and duly incorporated as such, succeeding to all of the rights and liabilities of the village.

The village law, now incorporated in chapter 64 of the Consolidated Laws, unchanged so far as it may bear upon the question under consideration, in substance, provided that the board of trustees may cause a street in the village, or part thereof, to be graded or sidewalked, flagged or curbed, or the street paved, or any one or more of such acts performed wholly at the expense of the village or of the owners of the adjoining lands, or partly at the expense of each. It further provided that "no landowner shall be required to grade, flag, curb, or pave, or bear the expense of so doing, any portion of the street not in front of such land, nor beyond the center of the street." Section 166.

As we have seen, the village assumed one-half of the expense of the paving of Grove avenue; the other half was assessed upon the owners in the manner to which we have called attention. The question is thus presented as to whether the expense of paving the space at intersecting streets can be charged upon the owners, or must be borne by the municipality. The Appellate Division reached the conclusion in this case that it must be borne by the municipality, and therefore gave judgment in favor of the plaintiff for the amount of his claim (128 App. Div. 683, 112 N. Y. Supp. 932). The court appears to have reached this conclusion upon the theory that the plaintiff's lands were bounded by the exterior line of the street, and, consequently, that the fee of Davis street was not in him, and therefore the space occupied by the intersecting streets was not in front of his lands within the meaning of the statute. The inference to be drawn from this conclusion is that, as to the owners of lands upon street corners, whose title extends to the center of the street, they would be chargeable with the expense. We hesitate about adopting this conclusion. It makes a distinction between the owners of the fee in the street and those who are not owners that has not heretofore been made by any authority to which our attention has been called. The general custom in the state, as stated by Vann, J., in *Smith v. City of Buffalo*, 159 N. Y. 427, 432, 54 N. E. 62, 63, "is not to assess public streets, even for local improvements, and if the Legislature had intended to depart from established usage, we think it would have expressed its intention in specific language." See authorities there cited.

We are thus brought to a consideration of the force and effect that should be given to the provision of the statute which relieves the owner of lands from being required to bear the expense of paving any portion of the street not in front of his lands. It is contended that the lands included in the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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intersecting streets are in front of the plaintiff's lands within the meaning of this statute, under the authority of *Holmes v. Carley*, 31 N. Y. 289, which held, in effect, that the statute conferring jurisdiction upon justices of the peace to try actions against parties residing in the next adjoining towns included two towns contiguous only at the corners. While we think that the statute must be given a reasonable construction, we hesitate about adopting this view, for the language of the statute is "in front of," not "adjoining to," as was the case in the decision referred to. "In front of" does not ordinarily mean "cornering on," and unless the Legislature so intended, we think it should not be so construed.

In the case of *City of Schenectady v. Trustees of Union College*, 144 N. Y. 241, 248, 39 N. E. 67, 68 (26 L. R. A. 614), there was no provision of the charter like that now before us, yet Earl, J., says: "It is argued on behalf of the city that the college should be treated as the owner of a lot in front of this paving done in Union street, because it owned the corner lots on Union street and the intersecting streets. But it has paid, as we must assume, for the paving in front of the corner lots, and the sums sought to be collected in this action have been treated in all the proceedings of the city, and in the complaint in this action, as due from the defendant solely on account of its ownership of the fee of the land in the intersecting streets. It is further argued that it must have been the intention of the Legislature that the owners of the fee of the land in the intersecting streets should be liable for the paving in front of such streets, so that the streets to be improved may be continuously paved and the expense thereof provided for. But there can be no doubt that under the city charter the paving in front of these open streets could be done at the expense of the city, and equitably and justly it should be so done."

In view of what was said in that case, we think we should hold, in construing this statute, that the intent of the Legislature was to limit the liability of the owner to that which was in front and did not include the paving of the intersecting streets.

We are aware that the effect of so holding operates in this case to create a deficiency, and would in every case where the assessment is made upon such basis. Such a result would be intolerable and could not have been so intended by the Legislature. It, consequently, is apparent that the basis adopted was erroneous and that the deficiency created resulted therefrom.

The municipality, in this case, took upon itself the burden of paying one-half of the expense of paving the entire street. This was more than sufficient to pay for the space included in the intersecting streets and must be deemed to have been paid for that purpose. The amount of tax, therefore, assumed

by the municipality should be deducted from the gross sum that the pavement cost, and the balance thereof assessed pro rata upon the lands of the abutting owners according to the feet frontage of their respective lots. Had this basis been adopted, then no shortage would have resulted and the entire cost of the pavement would have been provided for. This we understand to be the basis adopted in the case of *Conde v. City of Schenectady*, 164 N. Y. 258, 266, 58 N. E. 130, 132. In that case an action was brought to annul a tax levied upon Conde's land fronting on State street in the city of Schenectady. His lot was not a corner lot, but he was assessed for his proportionate share in paving the intersecting street, as well as the street in front of his premises, upon the foot-frontage basis. To that he objected. In that case the municipality had not assumed or undertaken to pay for any portion of the expense of paving, but had assessed the whole expense, including that of paving the intersecting streets, upon the owners of lands fronting upon the street, according to the number of feet frontage of each respective lot, and this court held that the basis adopted in making the assessment was correct. That case differed from the one under consideration with respect to the liability of the municipality to pave the space included in the intersecting street, by reason of the difference in the provisions of the charter of that city. The charter of 1890 expressly provided that the cost and expense of repaving the street intersections should be borne by the city at large, but under chapter 190 of the Laws of 1893 that provision was stricken out, this indicating an intent on the part of the Legislature to transfer the liability of the city to pave intersecting streets to that of the abutting owners; but with respect to the basis adopted, Cullen, J., says: "The effect of this amendment was to impose the whole cost of the improvement on the abutting lots. There was therefore no error in the assessment in this respect." Had this basis been adopted the effect would have been to increase the plaintiff's assessment upon his foot frontage to some extent, but would not have cast upon him the entire burden of paying for the cost of paving the intersecting streets. The amount that his tax would have been increased cannot now be determined from the facts agreed upon. He has paid the same proportionate share that has been assessed upon the other owners of lots upon the street. We therefore conclude that, under the circumstances, the judgment of the Appellate Division should be affirmed, but, under the stipulation of the parties, without costs.

CULLEN, C. J., and GRAY and HISCOCK, JJ., concur. VANN, WILLARD BARTLETT, and COLLIN, JJ., concur in result.

Judgment affirmed.

(200 N. Y. 121)

In re NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York. Dec. 6, 1910.)

1. RAILROADS (§ 99*)—PUBLIC SERVICE COMMISSION—GRADE CROSSING PROCEEDINGS—DECISIONS REVIEWABLE.

The decision of a board of railroad commissioners in proceedings for the elimination of grade crossings is reviewable on appeal by the party aggrieved, by the Appellate Division, and again on appeal to the Court of Appeals, as expressly provided by Railroad Law (Laws 1897, c. 754) § 62.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 90.*]

2. RAILROADS (§ 99*)—GRADE CROSSINGS—DIVERSION OF TRAVEL—DIVISION OF COSTS—"STREET, AVENUE, OR HIGHWAY."

Railroad Law (Laws 1897, c. 754) § 62, provides that the authorities of any village, town, or city within which a street, avenue, or highway crosses, or is crossed by a railroad at grade, may petition the public service commission for discontinuance of the grade crossing and the separation of travel, etc. *Held*, that the words "street, avenue, or highway" import ways of a public character only, and that proceedings are authorized for the discontinuance of grade crossings only where a public street, avenue, or highway crosses a steam surface railroad at grade, and the railroad commissioners have no authority to charge a village with a part of the expense of eliminating crossings over streets or ways which were exclusively private.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 298-304; Dec. Dig. § 90.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Petition by the New York Central & Hudson River Railroad Company against the President and Board of Trustees of the Village of Ossining for the elimination of grade crossings. From an order of the Public Service Commission eliminating the crossings, affirmed on the appeal of the village (136 App. Div. 760, 121 N. Y. Supp. 524) by the Appellate Division, the village again appeals. Modified and affirmed on condition.

Frank L. Young, for appellants. George H. Walker, for respondent.

WILLARD BARTLETT, J. This is a proceeding instituted by a steam surface railroad company, under section 62 of the former railroad law (Laws 1897, c. 754), now section 91 of the existing railroad law (chapter 481, Laws 1910 [Consol. Laws, c. 49]), for the elimination of certain grade crossings in the village of Ossining. It was begun before the board of railroad commissioners, but continued and concluded before the Public Service Commission, Second district, whose decision was reviewable by the Appellate Division, and is reviewable here at the instance of any party aggrieved thereby. Section 62 of chapter 565 of the Laws of 1890, as amended by chapter 754 of the Laws of 1897 and chapter 520 of the Laws of 1898. See, also, section 91 of chapter 481 of the Laws

of 1910. The village of Ossining claims to be aggrieved, because the decision of the Public Service Commission has the effect of charging the village with a part of the expense of eliminating certain crossings which are in no sense streets, avenues, or highways, but are exclusively private ways of passage. If such is the fact, the determination of the Public Service Commission is certainly erroneous to that extent.

It is only where "a street, avenue, or highway crosses or is crossed by a steam surface railroad at grade" that statutory proceedings are authorized for the alteration or closing and discontinuance of such grade crossing, and the diversion of travel therefrom. Railroad Law, § 62. The words "street, avenue, or highway" import ways of a public character, and no other ways whatsoever. The section in question has no application to private rights of way and does not authorize the elimination of such rights. Hence no party can be chargeable thereunder with any portion of the expense of closing ways which are wholly private.

There has been an attempt to impose a charge of this nature upon the village of Ossining in the present proceeding.

The uncontradicted evidence in the record shows that Quimby street and the three alleys or driveways which now cross the New York Central & Hudson River Railroad at grade north of Quimby street, which crossings the order of the Public Service Commission commands shall be closed and discontinued, are each and all of them private ways. For eliminating these crossings the village of Ossining cannot be compelled to pay either in whole or in part. Crossings of this character do not fall within the purview of the statute. Section 62 does not assume to deal with any but public crossings; that is to say, with those portions of public streets, avenues, and highways which cross steam surface railroads at grade. So far as the order under review undertakes to deal with any others, it is unauthorized by law. If, in a proceeding of this kind for the elimination of public grade crossings, it becomes necessary or expedient to close private crossings also, the expense of closing the latter must be borne by the railroad company concerned. No part of it can be thrown upon the village under the statute.

It follows from what has been said that the order of affirmance and the order of the Public Service Commission should be modified, so as to make the order of the Public Service Commission provide, in the subdivision thereof numbered 8, that the proportion of the cost of elimination of said grade crossings in the village of Ossining to be borne by the state and village, under section 62 of the (old) railroad law, shall not include any expense for eliminating the crossings at Quimby street and those at the three alleys

or driveways which now cross the New York Central & Hudson River Railroad at grade north of Quimby street, or any of them.

The respondent railroad company contemplates laying additional tracks on its line passing through Ossining, and also the introduction of the so-called third rail, in order to operate some of its trains by electricity. Counsel for the appellants suggested that the necessity for the elimination of grade crossings was due to this proposed change of motive power, rather than to any condition of danger to the public. Obviously the municipality ought not to be required to defray the expense of railroad improvements which have no relation to the public safety; and the Public Service Commission recognized this by inserting in its order a provision that the proportion of the cost of eliminating the grade crossings payable by the state and village "shall include only such cost as is necessary to cross the existing tracks of the railroad company, with the necessary approaches and connecting streets leading thereto, * * * and any sum in excess of such cost occasioned by additional main tracks or other improvements shall be paid entirely by the railroad company."

This is a proper requirement, but it may be doubted whether the Public Service Commission has the power to impose it without the express consent of the railroad company. The railroad law prescribes the method of defraying the expense of altering old crossings and constructing new ones, and the commission can hardly go beyond its provisions. Nevertheless, it is expedient to make it perfectly clear that the village is not to be chargeable with the cost of improvements which do not fall within the scope of the statute. Hence we think the respondent should stipulate that it will pay these expenses, as a condition of the affirmance of the order, with the modification which has been suggested in regard to Quimby street and the other private crossings.

Order modified, so as to make the order of the Public Service Commission relieve the state and the village of Ossining from any expense for eliminating the crossings at Quimby street and the three alleys north thereof, and as thus modified, affirmed, without costs of this appeal to either party, on condition that the respondent within 20 days file a stipulation in this proceeding that it will pay the expenses imposed upon it by the eighth paragraph of the order of the Public Service Commission; in default thereof, the order is reversed, with costs in all courts.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

Ordered accordingly.

(300 N. Y. 224)

MUNRO et al. v. SYRACUSE, L. & N. R. CO.
(Court of Appeals of New York. Dec. 13, 1910.)

1. DEEDS (§ 144*)—"CONDITION."

A condition in the law of realty is a qualification or restriction annexed to a conveyance, providing that if an event does or does not happen, or the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 469-472; Dec. Dig. § 144.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400.]

2. DEEDS (§ 145*)—CONDITIONS—CONSTRUCTION.

Conditions are not favored by courts, and, if it is doubtful whether a clause is a covenant or a condition, it will be so construed as to avoid forfeiture, but, when the intention of the parties is clearly expressed showing that the enjoyment of the estate was intended to depend on the performance of a certain stipulation, it is a condition, and not a covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

3. DEEDS (§ 145*)—CONDITIONS.

A provision in a deed that the "grant is made and received and may be enjoyed by the second party, its successors and assigns, subject to the following conditions," with a forfeiture clause providing that, in case of failure to keep and perform, the conditions or rights conferred shall revert to the grantors, is a condition, and not a covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

4. DEEDS (§ 155*)—"CONDITIONS SUBSEQUENT."

Conditions in deeds are either precedent or subsequent, and, where a certain condition was to be performed after the right granted had vested in the grantee, it is a condition subsequent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 483-495; Dec. Dig. § 155.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1402-1405; vol. 8, p. 7610.]

5. DEEDS (§ 158*)—"CONDITIONS SUBSEQUENT"—RUNNING WITH LAND.

Conditions subsequent necessarily run with the land where they are attached to the title which may be lost by failure to observe them.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 502-504; Dec. Dig. § 158.*]

6. DEEDS (§ 157*)—"CONDITIONS SUBSEQUENT"—RIGHTS OF SUBSEQUENT PURCHASERS.

Where a deed contains a condition subsequent providing that the terms of the agreement shall be binding on the heirs, successors, and assigns of the parties thereto, the successors of the grantee are bound thereby.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 500, 501; Dec. Dig. § 157.*]

7. SPECIFIC PERFORMANCE (§ 4*)—CONDITIONS SUBSEQUENT—NONPERFORMANCE—RIGHT OF GRANTOR.

Where grantors have the right to re-enter for nonperformance of a condition subsequent, they are not bound to declare forfeiture and take back the land, but may require specific performance of the agreement at their election.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.*]

8. RAILROADS (§ 67*)—RIGHT OF WAY—GRANT.

A grant to a railroad company of a right of way, which provided that grantee should build and maintain a certain crossing, and keep

the strip of land at all times well fenced, and that it should issue annually to the first parties during their several lives passes over its railway, was in the nature of a lease reserving a perpetual rent running with the land, and binding on the assigns of the grantees.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Isaac H. Munro and another, individually and as executors of David A. Munro, deceased, against the Syracuse, Lakeshore & Northern Railroad Company. From a judgment for defendant, affirmed by the Appellate Division (128 App. Div. 388, 112 N. Y. Supp. 938), plaintiffs appeal. Reversed.

On the 22d of May, 1899, the predecessors of the plaintiffs, as parties of the first part, entered into an indenture with the Syracuse, Lakeside & Baldwinsville Railway Company, the predecessor of the defendant and the party of the second part, under the seals and signatures of both parties thereto. The parties of the first part, after reciting a consideration of \$1 paid by the party of the second part, "and the covenants and conditions herein expressed to be kept and performed by the said second party," granted and released to "the said party of the second part, its successors and assigns, the right to build and maintain a street surface railroad * * * along a strip of land through" the premises in question. After the granting clause the instrument continued as follows: "This grant is made and received and may be enjoyed by the second party, its successors and assigns, subject to the following conditions, which the party of the second part hereby agrees to perform." Four clauses follow, separately numbered, embracing certain conditions and covenants relating thereto. The first clause relates to the removal of two tenement houses from said strip of land to another location. By the second clause the grantees agreed to build and maintain a cattle pass and three farm crossings over its tracks "and also to keep said strip of land at all times well fenced with suitable farm gates at the three crossovers herein mentioned."

The third and fourth clauses are as follows:

"The party of the second part hereby agrees to issue annually to first parties during the several lives of the parties of the first part a pass over its railway, which pass may be used by said first parties, either of them, or by the wife or any child of either of them, which pass, however, shall be good only for transportation of one person at a time. It is agreed that if the parties of the first part knowingly permit any person except themselves, their wives or one of their children to use for transportation any annual pass issued to them, the same shall be forfeited. The second party also agrees to issue and furnish to the tenant on said farm,

so long as the first parties, or either of them, shall own the same, an annual pass for transportation of said tenant, his wife or any of his children over said railway; but if said tenant shall permit any person other than himself, his wife or his children to present such annual pass for transportation, the same shall be forfeited. It is agreed that second party shall stop its cars when and where necessary to deliver and receive passengers at said farm and freight also, if freight is carried by said railroad.

"(4) In case said second party shall fail to keep and perform the conditions above expressed and each of them, or discontinue the operation of said railway over said land for the space of sixty days, or abandon the same for such street railway purposes, the rights and privileges hereby conferred shall revert to the parties of the first part, their successors, heirs and assigns. It is agreed that the covenants and conditions above expressed shall be considered as conditions precedent to the enjoyment of the grant herein made, and as covenants running with the land so far as they relate to the erection and maintenance of the fences, gates, cattle passes and crossovers herein mentioned, and the terms of this agreement shall be binding upon the heirs, successors and assigns of the parties hereto."

This instrument, after being signed and acknowledged by all the parties thereto, was duly recorded. The strip of land over which the right of way passed embraced from 15 to 20 acres out of a farm of 210 acres, the rental value of which, with and without the passes, was excluded by the trial justice upon the objection of the defendant and subject to the exception of the plaintiffs.

The Syracuse, Lakeside & Baldwinsville Railway Company at once entered upon the strip, raised an embankment over part and made a cut through the rest; laid its rails, removed the tenement houses, built the cattle pass and farm crossings, fenced the right of way, operated its railroad, and delivered the annual passes as long as it remained in possession. In September, 1905, through the foreclosure of a mortgage upon all the property of the company, title passed to the purchaser, Mr. Beebe, and from him to a new company, known as the Syracuse, Lakeshore & Northern Railroad Company, the defendant herein. Neither the plaintiffs nor their predecessors were parties to the action. The judgment of foreclosure contained a clause allowing the purchaser to "disavow, renounce and relinquish any contract or lease or rights thereunder which are recited" therein, provided the disavowal was filed with the referee appointed to conduct the sale within 10 days after the property "was struck off." The contract in question was not recited in the judgment roll, and no disavowal was made. The defendant entered into possession

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

of the road, and has since operated the same over the strip of land in question, but after it had taken possession and about September 30, 1905, it "refused to honor or receive the passes held by the plaintiffs and by their tenant, * * * and demanded, required, and compelled the plaintiffs and said tenant that they and each of them pay the regular fare while riding in its cars upon said railway, and refused and continues to refuse to issue, give, or furnish any further passes over its said railroad for the transportation of the plaintiffs or their said tenant or the wife or any child of either of them, though the same was duly demanded."

The plaintiffs still own the farm and continue to lease it. The action was brought to compel the defendant to issue annual passes to the plaintiffs and their tenant, to restrain it from using the land in question until the contract to that effect is performed, and to recover the damages accrued.

The trial justice, after finding the foregoing facts, in substance found as conclusions of law that "the covenant" relating to passes "was a personal one, in no way binding upon this defendant, its successor in title," and that the judgment of foreclosure and sale "cannot change personal contracts into covenants running with the land or create a liability against the defendant for the debts of the original company." He directed that the complaint be dismissed, with costs, and the judgment entered accordingly was affirmed on appeal by the Appellate Division, all of the justices concurring, except the presiding justice, who did not vote. The plaintiffs appeal to this court.

Donald F. McLennan, for appellants. William Nottingham, for respondent.

VANN, J. (after stating the facts as above). The first question presented for decision is whether the stipulation relating to passes is a covenant or a condition. Both grantor and grantee signed the instrument, which provides that "this grant is made and received, and may be enjoyed by the second party, its successors and assigns, subject to the following conditions," and among the "following conditions" was the provision for annual passes. After that provision was a forfeiture clause specifying that in case of failure "to keep and perform the conditions above expressed and each of them * * * the rights and privileges hereby conferred shall revert to the parties of the first part, their successors, heirs and assigns."

A condition as known in the law of realty is "a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated." Goodeve on Real Property, 188; Co. Litt. 201a; Anderson's Law Dict. tit. Condition. Conditions are not favored by the

courts, because they tend to destroy estates, and, if it is doubtful whether a clause is a covenant or a condition, it will be so construed as to avoid forfeiture. *Graves v. Deterling*, 120 N. Y. 447, 455, 24 N. E. 655. When, however, the intention of the parties is so clearly expressed as to show that the enjoyment of the estate created by the deed was intended to depend upon the performance of a certain stipulation, it is held a condition and not a covenant. *Cunningham v. Parker*, 146 N. Y. 29, 33, 40 N. E. 635, 48 Am. St. Rep. 765; 13 Cyc. 689; *Devlin on Deeds*, § 958.

The clause in question is expressly named as a condition by the parties, and the right to enjoyment by the grantee, its "successors and assigns," is in terms made subject thereto. There is in addition the right of re-entry for failure "to keep and perform the conditions above expressed," and the stipulation in regard to passes is one of those thus designated. The form, nature, and purpose of that stipulation, which was the substantial consideration for the conveyance, show that it is a condition, and not a covenant under all the authorities. *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655; *Plumb v. Tubbs*, 41 N. Y. 442; *Gilbert v. Peters*, 38 N. Y. 165, 169, 97 Am. Dec. 785; *Cowell v. Springs Co.*, 100 U. S. 55, 58, 25 L. Ed. 547; *Stuart v. Easton*, 170 U. S. 383, 18 Sup. Ct. 650, 42 L. Ed. 1078; *Reeves on Real Property*, 588. The learned author last cited says on the page named that: "The mere use of the word 'condition' will not make a stipulation in a deed of conveyance a condition subsequent, unless it plainly appears that the intention of the parties was that the grantor should have the right to re-enter if it were broken by the grantee. The clearest and most emphatic method of showing that intention is, of course, by a stipulation in or connected with the words that are meant to create a condition that the right of re-entry is reserved for its breach."

All conditions are either precedent or subsequent, and, as the condition in question was to be performed after the right granted had vested in the grantee, it cannot be termed a condition precedent. Obviously it is a condition subsequent, because the conditional event or the issue of passes was not to happen until after the principal event or the vesting of the right to use and possession. Performance thereof did not create and could not enlarge the estate, but failure to perform would defeat it at the election of the grantors. Hence, it could not be included in the enumeration of covenants and conditions relating to cattle passes, fences, etc., for they are to be "considered as conditions precedent" and also as "covenants running with the land." The terms and conditions which are not both conditions precedent and covenants running with the land are not mentioned in the classification either as precedent or subsequent, and the parties did

not stipulate that the clause in question should or should not run with the land but left that to be determined from its nature.

Conditions subsequent, however, necessarily run with the land because they are attached to the title, which may be lost by the failure to observe them. They "bind one who accepts the deed; a purchaser from the grantor, with notice; and any assignee or grantee of the grantee in whom the estate on condition is vested." 13 Cyc. 894, and cases cited. There is not only the condition subsequent, but there is an independent covenant to perform it in these words: "The terms of this agreement shall be binding upon the heirs, successors and assigns of the parties hereto." Clearly said condition is one of the terms of the agreement, which were thus made binding upon the successors and assigns of the original grantee. The old railroad company promised for itself and its assigns, and the new company by accepting a transfer of its rights and entering into possession of the land made the promise its own *durante possessione*. As the successor and assignee of the old company it is in actual possession and enjoyment of the subject of the grant, and must observe the conditions upon which the grant was made as long as it remains in possession. While the grantors have the right to re-enter, they are not bound to declare a forfeiture and take back the land after it has been rendered worthless for farming purposes or for any use except as a railroad, but they may require specific performance of the agreement at their election. As long as the new company holds, occupies, and enjoys under the deed, it stands in the shoes of the old company and performance to the same extent and of the same nature can be required from it as from its predecessor.

While the grant in question is not a lease in the ordinary sense, because it has no term of years, still it is in the nature of a lease reserving a perpetual rent. The consideration, as recited in the deed, is "one dollar * * * and the covenants and conditions herein expressed to be kept and performed by the said second party." Aside from the conditions which the law requires a railroad company to perform when the right of way is acquired by condemnation, the provisions relating to fences and the stoppage of cars to receive freight and passengers, which are perpetual, and that relating to passes, which is for an indefinite period, are the main consideration for the right granted. Obviously the other covenants and conditions are comparatively slight in value. Rent is the compensation for the use of land and is payable either in money or in services, cattle, grain, and the like according to agreement. Many early leases in this state were in the form of grants with rent reserved,

payable by acts of service or in specific articles of the kind mentioned. While the rent reserved in the case before us was perpetual in part and indefinite as to the rest, still the reservation was in a conveyance not for a term of years, or for life, but forever. All the rent was perpetual in principle because the deed was perpetual. "Perpetual rents are covenants which run with the land and are binding upon the heirs and assigns of the covenantors successively during their respective ownerships." *Fowler's Real Property Law*, 189, 197. The grant in question falls within the principle of the noted *Van Rensselaer Cases* which the learned author cites to support the proposition quoted, and which he says "are among the most interesting and instructive in our judicial history, and justly entitled to be regarded as among the most wisely decided cases of any age or country." *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Van Rensselaer v. Read*, 26 N. Y. 558, 564; *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Bradt v. Church*, 110 N. Y. 537, 18 N. E. 357.

Whatever form of payment may be prescribed, the law regards rent as issuing out of the land, and hence the land cannot be held and enjoyed by the grantee or lessee, or by the assignee of either, without paying the rent reserved. The defendant is the grantee and assignee of its predecessor, and as such owns its rights under the instrument in question. While an assignee may escape future liability by assigning the lease and surrendering possession, he is liable for all the rent which accrues while he is in possession as such. The defendant is liable for all conditions broken while it was in possession, and the failure to pay the rent by issuing passes is one of those conditions. As was said by Judge Selden in *Van Rensselaer v. Read*, 26 N. Y. 558, 564: "The covenants entered into by the grantee of the lands, in behalf of himself, his heirs, and assigns, are covenants real which run with the land, and are binding upon the heirs and assigns of the covenantor, successively as to all breaches of such covenants which occur during their respective ownership of the lands." While the condition needs no covenant to support it, as the condition runs with the land, the covenant to keep the condition runs with it also.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, and COLLIN, JJ., concur. HISCOCK, J., not sitting.

Judgment reversed, etc.

(200 N. Y. 113)

NEW YORK CENT. & H. R. R. CO. v. CITY OF BUFFALO.

(Court of Appeals of New York. Dec. 6, 1910.)

1. EMINENT DOMAIN (§ 47*)—PROPERTY SUBJECT TO APPROPRIATION—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE—RAILROAD RIGHT OF WAY.

Land taken by condemnation or acquired by purchase for public use should not be taken for another public use unless the reasons therefor are special, unusual, and peculiar, and they cannot be so taken, at least if such other public use would interfere with or destroy the public use first acquired, unless the intention of the Legislature that the land be so taken is shown by express terms or necessary implication.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

2. EMINENT DOMAIN (§ 317*)—TITLE ACQUIRED—STREETS.

By condemnation proceedings under charter of city of Buffalo, tit. 8 (Laws 1853, c. 230), which provides in section 18 that on payment of the amount awarded the fee of the land shall vest in the city, where land is condemned for a street across a railroad right of way, but the railroad continues to maintain its tracks and operate its trains there, the city acquired the fee to the land subject to the easement of the railroad for its right of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 834-840; Dec. Dig. § 317.*]

3. MUNICIPAL CORPORATIONS (§ 657*) — STREETS—ABANDONMENT—EFFECT.

Highway Law (Consol. Laws, c. 25) § 234, providing that every highway that shall not have been opened and worked within six years from the time it shall have been laid out, shall cease to be a highway and every public right of way that shall not have been used for such period shall be deemed abandoned as a right of way, applies only to unused easements, and where a city acquired title to land in fee for a street, there is no limitation on its ownership of the land and its right to open the street as a highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1429; Dec. Dig. § 657.*]

4. RAILROADS (§ 96*)—CROSSING HIGHWAYS—NEW HIGHWAY OVER RAILROAD—DETERMINATION OF MODE OF CROSSING.

Under Railroad Law (Laws 1897, c. 754) § 61, providing that when a new street shall be constructed across a steam surface railroad, the street shall pass over or under the railroad or at grade as the board of railroad commissioners shall direct, where a city condemned land for a street over a railroad right of way in 1867, but has not opened the street, when it decides to open it to the use of the public, its construction across the railroad must conform to the determination of the public service commission.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 284-290; Dec. Dig. § 96.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the New York Central & Hudson River Railroad Company against the City of Buffalo. From a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 373, 112 N. Y. Supp. 997), reversing in part and af-

firming in part the judgment of the trial court, both parties appeal. Modified.

Alfred L. Becker, for plaintiff. Harry D. Sanders, for defendant.

CHASE, J. It is not disputed that a railroad corporation on June 23, 1853, purchased in fee that tract of land "bounded by the two outward lines of the railroad constructed or to be constructed by the said company." The lands so described, so far as now under consideration, are further described as being 75 feet wide across lot 13 mentioned in the deed conveying said property. The plaintiff is the successor of such railroad corporation. About the time when such land was purchased by it, the corporation constructed railroad tracks thereon, and it, with other lands constituting its roadway, has ever since been used by the corporation and its successors as railroad property. Upon it at the time of the trial of this action were railroad tracks, which are a part of the plaintiff's main roadway, from Buffalo to Niagara Falls, and over it were run about 200 trains daily. It does not appear how many railroad tracks were maintained upon such piece of land in 1867, but at the time of the trial of this action there were two tracks and three side tracks thereon.

Upon a petition duly filed therefor, the city of Buffalo, in 1867, by resolution of its common council, declared that it thereby determined to take and appropriate the land and property necessary to lay out and extend Delevan avenue from its present (1867) termination on Niagara street in said city westerly to the towing path of the Erie canal. The land so declared to be necessary to lay out and extend Delevan avenue was a strip 66 feet wide across the land so purchased by the plaintiff's predecessor in title on June 23, 1853, and land of other persons adjoining the same on either side. The resolution was passed pursuant to the authority of title 8 of the charter of the city of Buffalo, being chapter 230 of the Laws of 1853. Proceedings were continued pursuant to said title of the charter, and commissioners were appointed to ascertain and award to the respective owners of the property taken such damages as were a just compensation to them respectively. Such commissioners duly reported, and their report was confirmed by the court. The plaintiff was made a party to the proceeding and was awarded damages "for all its rights, title, and interest in, and in full of, all damages for parcel No. 2" (the strip across the railroad company's land) the sum of \$132. The award to the plaintiff's predecessor was paid and accepted by it.

By section 18 of title 8 of the charter it is provided that: "Upon such payment . . . the fee of the land shall vest in the city." It will not be helpful at this time to specu-

late upon what determination would have been reached by the common council if the plaintiff's predecessor in title, then the owner in fee of the land on which its roadway was maintained, had appeared before it, and urged that the land should not be taken and appropriated for the extension of Delevan avenue. The plaintiff's predecessor in title did not, so far as appears, oppose the resolution of the common council or appear in the proceeding. It apparently acquiesced therein, and it accepted the award for damages made to it. In determining what interest the city of Buffalo obtained in the land by virtue of the resolution and proceedings mentioned, it is necessary to consider briefly the rule or rules of law affecting its right to take and hold the land or some interest therein.

Lands already taken by condemnation or acquired by purchase for public use should not be taken for another public use unless the reasons therefor are special, unusual, and peculiar. For this reason it has been frequently held that, where lands have once been taken or acquired for public use, they cannot be taken for another public use, at least if such other public use would interfere with or destroy the public use first acquired, unless the intention of the Legislature that such lands should be so taken is shown by express terms or necessary implication. *Matter of Mayor, etc., of N. Y. (East 161st Street)*, 52 Misc. Rep. 596, 102 N. Y. Supp. 500, affirmed, on opinion in the court below, 135 App. Div. 912, 120 N. Y. Supp. 839, affirmed 198 N. Y. 606, 92 N. E. 1083; *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574; *Matter of City of Buffalo*, 68 N. Y. 167; *Prospect Park & C. I. R. R. Co. v. Williamson*, 91 N. Y. 552; *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 845; *Suburban R. T. Co. v. Mayor, etc., of N. Y.*, 128 N. Y. 510, 28 N. E. 525; *Matter of Folts Street*, 18 App. Div. 568, 46 N. Y. Supp. 43.

Notice was duly published as required by the charter that the common council of the city had determined to take and appropriate the land and property necessary to extend Delevan avenue as therein stated. The plaintiff and its predecessor knew, or should have known, of the provisions of the city charter, including the one declaring that the fee of land taken for street purposes vests in the city. On the other hand the city knew that upon the land sought to be acquired there was constructed one of the railroad corporation's most important roadways. Was it the defendant's intention to exclude the railroad corporation therefrom? Lands may be used for railroad purposes and for a highway crossing at the same time. Such uses are not necessarily inconsistent. When lands in use as a railroad right of way are taken by condemnation for the purpose of opening a street across such right of way, the municipality ordinarily obtains a common right with the railroad company for the use of the land condemned, and the railroad company

continues to use its right of way for its corporate purposes not inconsistent with its use as a street crossing. *Chicago v. Cicero*, 157 Ill. 48, 41 N. E. 640; *Central R. R. Co. v. Normal*, 175 Ill. 562, 51 N. E. 781. The amount awarded the plaintiff for damages, and the history of the proceeding and the subsequent conduct of the parties, show that it was not the intention of the city to interfere with the railroad company's easement for railroad purposes. The municipality knew and should be presumed to have taken into consideration that there is no express authority given by the city charter to take the lands sought by it for street purposes to the exclusion of the railroad corporation for its right of way. By the proceedings maintained by the city, and in which the plaintiff's predecessor in title apparently acquiesced, the city should be held to have obtained the fee of the land and all interest therein, subject to the plaintiff's easement.

It appears from the deed by which the plaintiff's predecessor in title acquired the property in question, that it was so acquired for railroad purposes; and it does not appear in this action that the land over which the proposed highway is to be carried is more in width than is required or may reasonably be required by the plaintiff for its right of way. The plaintiff should have, as a part of the judgment herein, an adjudication that its easement in such land for right of way extends over the whole width thereof. It is claimed by the plaintiff that, because the defendant failed to open and work Delevan avenue across the strip of land described in the complaint within six years from the time it acquired title by virtue of the proceeding in 1867, such strip of land has ceased to be a highway, and the municipality has lost all right, title, or interest in such land. Section 234 of the Highway Law (Consol. Laws, c. 25), and the statutes from which it is derived, and of which it is a substantial re-enactment, is not applicable in this case, because the defendant obtained the fee of such strip of land subject to the plaintiff's easement as stated. *Vanderbeck v. City of Rochester*, 46 Hun, 87; *Matter of Lexington Avenue*, 29 Hun, 303, affirmed 92 N. Y. 629; *Woodruff v. Paddock*, 56 Hun, 288, 9 N. Y. Supp. 381; *Raynor v. Syracuse University*, 35 Misc. Rep. 83, 92, 71 N. Y. Supp. 293.

The period of six years mentioned in the statute is a limitation upon the life of an unused easement. When an easement is acquired by purchase or otherwise, by which a street can be opened and worked across a piece of land, such land does not thereby become a street in fact for public use until it is opened, and it is such an easement, consisting of a right to open and work a highway, which is deemed abandoned if not exercised within six years.

Where the title is taken in fee, although for the purposes of a highway, there is no limitation upon the municipality's ownership

of the land. After the fee of the land over which a highway is to be opened is obtained, if the municipality decides that the public interest does not require that the lands be immediately opened as a public highway, and it consequently delays opening the same, it does not thereby either lose the title to the land or its right to open the same to public use. When the municipality decides to open the same to the use of the public, its construction across the roadway of a railroad corporation must conform to the determination of the public service commission. Section 61, Railroad Law (Laws 1897, c. 754).

The discussion by the Appellate Division of the question as to the necessity of applying to the public service commission to determine whether Delevan avenue if constructed across the lands in question shall be carried over the same at grade or otherwise is convincing, and it is unnecessary to add to it at this time.

The judgment should be modified so as to include an adjudication that the plaintiff's easement for a railroad right of way in that part of the lands purchased by its predecessor in title, on June 23, 1853, which were taken by the defendant for the purpose of extending Delevan avenue in 1867 extended to the entire width thereof, and, as so amended, it should be affirmed, without costs in this court.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment accordingly.

(200 N. Y. 177)

In re TIMMIS.

(Court of Appeals of New York. Dec. 6, 1910.)

1. STATUTES (§ 225*)—CONSTRUCTION—INTENTION OF LEGISLATURE—POLICY AND PURPOSE OF ACT.

In the construction of a statute which relates to the same subject-matter as a previous act, the court may look at the situation when the previous act was passed as showing the purpose of the Legislature and as throwing light on the meaning of the words used to express its intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.*]

2. CORPORATIONS (§ 375*)—STOCK CORPORATIONS — TRANSFER OF CHARTER OR FRANCHISE — STATUTES — "SALE OF FRANCHISE AND PROPERTY."

Stock Corporation Law (Laws 1909, c. 61 [Consol. Laws c. 59]) § 18, which is entitled "voluntary sale of franchise and property," provides that a stock corporation with the consent of the holders of two-thirds of its stock may convey its property, rights, privileges, and franchises, or any interest therein, or any part thereof, to a domestic corporation engaged in a business of the same general character, and that, before the conveyance is made, such consent shall be obtained at a meeting of the stockholders. A stock corporation having operated a calendar department and employed

salesmen and kept accounts for it separate from its other business but doing the printing or lithographing for such department, sold to a corporation, organized for the purpose, its business, assets, good will, and contracts with salesmen, in all about one-thirteenth part of its whole business. *Held*, that the sale was not an ordinary business transaction, but a sale and transfer of a part of its franchise and property within the meaning of the section.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 375.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

3. CORPORATIONS (§ 375*)—SPECIAL CHARTERS — GENERAL LAWS.

Every statute which adds to or takes from the power of a corporation is a part of its charter, and, where a corporation in its notice of a meeting to consider the sale of a department refers to the requisite number of consenting stockholders, this is an indirect reference to a statute on that subject.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 375.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Application by Walter S. Timmis for the appraisal of his stock in the Sackett & Wilhelms Company, a stock corporation. From an order of the Appellate Division of the Supreme Court (139 App. Div. 936, 124 N. Y. Supp. 1132), affirming an order made at Special Term, defendant appeals. Affirmed.

The Sackett & Wilhelms Company is a domestic corporation organized to carry on the business of lithographing and printing. In August, 1909, at a meeting of its stockholders, held pursuant to notice, a resolution was adopted by the votes of the holders of more than two-thirds of the capital stock, authorizing the board of directors to "sell the good will, business, assets and property of what is known as its calendar department, the same being and constituting a separately conducted department of its business, upon such terms and for such consideration" as the directors should prescribe. The respondent, who owned 40 shares of preferred stock and 35 of common, voted against the resolution, and within 20 days after the meeting served a notice objecting to the sale and demanding payment for his stock, "pursuant to the provisions of the stock corporation law." As the demand was not complied with, upon a petition showing these facts among others, he moved at Special Term on due notice for the appointment of appraisers, and that he be paid for his stock the amount of the appraisal thereof, when made. Upon the hearing before the Special Term it appeared that the business of the calendar department was to obtain orders and create a demand for calendars and other advertising specialties through traveling salesmen, to secure designs and plates for the decoration thereof, to procure the same to be lithographed and printed by the regular department of the company, accounting for the work at current rates and to sell the same through its salesmen; that

it did no printing or lithographing; that the sales of the calendar department, which has always been separately conducted and the accounts thereof separately kept, amounted to about one-thirteenth of the entire business of the corporation; that the successful conduct of the department required the continued use of a large amount of capital which the corporation was unable to provide; that the business, assets, and good will comprised among other things pictures, plates, finished calendars, contracts with salesmen of calendars, and the good will of buyers of calendars; that a corporation known as the Robert Chapman Company had been organized with power to "acquire, as a going concern," the calendar business of the Sackett & Wilhelms Company, and the terms of sale required the purchaser to give all the printing and lithographing to the parent company at current rates for the period of 10 years; that the purchase price was to be \$20,000 in cash, all the common stock amounting to \$150,000 and \$60,000 of the entire issue of \$300,000 of preferred stock. The motion was granted, appraisers were appointed, and the court further ordered that within 10 days after their report "the said Sackett & Wilhelms Company pay in cash to the petitioner the value of his stock as estimated and certified by said appraisers, and that thereupon the petitioner surrender the certificates for said shares to said company for cancellation." The corporation appealed from the order of the Special Term to the Appellate Division and from the order of affirmance by that court to the Court of Appeals.

Harold Otis, for appellant. Harold Bunker, for respondent.

VANN, J. (after stating the facts as above). This appeal involves the construction of sections 16 and 17 of the stock corporation law. Section 16, which is entitled "voluntary sale of franchise and property," provides that: "A stock corporation * * * with the consent of two-thirds of its stock, may sell and convey its property, rights, privileges and franchises, or any interest therein or any part thereof to a domestic corporation, engaged in a business of the same general character * * * and such sale and conveyance shall, in case of a sale to a domestic corporation, vest the rights, property and franchises thereby transferred * * * in the corporation to which they are conveyed for the term of its corporate existence. * * * Before such sale or conveyance shall be made such consent shall be obtained at a meeting of the stockholders called upon like notice as that required for an annual meeting." The provisions authorizing a sale of property only to a foreign corporation are not now material. Section 17, entitled "rights of nonconsenting stockholders on voluntary sale of franchise and property," provides that: "If any stockholder not voting in favor of such proposed sale or conveyance shall

at such meeting, or within twenty days thereafter, object to such sale, and demand payment for his stock, he may, within sixty days after such meeting, apply to the Supreme Court * * * for the appointment of three persons to appraise the value of such stock, and the court shall appoint three such appraisers, and * * * also direct the manner in which payment for such stock shall be made to such stockholder. * * * When the corporation shall have paid the amount of such appraisal, as directed by the court, such stockholder shall cease to have any interest in such stock and in the corporate property of such corporation and such stock may be held or disposed of by such corporation." Stock Corporation Law (Laws 1909, c. 61 [Consol. Laws, c. 59]) §§ 16 and 17. The appellant claims that the sale of the calendar department is in the line of its ordinary business; that it is a lawful corporate act regardless of section 16; and that it did not give to the dissenting stockholder the rights created by section 17.

The substance of the sections in question was first enacted by chapter 638 of the Laws of 1893, probably to meet the situation as it was left by a line of judicial decisions ending in 1892. The valuable opinion of Judge Allen in *Abbot v. American Hard Rubber Co.*, 33 Barb. 578, after standing the test of time and criticism for 30 years, was followed by *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737. These cases and those which intervened establish the law that a corporation cannot sell all its property, or even a part thereof so integral as to be essential for the transaction of its ordinary business, because such a sale is wholly or partly an act of self-destruction and a practical dissolution without compliance with law.

The discussion of the subject in the various opinions suggested two evils: (1) The injustice to the bulk of the stockholders from want of power in a corporation to sell its business or an essential part thereof to another corporation organized for the purpose, frequently from its own membership, on terms deemed advantageous by the holders of a large majority of the stock. (2) The injustice to minority stockholders of requiring them to abandon, change, or limit their business if the majority should have the power to direct such a sale. An incidental evil was the power of a dissenting stockholder to compel the majority to buy him out on his own terms in order to secure unanimous consent with no one left to question the transaction. These evils could be remedied only by legislation, for the courts cannot provide against inherent defects in the creation of corporations. The act of 1893 is reproduced and amplified by sections 16 and 17 of the statute now in force. This legislation was designed to meet the evils pointed out by the courts by enabling a majority of two-thirds to sell if they deemed it was the best policy,

and at the same time to protect the minority, if they regarded the sale as opposed to their interests. The situation when the original act was passed points to the purpose of the Legislature and throws light on the meaning of the words used to express its intention. Notwithstanding the broad language of section 16, it is obvious that it was not addressed to ordinary sales by a corporation, nor even to those extraordinary in size, but still in the regular line of its business, for such sales would have been valid without amending the stock corporation law. We are not now called upon to lay down a rule embracing all the cases covered by the statute, but simply to decide whether the facts of this case bring it within the sections under consideration.

The sale before us was not made in the ordinary course of the business of the corporation, for it was not organized to sell calendar departments, or any department that would involve going out of business pro tanto. It was not a sale of calendars over the counter or on the road, but of the "business assets and property," including the good will, of an independent and important branch of its business, and the large price agreed upon indicates the actual value of what was sold. The parent company lacked capital to carry on the department, and, as the learned counsel for the appellant states, "the sale was a business necessity," which implies that it was not in the ordinary course. By the sale of the good will the corporation would be prevented from ever engaging in that kind of business again, and, while not in form a sale of its franchise to that extent, it would be in effect, because it could no longer exercise its franchise to make and sell calendars. One of the powers conferred by the charter would thus be parted with, and the right to carry on a line of business authorized by the law of its being would be permanently gone. It could not do a kind of business duly authorized by its charter as it had before. As an arm of a living man may become paralyzed and useless, so an arm of the appellant would become paralyzed and useless by a sale such as the one described. As the living arm could no longer lift, or touch, or exercise its cunning, so the arm of the artificial being could no longer make calendars, or sell them, or enter into contracts relating thereto. Its own action would result in complete paralysis of every power required to conduct a calendar department, and to this extent it would go out of business. Such a sale would therefore be corporate suicide to a certain extent, and to that extent a sale or abandonment of the charter. While a natural person may do anything within the limits of his physical and mental capacity not forbidden by law, an artificial person can do nothing except as authorized by law. The sale in question would not be valid without resorting to sec-

tion 16, and by resorting to that section the appellant opened the door for the respondent to enter and demand his rights under section 17. The claim that the earlier section was not invoked by specific mention in the notice calling a meeting of stockholders to authorize the sale is met by the statement therein that "under the charter of the corporation the calendar department cannot be transferred to a separate corporation without the authorization of the holders of two-thirds of the capital stock." While this did not refer directly to the stock corporation law, it did indirectly, for every statute which adds to or takes from the power of a corporation is a part of its charter.

As the appellant availed itself of the privilege conferred by the statute, it must comply with the condition prescribed for the exercise thereof.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Order affirmed.

(300 N. Y. 263)

HIRSCH et al. v. NEW ENGLAND NAVIGATION CO. et al.

(Court of Appeals of New York. Dec. 16, 1910.)

1. APPEAL AND ERROR (§ 987*)—QUESTIONS OF FACT.

It is not the appropriate function of an appellate court to determine controverted questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

2. APPEAL AND ERROR (§ 1175*)—FINAL JUDGMENT.

Where a judgment is reversed, final judgment cannot be rendered by the appellate court unless the facts are conceded, uncontrovertibly established, or found by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.*]

3. APPEAL AND ERROR (§ 842*)—ISSUES OF LAW—DISPOSITION OF CASE.

In deciding an issue of law, the appellate court may affirm or reverse an order or judgment on any ground and for any reason that such court may decide to be controlling, regardless of the ground or reason stated in deciding such issue by the Special or Trial Term.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 842.*]

4. CARRIERS (§ 62*)—CARRIAGE OF GOODS—TRANSPORTATION—JOINT CONTRACT.

There is no statute to prevent two or more persons from jointly, or jointly and severally, contracting to transport goods from one place to another.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 62.*]

5. PLEADING (§ 216*)—DEMURRER.

On a demurrer, only the allegations of the pleading are to be considered, and no inference

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

can be indulged in except such as properly arises from the pleading to which the demurrer is served.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 216.*]

6. ACTION (§ 50*)—CAUSES OF ACTION—JOINT CONTRACT.

A complaint alleging that defendant navigation company was a common carrier, that defendants F. were copartners engaged in the trucking business as a common carrier, that plaintiffs delivered to defendants a case of goods which defendants accepted for transportation, that they failed to deliver the goods to the consignee, etc., who assigned his claim to plaintiffs, etc., charged a joint promise to transport the goods, and stated but one cause of action against both defendants; it not being impossible that a joint agreement by defendants to transport might be shown.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 50.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Robert Hirsch and others, copartners doing business under the firm name and style of William Openhym & Sons, against the New England Navigation Company and Ferdinand S. Ferguson, Sr., and Ferdinand S. Ferguson, Jr., doing business under the firm name and style of F. S. Ferguson & Son. From a final judgment entered on an order of the Appellate Division affirming an interlocutory judgment by the Special Term sustaining a demurrer by defendants Ferguson to the complaint (see 129 App. Div. 178, 113 N. Y. Supp. 395), plaintiffs appeal. Reversed and judgment rendered for plaintiff on demurrer, with leave to defendants to withdraw demurrer and answer.

See, also, 130 App. Div. 879, 114 N. Y. Supp. 1131.

Wilson E. Tipple, for appellants. Henry C. Hunter, for respondents.

CHASE, J. The defendants Ferguson demurred to the plaintiffs' complaint upon the grounds: First, that the complaint does not state facts sufficient to constitute a cause of action as against them; second, that it appears upon the face of the complaint that causes of action have been improperly united therein.

The demurrer was sustained at the Special Term upon the ground that the complaint does not state facts sufficient to constitute a cause of action as against the defendants Ferguson. An appeal was taken from the interlocutory judgment entered thereupon to the Appellate Division, where it was affirmed without expressing in the order affirming the judgment any grounds therefor, but it appears by the opinion of the Appellate Division that a majority of the members of the court were of the opinion that the complaint states a cause of action against the defendants Ferguson, and that it also states a cause of action against

the defendant the New England Navigation Company, and that such causes of action have been improperly united in the complaint. The interlocutory judgment sustaining said demurrer was affirmed. 129 App. Div. 178, 113 N. Y. Supp. 395.

Final judgment has been entered against the plaintiffs in favor of the defendants Ferguson upon the order affirming the interlocutory judgment. The plaintiffs insist in this court that the Appellate Division was restricted in its consideration of the appeal to the question as to whether the complaint states facts sufficient to constitute a cause of action against the demurring defendants.

The contention of the appellants arises from their confusing the power of appellate courts in determining appeals involving questions of fact with appeals involving directly or indirectly questions of law.

It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court sitting as such to determine controverted questions of fact and render final judgment upon such determination. *Duclos v. Kelley*, 197 N. Y. 76, 89 N. E. 875; *Benedict v. Arnoux*, 154 N. Y. 715, 724, 49 N. E. 326; *Moffet v. Sackett*, 18 N. Y. 522; *Altman v. Hofeller*, 152 N. Y. 498, 46 N. E. 961; *Matter of Chapman*, 162 N. Y. 456, 56 N. E. 994.

There is an exception provided by statute by which the Appellate Division is given authority to decide questions of fact and receive further testimony in case of certain appeals from the Surrogate's Court (Code Civ. Proc. § 2586), and a submitted controversy to a court of record is tried in the Appellate Division of the Supreme Court, but the facts upon which the controversy depends must be stated by the parties. Code Civ. Proc. §§ 1279-1281. Where a judgment is reversed, final judgment cannot be rendered by the appellate court unless the facts are conceded, uncontrovertibly established by record or otherwise, or found by the trial court. *Duclos v. Kelley*, *supra*; *Matter of Chapman*, *supra*.

These rules, however, do not apply where the issue to be determined is solely one of law. A demurrer raises an issue of law. Code Civ. Proc. § 964. In deciding an issue of law the appellate court may affirm or reverse an order or judgment upon any ground and for any reason that such court may decide to be controlling, regardless of the ground or reason stated in deciding such issue by the Special or Trial Term.

It appears from the complaint that the defendant the New England Navigation Company is a foreign corporation, engaged in carrying and transporting goods, wares, and merchandise as a common carrier for hire and in operating certain specified lines

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to seacoast towns. The defendants Ferguson are copartners "engaged in the trucking and express business and the carrying and transporting of goods, wares and merchandise for hire in and about the borough of Manhattan, city and state of New York, as a common carrier for hire." The complaint alleges: "Fourth. That heretofore and on or about the 26th day of December, 1906, plaintiffs above named, in the borough of Manhattan, city and state of New York, delivered to defendants above named one case of goods, wares, and merchandise, designated by the number 2291, the contents of which is more particularly set forth in 'Schedule A' hereunto annexed and made a part of this complaint, properly packed, marked, and consigned to Jordan Marsh Company, Boston, Mass., which said defendants accepted as such common carriers for the purpose of carrying and delivering them to said consignee, for and in consideration of a reasonable reward to be paid therefor."

It is further alleged in the complaint that the defendants wholly failed and omitted to deliver said goods to said consignee; that demand has been made therefor; that the defendants refuse to deliver the same; and that Jordan Marsh Company has sold and transferred to the plaintiffs all right, title, and interest in and to the claim upon which the action is founded. Judgment is demanded for the value of the case of goods.

There is no statute to prevent two or more persons from jointly, or jointly and severally, contracting to transport a case of goods from one place to another. It may be the common practice as claimed, where a case of goods is transported from the city of New York to the city of Boston by way of coastwise lines, to deliver the same to a local truckman for transportation from the place of business of the consignor to the navigation company, and that the navigation company then receives it for transportation to the city of the consignee. In such case when the local truckman makes the delivery to the navigation company he so completes his contract as to be free from any liability to the consignor.

It is possible that it will appear upon the trial that the case of goods was so given to the demurring defendants, the local truckmen, and that it was delivered by them to the navigation company, and that evidence of a joint agreement by the defendants to transport the case of goods cannot be shown. The Special Term assumed that the proof upon a trial would be in accordance with such possibility, and that as the complaint shows a delivery to the navigation company, no cause of action was stated as against the demurring defendants. The Appellate Division, however, has assumed that there is in the complaint an independent and separate charge of violation of contract

against the demurring defendants and the navigation company, and that consequently two causes of action are improperly united in the complaint, and for that reason the demurrer should be sustained.

Upon a demurrer only the allegations of the pleading are to be considered. No inference or assumption can be indulged in except such as properly arises from the pleading to which the demurrer is served. The plain language of the fourth paragraph of the complaint charges a joint promise on the part of the defendants to accept the goods in the city of New York and transport them to the consignee and of a failure on the part of the defendants to perform their contract. The complaint therefore states one cause of action against both defendants.

The judgment of the Special Term and of the Appellate Division should be reversed and judgment rendered for plaintiffs on demurrer, with costs in all courts, with leave to the defendants to withdraw demurrer and serve answer within twenty days on the payment of such costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment accordingly.

(300 N. Y. 517)

FUNDA v. BETTS et al.

(Court of Appeals of New York. Nov. 29, 1910.)

1. APPEAL AND ERROR (§ 1094*)—UNANIMOUS AFFIRMANCE BY APPELLATE DIVISION—EFFECT.

A finding of fact unanimously affirmed by the Appellate Division is conclusive on the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

2. APPEAL AND ERROR (§ 1094*)—EXCEPTIONS—SUFFICIENCY.

An exception to each and every finding of fact and conclusion of law contained in the referee's report, except the first finding of fact, is unavailing on appeal from a judgment of the Appellate Division, unanimously affirming the findings of fact, where the findings sustain the conclusions of law.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1094.*]

3. APPEAL AND ERROR (§ 711*)—EXCEPTIONS—SUFFICIENCY.

An exception to the refusal of the court to find as requested in an action to foreclose mechanics' liens that each and every lien mentioned in the complaint be canceled and discharged of record is unavailing on appeal from a judgment of the Appellate Division, where none of the requests to find appear in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2950; Dec. Dig. § 711.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. APPEAL AND ERROR (§ 1082*) — APPEAL FROM APPELLATE DIVISION—QUESTIONS REVIEWABLE.

The Court of Appeals on appeal from a judgment of the Appellate Division, unanimously affirming a judgment foreclosing mechanics' liens, cannot modify the judgment by deducting items not subject of a mechanic's lien, where there is no sufficient exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1133-1136; Dec. Dig. § 1082.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Henry Funda against Samuel T. Betts and others to foreclose mechanics' liens. From a judgment of the Appellate Division (134 App. Div. 908, 118 N. Y. Supp. 1107), affirming a judgment for plaintiff and certain of the defendants, defendants, Samuel T. Betts and another, appeal. Affirmed.

George W. Gray, for appellants. John F. Nash, for respondent Henry Funda.

PER CURIAM. The judgment in this action forecloses mechanics' liens in behalf of the plaintiff and the defendants other than Samuel T. Betts and Edith L. Betts upon certain property in the city of Syracuse. Mr. and Mrs. Betts are the owners of the property, and have been held liable upon the ground that the repairs and improvements upon the same were undertaken by the lessee, and made by the lienors with their consent. The judgment entered upon the report of the referee has been unanimously affirmed by the Appellate Division, and therefore this finding is conclusive upon us. The only questions presented by the appeal arise upon the appellants' exceptions to the conclusions of law and to rulings upon the admission and exclusion of evidence.

"The appellants except to each and every finding of fact and conclusion of law" contained in the referee's report, except the first finding of fact. This exception avails nothing to the appellants, inasmuch as the findings of fact amply sustain the conclusions of law. There is a second exception "to the refusal of the court to find as requested, that each and every lien mentioned and set forth in the complaint * * * be canceled and discharged of record." This exception is equally unavailable, as none of the appellants' requests to find appear in the record.

An examination of the evidence shows that the appellants have been charged with some items of work which were not properly the subject of a mechanic's lien; such, for example, as the advertising panels mentioned in the testimony of the plaintiff and described in the brief for the appellants as easels. There are no exceptions in the record, however, which would permit a modification by the deduction of items of this character. The Appellate Division might have relieved the appellants in this respect, but there is

no power in this court to do so in the absence of a sufficient exception.

For these reasons the judgment must be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur. VANN, J., not voting.

Judgment affirmed.

(88 Oh. St. 101)

FICKEL et al. v. GRANGER.

(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

1. DIVORCE (§ 231*) — "ALIMONY" — DEFINITION.

"Alimony" is not due and payable as debt, damages, or penalty; but is an award by the court upon considerations of equity and public policy and is founded upon the obligation, which grows out of the marriage relation, that the husband must support his wife, which obligation continues after legal separation without her fault.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 1, pp. 307-311; vol. 8, pp. 7571-7572.]

2. DIVORCE (§ 321½*) — ALIMONY — LIABILITY FOR DEBTS OF WIFE.

Alimony cannot, either before or after payment thereof, be subjected to the payment of debts of the wife which existed prior to the allowance thereof.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 321½.*]

Error to Circuit Court, Cuyahoga County.

Action by one Granger against Minnie Fickel and others. Judgment for defendants in the court of common pleas was reversed by the circuit court, and defendants bring error. Reversed, and judgment for plaintiffs in error.

On October 15, 1906, the plaintiff in error, Mrs. Fickel, was indebted to the defendant in error upon a judgment of the probate court of Cuyahoga county in the sum of \$1,051.37, which was subsequently reduced by a payment of \$200 on October 30, 1906, leaving a balance due to the defendant in error of \$851.37, with interest. On June 18, 1908, Mrs. Fickel was divorced from her husband, Jacob Fickel, and was awarded \$1,200 alimony for her support and maintenance and was awarded the sole custody, care, and control of the three minor children of the parties to said divorce suit. This amount of alimony was on the following day paid to her attorney, E. C. Schwan, one of the plaintiffs in error. On June 20th the defendant in error began this action, setting up in her petition "that said Minnie Fickel has no real or personal property subject to execution out of which said money can be collected, but that defendant, E. C. Schwan, is indebted to said Minnie Fickel in the amount of about \$1,200 for alimony received by said Schwan

for said Minnie Fickel," and praying that said money in Schwan's hands be subjected to the payment of her claim. It appeared on the hearing of said cause that Schwan had still in his hands \$800 of the \$1,200 received, having retained \$250 due him for fees in the divorce case and for other legal services, and having paid \$150 to Mrs. Fickel and on her behalf to other persons. Mrs. Fickel claimed \$500 in lieu of a homestead, which was conceded to her; and the contention was therefore over the remainder of the alimony, to wit, \$300, which the plaintiff in error contended could not be subjected to the payment of the claim of defendant in error. The court of common pleas held with the plaintiff in error and dismissed the petition. Upon appeal a majority of the circuit court were of a different opinion and they ratified the payment by Schwan of the \$500 to Mrs. Fickel, as her statutory exemption in lieu of a homestead, but ordered him to pay said balance of \$300 to the defendant in error, and rendered judgment against both plaintiffs in error for costs. To reverse the judgment of the circuit court, this petition in error is prosecuted.

E. C. Schwan, for plaintiffs in error.
Laubscher & Kees, for defendant in error.

DAVIS, J. (after stating the facts as above). The question which is submitted to us in this case is this: Can money or property which has been awarded as alimony be subjected to pre-existing debts of the wife? It seems to be conceded that the question should be answered in the negative, except in cases where the alimony has come into the wife's possession; but we are of the opinion, for reasons which will be stated later, that at no time and under no circumstances can alimony be lawfully subjected to the payment of a pre-existing debt. There is a clear distinction in reason between debts antecedent and debts subsequent to the time of the allowance and payment of alimony. The latter class may be presumed to have been made on the credit of, and with reference to, the alimony; not so the former.

Alimony is an allowance for support, which is made upon considerations of equity and public policy. It is not property of the wife recoverable as debt, damages, or penalty. State, on complaint of Cook, v. Cook, 68 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625. It is based upon the obligation, growing out of the marriage relation, that the husband must support his wife, an obligation which continues even after a legal separation without her fault. Being thus founded upon public policy and created in equity, it cannot be diverted from the purpose of support without public injury; and therefore the courts which create the fund should see that it is not subjected to the rapacity of pre-existing creditors, who necessarily became such

on the faith and credit of other funds. Such creditors have no claim on the support provided by the husband during the existence of the marriage relation. We see no reason for allowing such a claim upon the support which he is compelled by law to make, whether with or without legal separation. Substantially the same answer was made to this question by the Court of Appeals of New York in *Romaine v. Chauncey et al.*, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544; and the same doctrine was announced in *Kansas in Kingman & Co. v. Carter*, 8 Kan. App. 46, 54 Pac. 13.

We do not think that this case runs parallel with the cases involving pension money, because section 4747 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3279) provides that money due to a pensioner shall inure wholly to the benefit of such pensioner only while it is in course of transmission to the pensioner, and because the pensioner's claim is wholly created by the statute.

Judgment of circuit court reversed, and judgment for plaintiffs in error.

SUMMERS, O. J., and SPEAR, SHAUCK, and PRICE, JJ., concur.

(33 Oh. St. 85)

AKRON & C. J. R. CO. v. WEEDMAN.

(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 429*)—WAIVER OF SUMMONS—DEATH OF DEFENDANT IN ERROR—EFFECT.

In view of the provisions of sections 6713 and 6714, Revised Statutes, counsel authorized to represent the party who prevails in the court of common pleas is empowered to waive summons in error upon a petition in error in the circuit court for its reversal, and there being such waiver in writing the jurisdiction of the circuit court is complete, even though the prevailing party dies before the filing of the petition in error, the fact of such death not being known to the adversary party or to counsel. *McGuire et al. v. Ranney*, 49 Ohio, 372, 34 N. E. 719, overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2168-2172; Dec. Dig. § 429.*]

2. APPEAL AND ERROR (§ 334*)—DEATH OF DEFENDANT IN ERROR—SUBSTITUTION OF EXECUTOR.

In such case the death of the prevailing party being made known in the circuit court, his executor should be made a party defendant by amendment of the proceeding which is authorized by section 5114, Revised Statutes.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1851-1863; Dec. Dig. § 334.*]

Error to Circuit Court, Huron County.

Action by Jane Ramey against the Akron & Chicago Junction Railroad Company. Judgment for plaintiff, and defendant brings error. Pending proceedings in error plaintiff died, and defendant moved to substitute the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

name of C. B. Weedman, executor, as plaintiff. Motion overruled, and defendant brings error. Reversed.

On the 25th of January, 1907, Mrs. Ramey recovered a judgment in the court of common pleas against the railroad company in an action upon contract. On the 3d of May, 1907, the company filed a petition in error in the circuit court for the reversal of that judgment. The issuance and service of summons on said petition in error was waived, and the appearance of Jane Ramey was entered by the following indorsement on said petition in error and by her attorneys of record in the court of common pleas: "Now comes Jane Ramey, the defendant in error in the above-entitled error proceeding, by C. P. Wickham and E. M. Palmer, her attorneys of record in the original action, and also her attorneys in this error proceeding, and waives the issuance and service of summons in error in this proceeding in error and enters her voluntary appearance herein. E. M. Palmer and C. P. and L. W. Wickham, Attorneys for Defendant in Error."

At two terms of the circuit court the hearing of said proceeding was continued, once upon the application of counsel for the company, and once upon the application of counsel for Mrs. Ramey. Thereupon it was learned by counsel that Mrs. Ramey had died on the 9th of March, 1907, though the fact of her death was not previously known by her own counsel, nor by any of the attorneys or officials of the company. Upon that discovery, on September 10, 1908, C. B. Weedman, who had been qualified as executor of her will by the same counsel who had represented her on the trial of the cause in the court of common pleas, filed the following motion in the circuit court: "Now comes C. B. Weedman, as executor of last will and testament of Jane Ramey, deceased, and not entering his personal appearance herein, but appearing only for the purposes of this motion, and protesting against the jurisdiction of this court in the above-entitled proceeding, and of himself as such executor, moves the court to dismiss said proceeding for the reason that on the 9th day of March, A. D. 1907, said Jane Ramey, deceased, departed this life, and summons in error did not issue within four months from and after the rendition of the judgment sought in said proceeding to be reversed, nor has service of the same even been had upon him as such executor. E. M. Palmer, C. P., L. W. & R. D. Wickham, Attorneys for C. B. Weedman, Administrator of the Estate of Jane Ramey, Deceased." Thereupon, on September 14, 1908, counsel for the company filed in the circuit court the following motion for the amendment of said proceeding: "Now comes the plaintiff in error in the above-entitled error proceeding, and moves the court to amend, upon proper terms, the petition in error heretofore filed herein, and the record of said proceeding, by striking therefrom the name of Jane Ramey,

and by adding in lieu thereof the name of C. B. Weedman, as executor of Jane Ramey, and by adding to said petition in error proper averments, showing the death of said Jane Ramey, and the appointment and qualification of said C. B. Weedman as her executor, and as ground therefor says: That said proposed amendments are in furtherance of justice, and that said final judgment sought to be reversed in said error proceeding was rendered in the original action in the court below at the January term thereof, 1907, and on the 25th day of January in said year; and that said Jane Ramey departed this life on the 9th day of March, A. D. 1907; and that said C. B. Weedman was duly appointed and qualified as her executor on the 18th day of March, A. D. 1907, by the court of probate in and for the county of Huron, and state of Ohio; and that at the time, to wit, May 3, 1907, said petition in error was filed in this court, and said error proceeding commenced, said executor had due and legal notice and knowledge thereof, and duly entered his voluntary appearance in said error proceeding, and from thenceforward until after the last term of this court, treated the same as duly pending in this court, and having had due notice and knowledge of the pendency of said proceeding, and the purpose thereof, ever since the same was filed therein, he is now estopped to claim to the contrary; and that through mistake and inadvertence the name of Jane Ramey was inserted in said petition in error and so filed, instead of the name of C. B. Weedman, as her executor, and as defendant in error in said proceeding; and that this plaintiff in error did not know, nor did any one of its attorneys know of the death of said Jane Ramey until about the 28th day of June, A. D. 1907, but the attorneys in the original action for Jane Ramey and said C. B. Weedman, her executor as aforesaid, and his general attorney in the settlement of her estate, did know of her death at all the dates hereinbefore stated subsequent to that of her death, and that in their conduct in reference to said error proceeding in this court said attorneys and said executor treated the same as duly commenced and pending against said executor, and in all their negotiations with the plaintiff in error, and its counsel, and in their statements to this court, they in like manner treated said error proceeding as duly commenced and pending against said Weedman as such executor, and that said attorneys and said executor, by their conduct and statements aforesaid, misled this plaintiff in error and its attorneys into the honest belief that said Jane Ramey was in full life on said 3d day of May, A. D. 1907, and for about two months thereafter. Wherefore, this plaintiff in error prays that said original petition and said record may be amended by striking therefrom the name of Jane Ramey, and by inserting in lieu thereof the name of C. B. Weedman, as executor of the last will and testament of

said Jane Ramey, and by adding thereto appropriate averments showing the death of said Jane Ramey, and the appointment and qualification of said Weedman as her executor; and that said executor may be adjudged to be estopped from claiming that he is not, and never was a party defendant to said error proceeding, and that it may have such other and further relief in that behalf as the facts and justice may require. Arrel, Wilson & Harrington, Attorneys for the Defendant in Error."

All the material facts alleged in these motions were, and are, admitted to be true. The circuit court overruled the latter motion, and sustained the former, and this is assigned here as error.

Arrel, Wilson & Harrington and W. Severance, for plaintiff in error. E. M. Palmer and C. P., L. W. & R. D. Wickham, for defendant in error.

SHAUCK, J. (after stating the facts as above). If it is assumed that attorneys at law are agents in the ordinary sense only of the parties whom they represent in courts of justice, the familiar rule that the authority of an agent is revoked by the death of his principal affords justification for the action of the circuit court in overruling the motion of the plaintiff in error to amend the proceeding in error, as well as in sustaining that of the defendant in error to dismiss it. But the subject of a proceeding in error is the judgment whose reversal is sought. Although, unlike an appeal, a petition in error is requisite as the basis of the proceeding, legislation designed to make the proceeding practicable and to relieve it, as far as may be, of difficulty and uncertainty, naturally considers the intimate relation of the jurisdiction exercised by the original and appellate courts, as well as the peculiar representative character of counsel who represent parties in the court of first instance. To facilitate the acquisition of jurisdiction in the reviewing court, and to prevent its failure, sections 6713 and 6714, Rev. St., were enacted. The former section provides that service of the summons in error shall be sufficient if made on the attorney of record in the original case. Section 6714 provides: "The summons mentioned in the last section shall, upon the written precept of the plaintiff in error, or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county in which the defendant in error, or his attorney of record is found * * * and the defendant in error, or his attorney, may waive in writing the issue or service of the summons."

To say that counsel who appear as representatives of parties litigant can have no authority except that which depends upon the terms of their employment, or its actual continuance, or which is subject to annulment by any act of the parties, or that it

may be revoked in any way by one party without the knowledge of his adversary and to his prejudice, even to the extent of defeating the review of a judgment, is to deny all effect to these provisions of the statute and to introduce unnecessary confusion and uncertainty. It results from these provisions that when a party authorizes an attorney to represent him in the court of record in which the cause is originally tried, he thereby authorizes him to represent him in the steps required to effect the jurisdiction of the reviewing court, and that until that jurisdiction is effected, a revocation of his authority, to be effective, must be of record.

The jurisdiction of the circuit court was complete when the counsel who had represented Mrs. Ramey in the court of common pleas, in strict pursuance of the terms and obvious purpose of the statute, entered in writing their waiver of a summons on the petition in error, and the circuit court should have not only overruled the motion to dismiss the proceeding, but it should have sustained the motion for the amendment of the proceeding. It cannot be necessary to repeat recent discussions which have conducted this court to the conclusion that section 5114, Rev. St., provides for the amendment of proceedings in error and that it extends to such amendment as was here sought. The cases have been intelligently collected by counsel, and they will be found in the reporter's abstract of the briefs.

The action of the circuit court in dismissing the petition in error was in accordance with the decision in McGuire et al. v. Ranney, 49 Ohio, 372, 34 N. E. 719. But in that case the statute authorizing service of summons in error upon the attorney of record in the original case, and authorizing such counsel in writing to waive the issuance of summons, does not appear to have been cited by counsel nor considered by the court. The basis of the conclusion reached in that case was thus stated by the court: "The decease of the defendant in error terminated the authority of the attorneys of record in the original case, and hence the entry of appearance on the petition in error is without legal effect." However obviously that proposition comports with the general law of agency it cannot be reconciled with the statutory provisions above cited, nor with the considerations which should control in the administration of remedial statutes. That case is overruled.

The order of the circuit court will be reversed and the cause will be remanded to that court with instruction to overrule the motion to dismiss the petition in error and grant the motion to amend, and for further proceedings.

Judgment reversed.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(23 Ohio St. 68)

STATE v. WALDER.

(Supreme Court of Ohio. Nov. 22, 1910.)

*(Syllabus by the Court.)***INTOXICATING LIQUORS (§ 184*) — SALE OF MALT LIQUOR—LOCAL OPTION LAW.**

It is unlawful to sell malt liquor to be used as a beverage in a county of this state where the county local option law is in force, whether such malt liquor is in fact intoxicating or nonintoxicating. Such is the effect of section three (3) of said enactment, which declares that the "phrase 'intoxicating liquor' as used in this act, shall be construed to mean any distilled, malt, vinous, or any intoxicating liquor whatever." See 99 Ohio Laws, p. 35.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 142-144; Dec. Dig. § 134.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 2736-3746; vol. 8, p. 7692.]

Shauck, J., dissenting.

Error to Circuit Court, Fulton County.

August Walder was convicted of violating the local option law in the court of common pleas, and on error the conviction was reversed by the circuit court, and the state brings error. Reversed.

See, also, 92 N. E. 1126.

At the April term of the court of common pleas of Fulton county, held in the year 1909, the following charge was made against the defendant in error, to wit: "The State of Ohio, Fulton County—ss.: Before me, Ed. Scott, clerk of the court of common pleas in and for said county, and in which said county Hon. J. M. Killits, judge of said court, is now sitting, personally came Fred Grandy, who, being duly sworn according to law, deposes, and says that on the twenty-fifth day of January, 1909, in the county of Fulton and state of Ohio, one August Walder did then and there sell intoxicating liquors, to wit, a malt liquor containing .49 per cent. alcohol and no more, commonly known as 'Near Beer,' as a beverage to one Fred Grandy; that the selling of said liquor as aforesaid by the said August Walder was then and there prohibited and unlawful and contrary to the local option laws of the general assembly of the state of Ohio, and against the peace and dignity of the state of Ohio. Fred Grandy." This is followed by the proper jurat signed by the clerk of the court. Upon this affidavit, a warrant was issued, and the accused party taken into custody and before the said John M. Killits, as judge of the court of common pleas, where he was tried on the charge made in said affidavit.

The bill of exceptions shows that certain facts were agreed upon at the trial, namely: "It was admitted by and between counsel in open court that whatever crime was committed, if any, was committed in the county of Fulton and state of Ohio; that a local option election was held in the county of Fulton, state of Ohio, on the 24th day of No-

vember, 1908, and that a majority of the votes cast were in favor of the sale of intoxicating liquors as a beverage being prohibited; that whatever, if any, crime was committed, was committed more than 30 days after the date of the holding of said local option election; that a certificate of said local option election has been filed with the clerk of court of Fulton county, Ohio, and that said certificate is on record as provided by law." The state introduced its evidence and rested, and the accused introduced his evidence and rested. Thereupon the court found him guilty as charged in the affidavit, and assessed a fine of \$50 and the costs of the prosecution. The finding of the court appears in the journal entry as follows: "On consideration whereof the court finds that the liquor charged in the affidavit to have been sold by defendant was a malt liquor, but was not intoxicating, and the court finds as a matter of law that the sale of said malt liquor is within the inhibition of statute and contrary to law." A motion for new trial was overruled, to all of which rulings and judgment proper exceptions were entered. A bill of exceptions was prepared, allowed, and signed. The circuit court granted leave to file therein a petition in error, which was filed, and, on hearing the cause on error, said court reversed the court of common pleas, on the ground, as stated in the judgment entry, "that said judgment is contrary to law, in this, to wit, that there was no evidence offered upon the trial of said cause showing or tending to show that the beverage sold was an intoxicating liquor." The case was remanded to the court of common pleas. The state prosecutes error in this court to reverse the judgment of the circuit court.

F. H. Wolf, Pros. Atty., and Wayne B. Wheeler, for the State. James P. Ragan, for defendant in error.

PRICE, J. (after stating the facts as above). This is one of the many cases which have reached this court, involving alleged violation of some provision of the county local option law. The act is designated in the statute as amended senate bill No. 345 and is entitled, "An act to provide against the evils resulting from the traffic in intoxicating liquors, by providing for local option in counties," and was passed March 5, 1908, to take effect and be in force on and after September 1, 1908. See 99 Ohio Laws, p. 35. It is regarded as a case of great importance by the prosecuting attorneys of at least 15 counties of the state who join in the brief for plaintiff in error. The charge preferred against defendant in error is that "on the 25th day of January, 1909, in the county of Fulton and state of Ohio, one August Walder did then and there sell intoxicating liquors, to wit, a malt liquor containing .49 per

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cent. alcohol and no more, commonly known as 'Near Beer,' as a beverage to one Fred Grandy; that the selling of said liquor as aforesaid by the said August Walder was then and there prohibited and unlawful and contrary to the local option laws of the general assembly," etc. The charge in full is found in our statement of the case. We are not clearly advised as to the author of the name of "Near Beer," nor as to its real significance, but it may mean next to or almost "beer." While the affidavit charges that the "Near Beer" so sold to Grandy was an intoxicating liquor, to wit, a malt liquor of .49 per cent. alcohol, it was found by the trial court where the evidence was heard and considered "that the liquor charged in the affidavit to have been sold by defendant was a malt liquor, but not intoxicating" and then found as a matter of law that the sale of said malt liquor is "within the inhibition of statute and contrary to law."

The statute authorizing a local option election provided how the question should be stated on the ballots, and it was in substance whether the sale of "intoxicating liquors" as a beverage should or should not be prohibited. And, when the majority of the votes cast at the election were in favor of prohibiting the sale of intoxicating liquors in that county, section 2 of the act referred to made it unlawful from and after the holding of the election, "for any person personally or by agent, within the limits of such county, to sell, furnish or give away intoxicating liquors to be used as a beverage." Therefore the sole living question in the case is: Did Walder violate the provisions of the statute by selling a malt liquor that was not in fact intoxicating? Or was it essential to a conviction that the malt liquor sold was intoxicating?

The accused testified in his own behalf, and he undertook to give the elements composing and the method of brewing the liquor from which the sale was made. His statement is brief, and we quote from it. "Ques. to Deft. Tell the court whether or not you sold Mr. Grandy beer as he testified to? Ans. I did. It isn't beer—'Near Beer.' At the time Mr. Grandy purchased that beer we were making 'Near Beer' on a—that is, practically it wasn't intoxicating at all. Of course, the beer was made, the first beer that was all made similar only far weaker than the other beer. The other beer contains 4 to 5 per cent. alcohol. We made it as weak as we could, and then we boiled out the alcohol so it didn't contain any alcohol whatever. Ques. This 'Near Beer' you sold to Grandy? Ans. Yes, sir; then the raw product, sugar, etc., and we made nothing but a syrup. These articles laid there till we got ready to use them, when we would put in one-third of the first substance, which didn't contain any alcohol whatever, and then we took two-thirds of the other stuff which contained mostly water, and then we put them

together, you know, and carbonated it. Carbonating is what forms the foam and gives it the life; but, of course, there is a natural limit to that. It might be 30 hours and it might be 10 hours. It depends on what kind of shape you keep it. If you keep it in a warm place, it would generate alcohol right away; where, if you keep it cold, it might go two weeks or three weeks, as far as that is concerned, and never get alcohol. That is the reason I didn't ship any or sell any except in my own place."

He was asked to tell what ingredients entered into the beer sold to Grandy, and he said: "It was made out of that sugar—of course, it had that malt ingredient. Part of the malt was in there, but the alcohol part had all boiled out. There is nothing but the nutritious part of the malt * * *." Another question: "Was there any alcohol in the beer, you sold Fred (Grandy)? Ans. I suppose it had generated a little, but I don't think at the time I sold it—I don't think there was probably two-tenths of 1 per cent.—maybe not that much * * *." On cross-examination he admits the malt ingredient, and in another part of his testimony he states that hops are used in lager beer, while in the Near Beer hop extract is used; that is, nonalcoholic, but is the same thing as hops. Again he is asked: "This brew that you sold that day would become intoxicating if left standing there? Ans. Yes; if I had sold it to somebody else, or let it go out of the place; but I don't allow it to go in a can or pail anywhere, so I was sure it wouldn't get intoxicating. * * *"

The purchaser of this article called "Near Beer" testified that it foamed like beer—looked like beer except that it was a little lighter—and smelled like beer. He also testified that Walder told him "he had a brew of malt the same as they would for beer, and that the liquid was boiled until they boiled the alcohol out of it. * * *." He said it was made from malt the same as they made their beer. It appears from the above and other evidence that the trial court is fully supported in its finding that the beverage sold was a malt liquor, and it might also have been found that, if given time or moderate warmth, it would generate alcohol. For this reason the accused would not sell the beverage to be taken from his premises.

What is the law applicable to the finding and the facts? Section 3 of the county local option statute, already referred to, provides: "The phrase 'intoxicating liquor' as used in this act shall be construed to mean any distilled, malt, vinous or any intoxicating liquor whatever." While this section of the above statute has not heretofore been before this court for construction, we borrow light from what has been said in construing certain provisions of the Dow law and of the later Aiken law, concerning the taxing of the traffic in intoxicating liquors. In State

ex rel. Guilbert, Auditor, v. Kauffman, 68, Ohio St. 635, 67 N. E. 1062, a dealer in "Bishop's Beer" was resisting the payment of what was commonly called the Dow tax, because such beer was not intoxicating, and did not come within the purview of the taxing statute. This court held in the syllabus that "section 4364-9, Rev. St., applies to the business of selling a malt liquor or beverage which contains less than 2 per cent. of alcohol and is not intoxicating." The court disposed of the question in the following per curiam: "Section 4364-9, Rev. St., imposes a tax on the business of trafficking in any intoxicating liquors, and also on the business of trafficking in spirituous, vinous or malt liquors. The generic term 'malt liquors' includes both nonintoxicating and intoxicating malt liquors. * * * The statute then before the court was section 4364-9, Rev. St., which provides that "upon the business of trafficking in spirituous, vinous, malt, or other intoxicating liquors, there shall be assessed yearly and shall be paid into the county treasury * * * the sum of. * * * This wording is the same as contained in the prior statute on the subject, except that the word "any" in the former is supplanted by the word "other" in the statute in force when the above Kauffman Case was decided. In a later case, La Follette, Treasurer, v. Murray, 81 Ohio St. 474, 91 N. E. 294, this court considered the section (4364-9), which is worded as above quoted, viz.: "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed," etc. The case was not one of "Near Beer," but of "Friedon Beer," containing .47 of one per cent. of alcohol, which it was claimed was not intoxicating. The statutes and former decisions were reviewed, and the court's conclusion is stated in the following syllabus: "Section 4364-9, Rev. St. (98 Ohio Laws, p. 100), in effect April 10, 1906, applies to the business of trafficking in malt liquors, whether intoxicating or nonintoxicating."

The Legislature went further, in order to make clear its meaning, and made a definition of the phrase "trafficking in intoxicating liquors," which is found in section 4364-16, Rev. St. And we find that in the statute providing for municipal local option the Legislature, in section 4364-20c, Rev. St., defines "the phrase 'intoxicating liquors' as used in this act shall be construed to mean any distilled, malt, vinous, or any other intoxicating liquors."

Now, as we come to the county local option law, we find the Legislature attempting to silence all quibbles as to what the phrase "intoxicating liquor" means, enacting section 3 of that act, which may again be quoted: "The phrase 'intoxicating liquor' as used in this act shall be construed to mean any distilled, malt, vinous, or any intoxicating liquor whatever." This definition is very clear, and is not vexed with the word "any" or

"other" which gave rise to the legal controversies in construing the taxing statutes. The Legislature may have heard of "Bishop's Beer," "Friedon Beer," and later of "Near Beer," and concluded that the enforcement of the will of the majority should not be defeated by subterfuge, or the juggling in percentages of alcohol, and has said that, for the purpose of carrying out the intention of the people to prohibit the sale of intoxicating liquors, certain beverages shall be legally considered intoxicating, although not so in fact; and malt liquor is one of those so designated. "Near Beer" being a malt liquor, the statute pronounces it an intoxicating liquor, and made proof of its real intoxicating qualities unnecessary. It is no more protected than "altogether" beer and the attempt to evade the law by brewing a "near" or "almost" beer, is by section 3, supra, rendered futile. The legislative fiat has gone forth that malt liquor is intoxicating within the meaning of the act, and that is the end of it. If the law is wrong, it is for the Legislature, and not the court, to correct it, but it was enacted no doubt to cover such evasions as have been tried in many localities.

However, this feature of legislation is not singular. It has been indulged in many other cases and on various subjects. We have seen how trafficking in intoxicating liquors is defined. We mention some other exemplifications of such legislation. Section 4200-5, Rev. St., defines the word "drug," and also what shall be considered as "food." The following section determines when "drugs" and when "food" shall be deemed adulterated. Section 4403f, Rev. St., provides: "Any person shall be regarded as practicing medicine or surgery or midwifery within the meaning of this act, who shall use the words or letters, 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' 'M. B.,' or any other title," etc. Section 4364-30g defines "intoxicating liquor," "qualified elector," "residence district," defines the words "block" and "saloon." Section 4364-30y makes certain facts prima facie evidence of guilt, and section 4387 defines a "pawnbroker." Many other illustrations may be found to show how fertile the Legislature has been in settling some things by statute which might otherwise be difficult of proof.

The courts of other states have passed on similar legislation, and we select a few decisions from the great number of reported cases. In *State v. Frederickson*, 101 Me. 37, 63 Atl. 535, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, the Supreme Judicial Court of that state held in the third section of the syllabus as follows: "The constitutional right of the Legislature to regulate or prohibit the sale and keeping of intoxicating liquors, and to declare certain liquors intoxicating within the meaning of the law governing intoxicating liquors irrespective of the intoxicating character of such liquors as a matter of fact, both under the state and

federal Constitutions, have been so universally answered in the affirmative, both by the decisions in our own state, and by the Supreme Court of the United States, that it is no longer a question for argument or even doubt." *Luther v. State*, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146, decides that the prohibition of the sale or keeping for the purpose of sale of malt liquors without a license so to do applies to all malt liquors sold or kept for sale to be used as a beverage, whether intoxicating or not, and that it was not necessary to allege or prove that the malt liquor was in fact intoxicating. This case was decided in 1909. To the same effect is *Eaves v. State*, 113 Ga. 749, 39 S. E. 318. In *Dinkins v. State*, 149 Ala. 49, 43 South. 114, the Supreme Court of Alabama held that "under Acts 1886-87, p. 665, prohibiting the sale of malt liquors, it is an offense to sell a fluid containing a weak solution of malt liquor which cannot intoxicate." It seems that in that state (Alabama) the courts were called upon to investigate the sale of various beverages which appeared under such enticing names as "Hop Jack," "Cherry Bitters," "Harter's Wildcherry Tonic," and "Cook's Malt Tonic." There, as in other states, enterprise was unbounded to prepare something to slake thirst for some even slight intoxicant, without being caught in the meshes of law. The above case reviewed *Felbelman v. State*, 180 Ala. 122, 30 South. 384, to which we merely refer without quotation. See, also, *State of Missouri v. Wittmar*, 12 Mo. 407. A case is found in *Commonwealth v. Timothy*, 8 Gray (Mass.) 480, in which it is held: "If the liquor sold was not in fact intoxicating, still, if it was within the liquors enumerated in the first section of the statute, the keeping of it with intent to sell was, by the terms of the statute, to be punished in the same manner as if it was intoxicating; and such an enactment is within the discretion of the Legislature to pass." Similar doctrine is laid down in *State v. Certain Intoxicating Liquors et al.*, 76 Iowa, 243, 41 N. W. 6, 2 L. R. A. 408. The case is directly in point. We cite nothing further from the great array of authorities, some of which may be found in the brief for plaintiff in error.

The finding that the sale made which is now under consideration was a sale of malt liquor is amply supported by the facts, and the statute declares malt liquor to be intoxicating within the meaning of the act.

The circuit court erred in its judgment, which is now reversed, and the judgment of the court of common pleas is affirmed.

Judgment reversed.

SUMMERS, C. J., and CREW, SPEAR and DAVIS, JJ., concur. SHAUCK, J., dissents.

(83 Oh. St. 97)

DRAKE et al. v. TUCKER et al.
(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 22*)—REVIEW—APPEAL FROM COMMON PLEAS.

Whether a cause in which an appeal has been taken to the circuit court from the judgment of the court of common pleas is appealable is a question which cannot be effectively made except by a motion to dismiss the appeal interposed in the circuit court before the trial in that court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 98; Dec. Dig. § 22.*]

Error to Circuit Court, Lorain County.

Action by Drake and others against Tucker and others. Judgment for plaintiffs in the court of common pleas, and defendants appeal to the circuit court. From the judgment of the circuit court, plaintiffs bring error. Affirmed.

Plaintiffs in error brought suit in the court of common pleas to recover possession of a strip of ground eight feet in width, which it was admitted the trustees of the church had leased to the ancestor in title of the defendants, and they alleged that the lessee's right of possession had been forfeited because the property had been put to other than residential uses for which alone it has been leased, and that by the terms of the lease the premises had, in consequence of such forbidden use, reverted to the lessors. The defendants pleaded by way of estoppel against the right of the plaintiffs to insist upon a forfeiture of the leasehold estate, their acquiescence in the changes of the uses of the property made by the defendants, and a waiver of the condition in the lease upon which the action counted. The plaintiffs replied denying the allegations of the answer. In the court of common pleas a jury was waived, and upon a trial to the court the issues were found in favor of the plaintiffs, and judgment was accordingly rendered in their favor for the possession of the strip. The defendants appealed the cause to the circuit court. No motion to dismiss the appeal was made in the circuit court, but, as the record informs us, the cause was submitted to the court upon the pleadings and the evidence, and the court found that the defendants were entitled to the continued possession of the property, but that they should be enjoined from making further contemplated changes in its use, and rendered judgment accordingly. The circuit court made no special findings of fact, nor was a bill of exceptions taken to present the evidence upon which it made its general finding in favor of the defendants. The original plaintiffs prosecute error here for the reversal of the judgment of the circuit court.

Webber & Metcalf, for plaintiffs in error.
Stroup & Fauver, for defendants in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SHAUCK, J. (after stating the facts as above). Since the record does not contain either a special finding of the facts upon which the circuit court rendered judgment in favor of the defendants, or a bill of exceptions showing the evidence upon which it based its conclusion as to the right of possession, no question respecting that right is before us.

But counsel for the plaintiffs insist that from the nature of the issues joined the case was not appealable from the common pleas court to the circuit court, and that the latter court was, therefore, without jurisdiction to render the judgment whose reversal they now seek. In order that the view upon which the case is to be determined here may not be obscured, we assume, without deciding, that the case was not appealable. It does not follow this assumption that the circuit court was without jurisdiction of the subject of the controversy between the parties. Such jurisdiction is conferred upon the circuit court by statute over the subject of every matter which has been litigated in the court of common pleas. It is quite true that there are different modes of invoking the exercise of that jurisdiction. It may be by appeal for a trial de novo in the cases designated in section 12,224, Gen. Code, or by a petition in error upon the record made in the court of common pleas, as is authorized in all cases by section 12,250, Gen. Code. To give the circuit court jurisdiction of the subject of the controversy, the consent of the plaintiffs, upon the assumption we are now making, was not necessary. Nothing further was necessary than that they should waive objection to the mode in which the defendants invoked the exercise of the jurisdiction; and that they effectively did by entering upon the trial of the cause in the circuit court without there interposing a motion to dismiss the appeal. The record shows that they raised no question respecting the mode by which the defendants had invoked the exercise of the jurisdiction of the circuit court until their motion for a new trial which was made after the trial was completed, and the adverse conclusion of the court announced.

It frequently happens that the judgment of the circuit court is more favorable to the appellee than was that of the court of common pleas from which the appeal is taken. The view suggested by counsel for the plaintiffs would authorize the appellee in doubtful cases to seek such more favorable judgment by trying his case upon the appeal, and then challenging the jurisdiction of the appellate court after it reaches a conclusion less favorable to him. That view is inconsistent with familiar practice and with obvious reasons. The appellee cannot challenge the appealability of a cause in which proper steps for an appeal have been taken

except by a motion to dismiss the appeal made in the circuit court before the cause is there tried. We attach no importance to the fact that in the present case there was a trial in the common pleas court without the intervention of a jury, because the question of appealability of a case cannot be effectively determined in that court even in the first instance.

Judgment affirmed.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(175 Ind. 554)

BARTH et al. v. PITTSBURGH, C. O. & ST. L. RY. CO. (No. 21,808).¹

(Supreme Court of Indiana. Jan. 12, 1911.)

1. LANDLORD AND TENANT (§ 120*)—TENANCY AT WILL—TERMINATION—NOTICE.

Where defendant B. granted complainant railroad company a right to construct a side track across certain land, and claimed that such contract constituted a tenancy at will, she was not entitled to terminate the same under such theory until she had given complainant 30 days' notice to quit, as required by Burns' Ann. St. 1908, § 8053.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 422; Dec. Dig. § 120.*]

2. CONTRACTS (§ 10*)—RIGHT OF WAY—MUTUALITY OF OBLIGATION.

A contract authorizing complainant railroad company to lay a switch track over land on its face showed a money consideration, and the furnishing of shipping facilities to the landlord's tenant and to another not her tenant. It was also shown that the railroad company had expended considerable money on the faith of the contract, and had removed another track and made other improvements. The agreement also obligated the railroad company to furnish shipping facilities to two certain manufacturing plants so long at least as the tracks were maintained over the land and prevented the removal of the tracks without the consent of one of the companies. Held, that the contracts were not void for want of mutuality of obligation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.*]

3. RAILROADS (§ 82*)—RIGHT OF WAY—CONTRACT—RESCISSION—GROUNDS—BREACH—CONDITIONS SUBSEQUENT.

Where a contract, granting a railroad company the right to lay tracks over certain land, provided that the company should not use the tracks for storage, or extend more than one track beyond the grantor's lands, a violation of such provisions was not ground for revoking the agreement, as they must be regarded as conditions subsequent, on breach of which the landowner might obtain injunctive relief.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 215; Dec. Dig. § 82.*]

4. RAILROADS (§ 82*)—RIGHT OF WAY—CONTRACT—RESCISSION—GROUNDS—VIOLATION OF CONDITIONS.

Violation by a railroad company of provisions of a right of way contract that the tracks should not be used for storage, and should not, with one exception, extend beyond the lands of the grantor, would not authorize the termination of the contract by the landowner and her forcible removal of the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 215; Dec. Dig. § 82.*]

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied.

5. INJUNCTION (§ 189*)—DECREE—SUPPORT OF RELIEF.

Where, in a suit for injunction, the real controversy was as to defendants' right to remove complainant's railroad tracks summarily from land, where they had been placed under contracts with defendant B., a decree enjoining such removal, and also enjoining defendant B. from violating the agreement generally, was too broad and too indefinite.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 409; Dec. Dig. § 189.*]

Appeal from Circuit Court, Floyd County; W. C. Utz, Judge.

Action by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company against Elizabeth Barth and others. Decree (90 N. E. 488) for complainant, and defendants appeal. Case transferred from the Appellate Court. Reversed, with instructions.

See, also, 90 N. E. 322.

John D. Welman and O. L. Jewett, for appellants. M. Z. Stannard, for appellee.

MYERS, C. J. Appellee successfully maintained an action for an injunction to prevent appellees from removing a railway switch from the real estate of appellee Elizabeth Barth. The special findings of fact show that appellant Elizabeth Barth owned certain real estate in the city of New Albany on the south side of and abutting on State street between Eighth and Ninth streets in the city of New Albany. State street runs in a general easterly and westerly direction in which appellee maintains its main track, and she also owned real estate on the south side of and abutting on Macbeth street in that city, which ran in a general southeasterly direction from Ninth street, from a point some distance south from State street, and between Ninth and Tenth streets which latter ran in a northerly and southerly direction. On the land south of Macbeth street, under lease from Elizabeth Barth was the plant of appellant the August Barth Leather Company. The city council of New Albany on April 20, 1901, authorized the railway company to construct a switch from its main track on State street from a point near the east line of Eighth street along Macbeth street to and across Tenth street to the property line of the American Plate Glass Works, occupied by the New Albany Manufacturing Company, which abutted on the east line of East Tenth street; the purpose being to connect the main line by a switch with the plant of the leather company and the New Albany Manufacturing Company, which is located on the east side of, and abutting on the east line of, East Tenth street. July 25, 1903, appellee entered into a written agreement with the New Albany Manufacturing Company for the construction and maintenance of side tracks 6 and 24, all of which, except the west 50 feet of spur 24 within the machine shop, was to be constructed and maintained and own-

ed by appellee with provisions substantially the same as in the leather company contract, except that the railway company, its successors and assigns, should have the right "at any time after notice in writing to the second party, manufacturing company, to discontinue the use of said side track, to remove the connections, switches, and frogs, and to enter upon the property of the second party and take up and remove," etc., its own tracks.

On September 2, 1903, Elizabeth Barth executed to appellee a written instrument reciting the fact of the agreement with the leather company and the manufacturing company, and reciting track No. 6 as "beginning at a point in the southerly main track of the aforesaid railway east of Eighth street, and extending southeasterly to the west line of Eleventh street produced southerly to the Ohio river, the route of said track being shown on plan attached hereto marked 'Exhibit A,' and made part of this conveyance," etc. It recites the route of the proposed track No. 6 over the real estate of Elizabeth Barth, specifically describing it, and reciting that for a consideration she had "granted, bargained and sold appellee the right to enter upon said premises, and to construct and maintain and operate thereon said side tracks, provided said side track shall not be used for the storage of cars, and no cars shall be allowed to remain thereon longer than is necessary for loading and switching purposes where the same now is or may be surveyed and located. The width of land to be occupied for this purpose, however, not to exceed fourteen feet. To have and to hold the above-described rights and privileges unto the said company, its successors and assigns, for so long a time only as such company, its successors or assigns, shall elect to continue the existence and use of said side track No. 6, and for so long a time only as said company shall maintain said side track No. 23 for the use of the August Barth Leather Company, its successors or assigns. Upon removal, all right in the railway company to cease and determine." The plat made exhibit of this instrument shows one main red line from the main track at Eighth street to the east line of Eleventh street, with a line on each side in red shaded between, so as to show a heavy shaded line from the north line of Elizabeth Barth's property near Eighth street to the west line of Tenth street, with a single red line marking spurs 23 and 24, and a white line in continuation of track 6 from the east line of Eleventh street, in the same general southeasterly direction.

On March 8, 1907, appellee entered into a written agreement with the leather company plant for the construction and maintenance of said track No. 23, recited therein to connect with a proposed side track No. 6, by which appellee was to furnish all the ma-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

terial and labor, and construct and maintain the track No. 23, with ownership vested in the railway company, with "the right to use without cost the whole or any part of said siding No. 23 in connection with other business than that of the second party (the leather company), when the same is not occupied by the second party, providing such use of the siding No. 23 will not interfere with the handling of the business of the second party. The second party agrees that without the written consent of the first party it will not direct or authorize the use of said track No. 23 by or for the benefit of another party not one of the parties hereto. The second party agrees that the first party, its successors or assigns, shall have the right at any time, after securing consent from the second party, to discontinue use of said side track No. 23 to remove the connections, switches, and frogs upon the property of the first party, and to enter upon the property of the second party, and take up and remove so much of said side track No. 23 belonging to the first party as may be located thereon, the first party, in such case, to commit no unnecessary injury to the property of the second party."

During the year 1903 appellee constructed a switch across the land between Eighth and Ninth streets and through a portion of Macbeth street to a point east of the east line of Tenth street where it diverged southeasterly through the plant of the New Albany Manufacturing Company to the east line of Eleventh street, known as "Switch No. 6," and from a point near the west line of Eleventh street a spur westwardly through the New Albany plant nearly to the east line of Tenth street, known as "Switch No. 24," and had constructed a spur from a point near the west line of Ninth street southeasterly into and through the property of Elizabeth Barth between Ninth and Tenth streets occupied by the leather company plant nearly to the south line thereof, known as "Switch No. 23." Concurrently with the construction of said side tracks appellee took up and abandoned another side track connection between its main track and the premises of the New Albany Manufacturing Company. The system of side tracks was completed and set in operation in the year 1903, and ever since maintained and operated, and it is the purpose of appellee to extend track No. 6 from its easterly terminus on the premises of the New Albany Manufacturing Company to the premises occupied by the New Albany Veneering Company; that the system of side tracks has been at all times operated in accordance with the various agreements, and appellee has kept and performed all the provisions of the ordinance and the various agreements to be performed on its part except in the following particulars: That the leather company has on its premises, and had when the switch was constructed, a three-story frame

building in which part of its business is conducted, which building is within 18½ feet of track No. 6, and that the passage of engines and cars on track No. 6 causes a vibration and jarring of the building perceptible to the occupants, and that at various times appellee has stored cars on the tracks, and on one occasion appellants notified appellee's local freight agent to desist from so doing. In operating said system of switches and side tracks appellee frequently delivered to and received from the leather company loaded and empty cars. On December 30, 1907, the leather company notified appellee that it elected to discontinue the use of the tracks maintained on the premises occupied by it, and on the same day Elizabeth Barth notified appellee to discontinue the use of the tracks on her premises, and both notified appellee to remove the tracks from the premises immediately; that at the time the action was begun it was the intention of said leather company and Elizabeth Barth to enter upon the premises and tear up and remove such of said tracks as were on the land of said Elizabeth and the premises occupied by the leather company, and they were only prevented from doing so by the restraining order issued; that the removal of the tracks will prevent the delivery of cars to both the leather company and the New Albany Manufacturing Company. The complaint sought an injunction preventing appellants from removing the tracks or any part thereof "and from further violation of their said contract." The conclusions of law were that the agreement with Elizabeth Barth is not a lease, but a license, which having been accepted, and valuable improvements and large expenditures made, and other tracks surrendered, is a license coupled with an interest, and cannot be revoked at the will of appellants, and that all three contracts are one instrument, and the storage of cars and the injury to the building are not such breaches of the agreement as authorize appellees to terminate the agreement, and rendered judgment accordingly, but also rendered judgment that the defendants, their agents and officers "be, and they are and each of them is hereby, enjoined from violating the agreements" of September 2, 1903, and March 3, 1907. There was a motion to modify the judgment by striking out the portion of the judgment above referred to as not being within the issues nor warranted by the facts found or the conclusions of law stated, which was overruled. The questions here presented arise upon exceptions to the conclusions of law, and the motion to modify the judgment; the evidence is not in the record.

Appellants' contention is that the court erred, first, in its conclusion of law that the agreement was a license and not a lease; second, that the agreement created a tenancy at the will of appellee, and equally a tenancy at the will of Elizabeth Barth; third, that

the agreement between appellee and Elizabeth Barth and the leather company were each void for want of mutuality; fourth, that the court erred in holding that the frequent storage of cars as found was not a breach of the contract authorizing rescission by Elizabeth Barth; fifth, that by violating the agreement as to storing cars and proposing to extend track No. 6 beyond Eleventh street in violation of the agreement appellee estopped itself from obtaining injunctive relief, as not having done equity.

Much research and learning is exhibited by counsel upon both sides in discussion of the question whether the instruments in question constitute a tenancy at will or a license. We do not deem it necessary to determine that question in this case, for even if appellants' contention be correct that the instrument is a tenancy at will, as to which we express no opinion, appellants must fail on that point by force of the statute that, in case of tenancy at will, one month's notice shall be required. Burns' Ann. St. 1908, § 8053; *Coomler v. Hefner*, 86 Ind. 108.

The findings in the case show that the notice to remove the tracks was given December 30, 1907, and the action for injunction was commenced January 3, 1908, and that the notice given was to remove the tracks immediately, and that at the time the suit was begun it was appellants' intention to remove the tracks, and that they were only prevented by the restraining order, so that under appellants' own construction of the agreement the necessary notice was not given to authorize the forcible removal of the tracks.

Appellants' insistence that by reason of the contract imposing no obligations upon appellee the contract was void for want of mutuality, and Mrs. Barth was at liberty to ignore it, we think cannot be correct. On its face it shows a money consideration, the furnishing of shipping facilities to her tenant, and to another not her tenant, and the finding shows the expenditure of considerable sums of money upon its faith, and the removal of another track theretofore reaching the New Albany Manufacturing Company; and in addition connect with 50 feet of track in the machine shop of the New Albany Manufacturing Company owned by the latter, constructed by it under the agreement. The agreements impliedly obligated appellee to furnish shipping facilities to the two plants, so long, at least, as the tracks are maintained over the lands of Elizabeth Barth, and prevented the removal without consent of the leather company, so that we think the contracts are not wanting in mutuality of obligation.

It is not claimed by appellants that injunction is not a proper remedy to prevent violation of a contract in a proper case, but that under the finding that appellee had at various times stored cars on said system of

tracks, and had at one time been notified to desist, and the further finding that appellee had the purpose to extend its track No. 6 from its easterly terminus on the premises occupied by the New Albany Manufacturing Company beyond the east line of Eleventh street to the premises of the New Albany Veneering Company, shows such violation of the agreement as precludes appellee in equity from injunctive relief.

It is not to be passed without notice that it is found that the system of tracks was constructed and put in operation during the year 1903; the contract with the New Albany Manufacturing Company bears date July 25, 1903; that of Mrs. Barth, September 2, 1908, and that with the leather company, March 3, 1907, in cases of which it is recited that the tracks are proposed tracks. We can only reconcile the apparent discrepancy upon the ground that there is a mistake in the date of the leather company contract, or that it was formally executed long after a tentative agreement for the construction of the tracks was made, and after they had been constructed. No explanation of this discrepancy is offered, and, throughout, the date—March 3, 1907—is treated as correct. If that be so, there being no finding as to when cars were stored on the tracks, with relation to March 3, 1907, if it had occurred before the making of the contract of March 3, 1907, and within 11 months of the date of the notice to remove them, it seems to have been treated as inconsequential in the making of the contract.

Whether the agreement be regarded as a tenancy at will or a license coupled with an interest, the agreement not to use the tracks for the storage of cars, and the agreement as claimed that tracks should not extend beyond the lands of Elizabeth Barth except track No. 6 to the New Albany Manufacturing Company, are clearly conditions subsequent. They are not made grounds for revoking the agreement. If either constitute a substantial breach, however, they would furnish ground for injunctive relief. Appellants would not be driven to successive actions for damages. *Ferris v. American, etc., Co.* (1900) 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 306.

The finding with respect to the vibrations in the building occupied by the leather company might furnish grounds for the intervention of a court to prevent the extension of the track if unauthorized, or the extension if authorized might furnish ground for an action for damages, in the fact of the land being applied to a use not contracted for, but we see no ground for the arbitrary action contemplated by appellants in removing the tracks, and the injunction in that respect is correct.

That part of the decree, however, enjoining appellants from violating the agreement executed September 2, 1903, and March 3,

1907, is too broad and too indefinite. As it stands, it is a sweeping decree generally commanding observance by appellants of their contract. The real controversy here was as to the right of appellants to remove appellee's tracks summarily.

The judgment is reversed, with instructions to the court below to restate the conclusions of law, by restricting them to the one question of the right of appellee, upon the facts found, to maintain this action at the time this suit was begun, and to sustain appellant's motion to modify the judgment by eliminating the portion thereof embraced in their motion to modify, and enter judgment upon such conclusion of law.

(175 Ind. 108)

STATE ex rel. BALTIMORE & S. W. R. CO.
v. DALY. (No. 21,646.)

(Supreme Court of Indiana. Jan. 10, 1911.)

1. APPEAL AND ERROR (§ 1040*)—REVIEW—
HARMLESS ERROR—OVERRULING DEMURRER.

It is not available error to overrule a demurrer to an argumentative denial where a general denial is also pleaded, the same facts being admissible under the general denial as under the argumentative denial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4101; Dec. Dig. § 1040.*]

2. JUSTICES OF THE PEACE (§ 149*)—APPEAL—
NATURE OF RIGHT.

A party has no natural, inherent right to appeal from a judgment of the justice of the peace, such right not existing at common law, but being given only by statute, and measured thereby.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 508; Dec. Dig. § 149.*]

3. JUSTICES OF THE PEACE (§ 159*)—APPEAL—
BOND.

To secure the right of appeal from a judgment of a justice of the peace, one must bring himself clearly within Burns' Ann. St. 1908, §§ 1790, 1791, authorizing any party to appeal from a judgment of a justice, and requiring the appellant to file a bond with sureties to be approved by the justice in a sum sufficient to secure the claim of the appellee and interest and costs, and section 1863 setting out a form of bond, indicating, if not requiring, that a penalty of double the amount of the judgment and costs shall be named therein.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550-578; Dec. Dig. § 159.*]

4. MANDAMUS (§ 57*)—ACTS OF JUDICIAL OFFICER—ALLOWANCE OF APPEAL.

Mandamus will not lie to a justice of the peace to compel the approval of a bond with no penalty named therein, and to grant an appeal.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 57.*]

5. JUSTICES OF THE PEACE (§ 159*)—APPEAL—
BOND—CURATIVE STATUTE.

Where a bond for appeal from a judgment of a justice of the peace was left with a clerk at the office of the justice in his absence, the bond being defective in that it named no penalty, where the justice ordered the bond marked "filed," but refused to approve it, and notified the attorney for appellant of his disapproval, Burns' Ann. St. 1908, § 1278, curing bonds taken by any officer in the discharge of his du-

ties, is not applicable, since the bond was not taken by the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 159.*]

Appeal from Circuit Court, Scott County; Joseph H. Shea, Judge.

Application by the State, on the relation of the Baltimore & Southwestern Railroad Company, for mandamus to William H. Daly. From a judgment denying the writ, relator appeals. Affirmed.

S. B. Wells, McMullen & McMullens, Edward Barton, and R. S. Alcorn, for appellant. Kochenour & Prince, for appellee.

COX, J. On September 11, 1908, a judgment for \$19 and costs was rendered by appellee, then a justice of the peace of Jackson county, having jurisdiction of the cause against appellant; and thereupon at the request of the appellant the amount for a bond to appeal was fixed at \$100 by appellee. On October 5th following, an appeal bond with no penalty named therein, but otherwise sufficient in form and properly executed, was left with a girl clerk at the office of the appellee in his absence by an attorney for appellant, who directed the clerk to call appellee's attention to it. Appellee was a blind man, and, when he subsequently came in after the departure of appellant's attorney, this girl clerk read the bond to him, and he directed her to mark it filed, but declined to accept and approve it because of the defect stated. In a few days thereafter (as to whether before or after the expiration of the time for appealing, the evidence conflicts) appellee informed appellant's attorney of his disapproval of the bond and the reason for it. On October 22, 1908, appellant filed in the Jackson circuit court a petition for a writ of mandate to require appellee "to approve said bond, to grant an appeal, and to make a proper transcript of said cause and proceedings, and to certify the same to the circuit court." The issuing of an alternative writ was waived by appellee appearing and answering. To an amended petition which set out the defective bond, appellee answered by a general denial; and a second paragraph which is an argumentative denial. A demurrer to this latter paragraph of answer was overruled, and appellant filed a reply to it of general denial; and so the issue was formed. Subsequently appellant asked and was granted a change of venue, and the cause was sent to the Scott circuit court, where a trial by court was had, and a finding announced that appellant was not entitled to a mandate against appellee to approve the bond in question. A motion for a new trial was filed by appellant and overruled, and a judgment which followed the finding was rendered.

Appellant has assigned error as follows:

(1) In overruling the demurrer of appellant

to the second paragraph of answer. (2) In overruling appellant's motion for a new trial. The reasons assigned for a new trial were that the decision of the court was not sustained by sufficient evidence, and that it was contrary to law.

There was no error in overruling the demurrer to the second paragraph of answer. Under an answer of general denial a defendant is not confined to mere negative proof in denial of the facts alleged in the complaint as the cause of action, but may introduce proofs of facts independent of, and inconsistent with, those alleged in the complaint, and which tend to meet and defeat the cause of action set up. All the material facts averred in his second paragraph of answer appellee would have been entitled to prove under his general denial. It is not available error to overrule a demurrer to an answer which is merely an argumentative denial. *Jeffersonville, etc., Co. v. Riter*, 146 Ind. 521-523, 45 N. E. 697; *Adams v. Pittsburgh, etc., R. Co.*, 165 Ind. 648-655, 74 N. E. 991.

It cannot be said that the decision of the trial court is not sustained by the evidence or that it is contrary to law. Appellant had no natural, inherent right to appeal from the judgment rendered against it by appellee. The right of appeal from the judgment of a justice of the peace did not exist at common law, and is given only by the statute, and must be measured thereby. Appellant's rights, and what was required of it to entitle it to appeal from the judgment of the justice, are shown by the following provisions of Burns' Annotated Statutes of 1908: Section 1790: "Any party may appeal from the judgment of any justice of the peace within thirty days from the rendition thereof." Section 1791: "The appellant shall file with the justice a bond with security to be approved by the justice * * * in a sum sufficient to secure the claim of the appellee and interest and costs. * * *" The form of such a bond presented by and set out in section 1863 indicates, if it does not indeed require, that a penalty of double the amount of the judgment and costs shall be named therein.

To secure the right, one seeking to appeal must bring himself clearly within the statute by complying with its requirements. 28 Am. & Eng. Ency. of Law (2d Ed.) pp. 671, 672; *State v. Johnson*, 21 Ind. App. 813, 814, 52 N. E. 422; *Boyd v. Brazil, etc., Co.*, 25 Ind. App. 157-162, 57 N. E. 732; *Lake Erie, etc., Co. v. Charman*, 161 Ind. 95-97, 67 N. E. 923; *Ft. Wayne v. Parsell*, 168 Ind. 228-227, 79 N. E. 439; *Town of Windfall v. State ex rel.*, 172 Ind. 302-306, 88 N. E. 505; *Randolph v. City*, 172 Ind. 510, 88 N. E. 949. The rule stated applies with even greater force to one who seeks, as does appellant here, the aid of an extraordinary remedy to

secure a claimed statutory right. Appellant could invoke and receive the aid of the writ of mandata only by showing that he had a clear legal right to have the bond tendered approved, and that it was the imperative duty of appellee to approve it. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 858; *City of Auburn v. State ex rel.*, 170 Ind. 511-529, 88 N. E. 997, 84 N. E. 990; *State ex rel. v. Cummins*, 171 Ind. 112-114, 85 N. E. 859; *Town of Windfall v. State ex rel.*, supra; *State ex rel. v. Winterrowd*, 91 N. E. 958.

Neither the appellant's petition for the writ nor the evidence given in the cause show the high measure of right required. They cannot be aided as the appellant contends by the statute curative of bonds, for the bond was not taken by the justice. Section 1278, Burns' Ann. St. 1908. It is apparent from the record that the cause was fairly tried and determined on its merits in the court below, and we are required to affirm it.

Judgment affirmed.

(175 Ind. 93)

TOUHEY v. CITY OF DECATUR. (No. 21,613.)

(Supreme Court of Indiana. Jan. 6, 1911.)

1. HIGHWAYS (§ 99*)—CONSTRUCTION AND REPAIR—AUTHORITY OF STATE.

The construction and repair of highways is a state function, and may be done by the state or under state authority by municipal subdivisions within whose limits they may be needed.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 99.*]

2. MUNICIPAL CORPORATIONS (§ 755*)—TORTS—DEFECTIVE STREETS—LIABILITY.

The liability of cities and towns for injuries from defects in streets is implied from the provisions of the statutes which impose the duty on such municipalities to keep streets in repair and give them ample power to provide the means necessary therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.*]

3. MUNICIPAL CORPORATIONS (§ 755*)—TORTS—DEFECTIVE STREETS—STATUTES.

As the liability of a municipal corporation for injuries from defective streets rests exclusively upon the statutes, it is competent for the Legislature to limit or remove it entirely.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. § 755.*]

4. CONSTITUTIONAL LAW (§§ 205, 206*)—SPECIAL PRIVILEGES—LIABILITY OF MUNICIPALITIES—PRESENTATION OF CLAIM.

Burns' Ann. St. 1908, § 8962, providing that no action for injury resulting from any defect in streets shall be maintained against any city unless written notice describing the time, place, cause, and nature of the injury, shall within a certain time be given, is not in violation of Const. Amend. U. S. 14, or State Const. art. 1, § 23, providing that the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which,

upon the same terms, shall not equally belong to all citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-648; Dec. Dig. §§ 205, 206.*]

5. MUNICIPAL CORPORATIONS (§ 812*)—TORTS—DEFECTIVE STREETS—CLAIM FOR INJURY.

Burns' Ann. St. 1908, § 8962, requiring that notice of claim for injuries from defective streets shall be given within a certain time, is mandatory, and the giving of said notice is a condition precedent to a right of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

6. MUNICIPAL CORPORATIONS (§ 816*)—TORTS—DEFECTIVE STREETS—PLEADING—NOTICE OF CLAIM.

Under Burns' Ann. St. 1908, § 8962, requiring notice of claims for injuries from defects in streets, facts showing the giving of notice must be alleged in the complaint, or the same will be insufficient on demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1715; Dec. Dig. § 816.*]

7. PLEADING (§ 63*)—COMPLAINT—STATUTORY RIGHTS.

One who seeks the benefit of a statute or to enforce a statutory right or liability must allege and prove facts bringing himself clearly within its provisions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 133; Dec. Dig. § 63.*]

8. MUNICIPAL CORPORATIONS (§ 812*)—TORTS—DEFECTS IN STREETS—NOTICE OF CLAIM—ACTUAL NOTICE.

Under Burns' Ann. St. 1908, § 8962, requiring notice of claim for injuries from defective streets to be given within a certain time, the right of action is to be determined from the sufficiency of the notice given by plaintiff, and not by the fact that the city had actual notice from a published account in the daily newspapers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.*]

Appeal from Circuit Court, Adams County; J. T. Merryman, Judge.

Action by James Touhey against the City of Decatur. From the judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Amos P. Beatty and David E. Smith, for appellant. Lewis C. De Voss and Clark J. Lutz, for appellee.

MONKS, J. Appellant brought this action on August 23, 1909, for injuries sustained on February 19, 1909, by falling through an opening in a sidewalk from which the grate or cover had been removed by a third party. The complaint was in two paragraphs. A demurrer for want of facts was sustained to each paragraph. Judgment was rendered on demurrer against appellant.

At the time of the injury sued for there was in force the following statute: "That no action in damages for injury to person or property resulting from any defect in the condition of any street, alley, highway, or bridge, shall be maintained against any city or town of this state, unless written notice containing a brief general description of the

time, place, cause, and nature of such injury, shall, within sixty days thereafter, or if such defect consists of ice or snow, or both, within thirty days thereafter, be given to the clerk or mayor or members of the board of trustees of such city or town." Section 8962, Burns' Ann. St. 1908.

It is not alleged in either paragraph of the complaint that appellant gave or caused to be given the written notice required by said section. As an excuse for the failure to give said notice it is alleged in each paragraph "that, by reason of said injuries so received as aforesaid, this plaintiff was for more than sixty days thereafter, rendered physically and mentally unable to give written notice containing a brief general description of the time, place, cause, and nature of such injuries, or to cause the same to be given to the clerk, mayor, or members of the common council of this defendant, but that said clerk, mayor, and members of the common council of this defendant did have notice of the time, place, cause, and nature of the plaintiff's injuries within thirty days from the date the same occurred, as a full and detailed account of the same was published in the Decatur Daily Democrat and Daily Times—two daily newspapers of general circulation published within the corporate limits of the defendant city—and that said accounts were read by all the above named officials of the defendant."

It is insisted by appellant: (1) "That when the person injured was under such mental and physical incapacity as to make it impossible to give or procure such notice to be given, within the time provided in said section 8962, that the failure to give said notice is excused." (2) "That said provision for notice is for the benefit of the city or town; that they may waive it; and that unless they take advantage of the failure to give notice by answer they have expressly waived such notice." (3) "That section 8962, supra, is in violation of the fourteenth amendment to the Constitution of the United States and section 23, art. 1, of the Constitution of the state of Indiana."

The construction and repair of highways is a state function, and they may be constructed and kept in repair by the state, or under state authority, by municipal subdivisions of the state within whose limits they may be needed. *Lowe v. Board*, 156 Ind. 163, 59 N. E. 466; *State ex rel. v. Board*, etc., 170 Ind. 595, 610, 611, 85 N. E. 513.

The liability of cities and towns for injuries resulting from defects in the streets, alleys, highways, and bridges is implied from the provisions of the statutes which impose the duty upon such municipalities to keep the streets, alleys, highways, and bridges in repair and give them ample power to provide the means necessary to make such repairs. As said liability rests exclusively up-

on said statutes, it is competent for the Legislature to limit or remove it entirely. The claim being a statutory one, it is clear that said section 8962, *supra*, providing the conditions upon which an action can be maintained, is not in violation of the fourteenth amendment to the Constitution of the United States or section 23, art. 1, of the Constitution of this state. This is true, because a duty imposed by the Legislature upon cities or towns or a liability against them created by the Legislature may be qualified, limited, or removed by that body. No one complaining of the omission to perform such duty can successfully object to the qualifications and limitations imposed by the Legislature.

Under section 8962, *supra*, no action can be maintained for an injury "resulting from any defect in the condition of any street, alley, highway, or bridge" unless the written notice required thereby is given as therein provided. The provisions of said section are mandatory, and the giving of said notice is a condition precedent to a right of action. Facts showing the giving of the notice required by said section must therefore be alleged in the complaint or the same will be insufficient on demurrer. These propositions are sustained by the following authorities: *Crocker v. City of Hartford*, 66 Conn. 387, 34 Atl. 98; *Forbes v. Town of Suffield*, 81 Conn. 274, 70 Atl. 1028; *Bulkley v. Norwich, etc., R. Co.*, 81 Conn. 284, 287, 129 Am. St. Rep. 212; *Hoyle v. Town of Putnam*, 46 Conn. 56, 61; *Fields v. Hartford, etc., R. Co.*, 54 Conn. 9, 11, 4 Atl. 105; *Gardner v. City of New London*, 68 Conn. 287, 28 Atl. 42; *Breen v. Town of Cornwall*, 78 Conn. 309, 47 Atl. 322; *Trost v. City of Casselton*, 8 N. D. 534, 538, 539, 79 N. W. 1071; *Underhill v. Town of Washington*, 46 Vt. 771; *Jacobs v. City of St. Joseph*, 127 Mo. App. 669, 106 S. W. 1072; *City of Hastings v. Foxworthy*, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, 350; *Schmidt v. City of Fremont*, 70 Neb. 577, 97 N. W. 830; *Goddard v. City of Lincoln*, 69 Neb. 594, 96 N. W. 273, and cases cited; *Ellis v. City of Kearney*, 80 Neb. 51, 113 N. W. 803; *McCollum v. City of South Omaha*, 84 Neb. 413, 121 N. W. 438; *Cunningham v. City of Denver*, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212; *Gay v. City of Cambridge*, 128 Mass. 387; *Kenady v. City of Lawrence*, 128 Mass. 318; *Saunders v. City of Boston*, 167 Mass. 595, 46 N. E. 98; *May v. City of Boston*, 150 Mass. 517, 23 N. E. 220; *Shea v. City of Lowell*, 132 Mass. 187; *Huntington v. City of Calais*, 105 Me. 144, 73 Atl. 829; *Greenleaf v. Naridgwock*, 82 Me. 64, 19 Atl. 91; *Lowe v. Windham*, 75 Me. 113; *Moulter v. City of Grand Rapids*, 155 Mich. 165, 113 N. W. 919, and cases cited; *Erford v. City of Peoria*, 229 Ill. 548, 553, 82 N. E. 374; *Lucas v. City of Pontiac*, 142 Ill. App. 470, and cases cited; *Taylor v. Peck*, 29 R. I. 431, 72 Atl. 645; *Hay v. City of Baraboo*, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977; *Daniel v. City of Ra-*

cine, 98 Wis. 649, 74 N. W. 553, and cases cited; *Sowle v. City of Tomah*, 81 Wis. 353, 31 N. W. 571, and cases cited; *Morrison v. City of Eau Claire*, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955; *Sollenbarger v. Town of Lineville*, 141 Iowa, 203, 119 N. W. 618, and cases cited; *Forsyth v. City of Oswego*, 191 N. Y. 441, 445, 84 N. E. 392, 123 Am. St. Rep. 605, 608, 609, and note; *Purdy v. City of New York*, 193 N. Y. 524, 86 N. E. 560; *Winter v. City of Niagara Falls*, 190 N. Y. 198, 204, 206, 82 N. E. 1101, 125 Am. St. Rep. 540, 543, 545; *City of Ft. Worth v. Shero*, 16 Tex. Civ. App. 487, 490, 41 S. W. 704; *Williams v. City of Galveston*, 41 Tex. Civ. App. 63, 90 S. W. 505; 23 Cyc. 1447-1449; 15 Am. & Eng. Encyc. of L. 483-487; 3 *Abbott on Municipal Corp.* §§ 994, 1061, 1063; *Elliott's Roads & Streets* (2d Ed.) §§ 642, 643; 1 *Shearman & Redfield on Neg.* (5th Ed.) § 254.

It is well settled that when any one seeks the benefit of a statute or to enforce a statutory right or liability he must by allegation and proof bring himself clearly within its provisions. *Town of Windfall City v. State* (Ind.) 92 N. E. 57, 58, and cases cited; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 96, 69 N. E. 669, 102 Am. St. Rep. 185, 193, and cases cited.

The fact that the city officers named in said section 8962, *supra*, had notice of the time, place, and cause and nature of appellant's injuries within 30 days or within the 60 days given by said section from a full and detailed account of the same published in two daily newspapers of general circulation published within the limits of said city as alleged in each paragraph of the complaint, did not dispense with the necessity of giving the notice in writing required by said section. Appellant's right to maintain an action must be determined from the sufficiency of his notice, and not by the fact that appellee obtained, from other sources, full knowledge of the time, place, cause, and nature of his injury. *Crocker v. City of Hartford*, 66 Conn. 387, 391, 34 Atl. 98, and cases cited; *Gardner v. City of New London*, 68 Conn. 287, 273, 28 Atl. 42; *Kenady v. City of Lawrence*, 128 Mass. 318; *De Vore v. City of Auburn*, 64 App. Div. 84, 71 N. Y. Supp. 749; *Sowle v. City of Tomah*, 81 Wis. 353, 51 N. W. 571; *McKeague v. City of Green Bay*, 106 Wis. 577, 82 N. W. 708; *Trost v. City of Casselton*, 8 N. D. 534, 339, 79 N. W. 1071; *Huntington v. City of Calais*, 105 Me. 144, 73 Atl. 829; *Underhill v. Town of Washington*, 46 Vt. 771; 28 Cyc. 1453-1458; 15 Am. & Eng. Encyc. of L. 484-487.

It has been held that the notice required by said section cannot be waived by the city or town. *Batchelder v. White, City Treas.*, 28 R. I. 466, 68 Atl. 820; *Starling v. Bedford*, 94 Iowa, 194, 62 N. W. 674; *Veazie v. Rockland*, 68 Me. 511; *Forsyth v. City of Oswego*, 191 N. Y. 441, 446, 84 N. E. 392, 123 Am. St. Rep. 605, 608, 609, and note; *Purdy*

v. City of New York, 193 N. Y. 521, 86 N. E. 590; Winter v. City of Niagara Falls, 190 N. Y. 198, 204, 205, 82 N. E. 1101, 123 Am. St. Rep. 540, 543, 545, and note; 28 Cyc. 1452, 1453.

It follows from what we have said and the authorities cited that the court did not err in sustaining the demurrer to each paragraph of the complaint.

Judgment affirmed.

(175 Ind. 112)

BARRETT v. STATE (No. 21,725.)

(Supreme Court of Indiana. Jan. 13, 1911.)

1. CRIMINAL LAW (§ 1180*)—APPEAL—FREE TRIAL—LAW OF THE CASE.

Where on appeal the case was reversed, with a mandate to the trial court to sustain the state's demurrer to defendant's special answer, and after doing this, there being no plea, the state, by leave of court, amended its affidavit and refiled it as authorized by Burns' Ann. St. 1908, § 2043, the amendment being immaterial, the refiled of the affidavit did not constitute a new case against defendant, and hence the decision on the former appeal constituted the law of the case on a trial on the amended affidavit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3003; Dec. Dig. § 1180.*]

2. CRIMINAL LAW (§ 1180*)—SECOND APPEAL—FIRST DECISION—LAW OF THE CASE.

On a second appeal, the case must be considered in the light of the questions of law presented by the record and decided on the former appeal, as such determination is the law of the case, binding on all courts and the parties through all the stages of the cause following, whether the questions arise in the same manner or not.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3003; Dec. Dig. § 1180.*]

3. CRIMINAL LAW (§ 1180*)—FORMER APPEAL—LAW OF THE CASE.

Where, on a prior appeal, it was held that defendant's special answer to the affidavit was insufficient, and the case was reversed with directions to the court to sustain the state's demurrer thereto, and after amendment of the affidavit on retrial defendant filed a new answer not materially different from the facts alleged in the original, the trial court was bound by the decision on the former appeal to sustain a demurrer thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3003; Dec. Dig. § 1180.*]

4. CRIMINAL LAW (§ 1167*)—APPEAL—RULINGS ON PLEADINGS—PREJUDICE.

Accused was not prejudiced by the sustaining of a demurrer to paragraphs of his special answer when all the facts alleged therein were provable under the general issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3105; Dec. Dig. § 1167.*]

5. CRIMINAL LAW (§ 266*)—TRIAL—PLEADINGS—GENERAL ISSUE.

The general issue cannot be evaded in a criminal case, since if not tendered by accused, it is interposed by force of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 619, 620; Dec. Dig. § 266.*]

6. CONSTITUTIONAL LAW (§ 251*)—FEDERAL CONSTITUTION—FIFTH AMENDMENT—APPLICATION.

Const. U. S. Amend. 5, declaring that no person shall be deprived of life, liberty, or prop-

erty without due process of law, operates exclusively in restriction of federal power, and is a limitation on Congress, and not on the states.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 727; Dec. Dig. § 251.*]

7. CONSTITUTIONAL LAW (§ 278*)—COAL MINES—REGULATION—DUE PROCESS OF LAW—POLICE POWER.

Laws 1907, c. 197, regulating the width of certain entries in bituminous mines, and exempting block coal mines from its provisions, is a proper exercise of police power, and is not unconstitutional as a deprivation of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 278.*]

8. CONSTITUTIONAL LAW (§ 205*)—COAL MINES—REGULATION—CLASS LEGISLATION.

Laws 1907, c. 197, regulating the width of certain entries in bituminous coal mines, and exempting block mines from the provisions thereof, is not unconstitutional as granting special privileges to a class of citizens engaged in operating block mines; there being no showing that the legislative power to regulate was arbitrarily exercised.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

Appeal from Circuit Court, Sullivan County; Chas. E. Henderson, Judge.

Charles E. Barrett was convicted of violating the wide entry law applicable to coal mines, and he appeals. Affirmed.

Chas. E. Barrett and Fred E. Barrett, for appellant. Jas. Bingham, A. G. Cavins, E. M. White, and Wm. H. Thompson, for the State.

COX, J. This prosecution of appellant, as the agent of the Vandalla Coal Company, for an alleged violation of the act approved March 9, 1907 (Laws 1907, c. 197), commonly called by coal miners and operators the "wide entry law," has been in this court before. State v. Barrett, 172 Ind. 169, 87 N. E. 7. On that appeal, after a full consideration of the case then presented, this court reached the conclusion that the act in question was constitutional, that the affidavit charging the defendant, the appellant herein, with a violation of it was good, and that the defendant's special answer was not good. The case was reversed with a mandate to the trial court to sustain the state's demurrer to such special answer, and this the trial court did. There being then no plea, the state, by leave of court, amended the affidavit, and refiled it. The appellant unsuccessfully assailed the amended affidavit by a motion to quash and then a demurrer. He then filed a special answer in two paragraphs, to which demurrers were sustained, after which he entered a plea of not guilty. The cause was submitted to the court for trial, and appellant was adjudged guilty, and fined.

The appellant treats this case as a new one, merely similar to the case of State v. Barrett, supra; and he argues that, "in view of the state amending the affidavit, a new ac-

tion or prosecution was commenced, and therefore the decision in the former case cannot be said to be *res adjudicata*." This contention cannot prevail, for the amendment was authorized by the Criminal Code (section 2043, Burns' Ann. St. 1908); and, furthermore, an examination of the two affidavits shows that the amendment was wholly immaterial, and left the material facts substantially, if not identically, the same as those alleged in the affidavit held good by this court. *State v. Simpson*, 166 Ind. 211, 214, 76 N. E. 544, 1006. This is therefore a second appeal of this case, and it must be considered in the light of the questions of law presented by the record and decided upon the former appeal, for such questions of law are the law of the case binding upon all the courts and the parties through all of the stages of the cause following, whether the questions arise in the same manner or not. *City v. Humphrey* (1886) 106 Ind. 146, 147, 6 N. E. 337; *Lillie v. Trentman* (1891) 130 Ind. 16, 17, 29 N. E. 405; *Board v. Bonebrake* (1896) 146 Ind. 311-313, 45 N. E. 470; *Brunson v. Henry* (1898) 152 Ind. 310-312, 52 N. E. 407; *Pittsburgh, etc., Co. v. Collins* (1907) 168 Ind. 467-472, 80 N. E. 415.

The only errors which are well assigned by appellant are (1) the action of the trial court in overruling appellant's motion to quash the amended affidavit, and (2) in sustaining the state's demurrer to the two paragraphs of appellant's special answer. The trial court did not commit error in sustaining the demurrer to appellant's special answer. The facts alleged in both of these paragraphs were not materially different from the facts set out in the special answer of appellant, which this court held bad on the former appeal for not alleging facts which brought him within the exemption of the proviso of the act; that is, for not alleging facts showing that his mine was in the block coal field or devoted in whole or in part to mining block coal. And under the law as long and well settled, and announced in the cases above cited, the trial court was as firmly required by the mandate of this court to hold these answers bad as the identical answer involved in the former appeal, for this court's conclusion, that the special answer therein considered is bad, is the law of the case on that question, to be adhered to throughout all subsequent stages of the case. Moreover, it is true that all the facts alleged in the two paragraphs of special answer in this case appellant could have proven under the general issue; they were intended to meet the charge contained in the affidavit that appellant had violated the act in question, to give in detail the circumstances constituting his defense, they were mere argumentative denials of the charge, and the general issue could not be evaded. If the appellant had not tendered it, the statute would have forced it. It is questionable whether they were properly pleaded special-

ly in any view of the matter. He could not therefore have been harmed by the action of the trial court in sustaining the state's demurrer. *Neaderhouser v. State* (1867) 28 Ind. 257; *Williams v. State* (1907) 169 Ind. 384, 82 N. E. 790.

Without setting the amended affidavit out in this opinion it may be said again that it is substantially the same as the one set out in the former opinion of this court and there held good and based on a valid law. That holding must, for the reasons above given, be adhered to and applied to the amended affidavit unless some constitutional objection to the act in question of sufficient potency to overthrow it is now urged that was not presented and decided on the former appeal. The one objection which is presented by appellant as such, and which was not presented and decided then, is that said act "is in violation of article 5 of the amendments to the Constitution of the United States, in this, that it deprives one class of citizens of property without due process of law." This objection is not well grounded as assigned, for this amendment operates exclusively in restriction of federal power, is a limitation on the Congress, and has no application to the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672; *Thorington v. Montgomery*, 147 U. S. 490, 13 Sup. Ct. 394, 37 L. Ed. 252; *Capital City Co. v. Ohio*, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171.

However, as this same provision against the taking of property without due process of law is found in the fourteenth amendment of the United States Constitution, which does relate to the states, it may not be out of place to inquire whether this point of appellant presents any objection to the act, sufficient to overcome the presumption in favor of its validity with which it is clothed at the outset. Appellant's objection to the act on this ground is general; so general, that, as there is nothing on the face of the act to suggest any arbitrary purpose or requirement, or any unfairness, in the regulation of mines provided for therein it is difficult indeed to see wherein the act is not clearly within the legitimate scope of the police power. The police power of the state is broad and plenary in its effect, embracing its whole system of internal regulation. It embraces all regulations designed to promote the public health, morals, or safety. Its scope, and those things it operates on specifically, increase with the increasing development of the resources of the state. The passing of our forests and the development of industry make the development of our coal deposits necessary and desirable. Necessity for the proper regulation of operation of such mines results for the protection of those who work therein, and such regulation is too clearly within the police power to be questioned. Appellant in this case complains that the act discriminates between block coal and bituminous mines, to the benefit of

the former and hurt of the latter, but there is nothing presented by the record to show that the discretion which the Legislature has in the power to regulate, was arbitrarily exercised. In fact, the reason for the discrimination seems to be made clear and proper in the opinion of the court on the former appeal of this case. "Legislation which regulates business may well make the distinctions depend upon the degrees of evil without being arbitrary or unreasonable, or in conflict with the equal protection provisions of the fourteenth amendment of the federal Constitution." *Heath & Milligan, etc., Co. v. Worst* (1907) 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. In the case just cited it was held that the Supreme Court of the United States would not limit the power of the state by declaring that, because the judgment exercised by the Legislature is unwise, it amounts to a denial of the equal protection of the laws, or deprivation of property or liberty without due process of law. In the case at bar there is not apparent on the face of the law, nor does the record disclose, un wisdom, but a care for workers in a dangerous employment. Appellant has not been deprived of his property, but has had impressed upon it a regulation, which the Legislature in its discretion had deemed wise, and he is pursuing due process of law in the usual orderly course of procedure.

The further suggestion of appellant that the act violates section 23 of article 1 of our state Constitution, and the fourteenth amendment to the federal Constitution, in that "it grants special privileges to another class of citizens engaged in mining coal in what is known as the block coal district, and denies these privileges to all other persons," we think has been sufficiently met by what was said in the former opinion in this case. *State v. Barrett* (1909) 172 Ind. 169, 87 N. E. 7. See, also, *Chandler Coal Co. v. Sams* (1906) 170 Ind. 623, 85 N. E. 341, which is decisive of this question.

There is no error in the record, and the judgment is affirmed.

(176 Ind. 12)

MCCUTCHEON et al. v. STATE.¹
(No. 21,666.)

(Supreme Court of Indiana. Jan. 13, 1911.)

1. FRAUD (§ 69*)—CRIMINAL RESPONSIBILITY—STATUTES.

Burns' Ann. St. 1908, § 2508, punishing one offering for sale any horse, knowing the same to be afflicted with enumerated diseases and concealing the existence thereof from the person to whom he is offering the animal for sale, or one who shall employ any trick to conceal the existence of such disease and thereby effect a sale to one ignorant thereof, defines two offenses, one of offering to sell a diseased animal, knowing it to be so, without disclosing that fact to one who does not know it, and the other, the employment of any trick by which a sale is effected, and to conceal the existence

of such a disease; hence an indictment for offering such a diseased horse for sale and concealing the disease, is not defective for failing to allege any trick by which the disease was concealed.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 69.*]

2. FRAUD (§ 69*)—CRIMINAL RESPONSIBILITY—STATUTES.

An indictment charging that accused offered for sale to prosecutor a horse which was broken-winded, that accused knew that the horse was diseased, but concealed the existence thereof from prosecutor, and that accused thereby effected a sale of the horse to prosecutor, states a violation of Burns' Ann. St. 1908, § 2508, making it an offense to offer to sell a diseased animal, knowing it to be so, without disclosing that fact to one who does not know it, and the averment in the indictment that a sale was effected is mere surplusage.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 69.*]

3. CRIMINAL LAW (§ 903*) — NEW TRIAL — STATUTORY RIGHT.

The right to file a motion for a new trial in a criminal case is statutory, and one seeking to avail himself of the right must bring himself within the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2129; Dec. Dig. § 903.*]

4. CRIMINAL LAW (§ 951*) — NEW TRIAL — STATUTORY RIGHT.

The failure of accused to move for new trial within 30 days after verdict, as required by Burns' Ann. St. 1908, § 2153, subd. 9, cannot be waived either by the trial court permitting a motion after the 30 days or by the Attorney General failing, in his brief first filed, to point out the defect.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 951.*]

5. OFFICERS (§ 103*) — POWERS — PUBLIC RIGHTS—WAIVER.

Public, administrative, or ministerial officers are not authorized to waive public rights.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 103.*]

6. CRIMINAL LAW (§ 1063*) — APPEAL — NEW TRIAL—MOTION—TIME TO FILE.

A motion for new trial not filed within 30 days from the return of the verdict, as required by Burns' Ann. St. 1908, § 2153, subd. 9, is unauthorized and presents no question for determination on appeal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1063.*]

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

George L. McCutcheon and another were convicted of crime, and they appeal. Affirmed.

Alexander Dowling, for appellants. Jas. Bingham, Edw. M. White, Alex. G. Cavins, and Wm. H. Thompson, for the State.

MYERS, C. J. Appellants were indicted under section 2508, Burns' Ann. St. 1908 (Acts 1907, p. 100), charging that they did on or about March 24, 1908, "unlawfully offer for sale to Charles W. Marshall a certain horse for one hundred and sixty-five and ninety-hundredths (\$165.90) dollars in money, which said horse was then and there diseased in this, to wit, that said horse was then and there, broken-winded, said George L. Mc-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
93 N.E.—35
¹Rehearing denied.

Cutcheon and Harry W. Martin then and there well knowing said horse to be broken-winded and diseased as aforesaid, and did then and there conceal the existence of such disease from said Charles W. Marshall, to whom they were then and there offering said diseased horse for sale, and did then and there and thereby effect the sale of said diseased horse to said Charles W. Marshall, he, the said Charles W. Marshall, being then and there ignorant of the existence of said disease; and said George L. McCutcheon and Harry W. Martin did then and there by such sale unlawfully obtain one hundred and sixty-five dollars and ninety cents in money, of the value of one hundred and sixty-five and ninety-hundredths dollars of the personal property of the said Charles W. Marshall, contrary," etc.

Over motion to quash, and plea of not guilty, they were found guilty on trial by a jury and fined, and over motions for a new trial judgment was rendered against each. Separate errors are assigned on the motions to quash the indictment, and on overruling the separate motions for a new trial.

The sufficiency of the indictment is challenged on the ground that a fraudulent sale, where it fails to allege that any trick, artifice, drug, or device of any character was employed to conceal the existence of the alleged disease or defect, fails to charge any public offense, for the reason that it does not show any affirmative act by which appellants concealed the existence of the alleged disease or defect. It is held in *Boyer v. State* (1908) 169 Ind. 691, 83 N. E. 350, that the statute defines two offenses, viz., offer to sell a diseased animal, knowing it to be so, without disclosing that fact to one who does not know it, and to prohibit the employment of any trick, drug, or artifice by which sale is effected. The indictment in the case before us is identical in effect with the indictment in that case, where it was held that while it is not necessary under the first defined offense to charge that a sale was effected, that part of the indictment was surplusage, for the reason that a sale effected necessarily included, under the first offense described, an offer to sell, and the indictment was upheld. That case governs here.

The question of strict construction raised here was also determined in that case against the contention of appellants.

No question is presented upon the motion for a new trial, for the reason that the motion, with causes, was not filed within 30 days from the return of the verdict, as required by Burns' Ann. St. 1908, § 2158, subd. 9. Appellants urge that the point is waived, for the reason that the Attorney General in his brief, first filed, did not point out the state of the record, and raised the question by a brief 15 days later, under the heading "Additional Authorities of Appellee."

Public administrative or ministerial officers are not authorized to waive public rights. Throop on Public Officers, §§ 21, 551. At common law there was no right to file a motion for a new trial, and as it is a favor or right conferred by the statute, one who would avail himself of the right must bring himself within it. The trial court could not waive the state's right by permitting the motion to be filed after the 30 days; and hence the motion was unauthorized, and no question was presented under it for determination by the trial court, and none is here presented. *Keefer v. State* (1910) 92 N. E. 656; *Ward v. State*, 171 Ind. 565, 86 N. E. 994; *Quinn v. State*, 123 Ind. 59, 23 N. E. 977.

It remains but to affirm the judgment, and it is so ordered.

(176 Ind. 103)

INDIANAPOLIS TRACTION & TERMINAL CO. v. RIPLEY et al. (No. 21,634.)

(Supreme Court of Indiana. Jan. 10, 1911.)

1. EMINENT DOMAIN (§ 243*)—PROCEEDINGS—APPRAISERS' AWARD—ESTOPPEL—APPEAL.

In a condemnation proceeding, the defendant excepted to the appraisers' award, demanding a review because the damages for land taken were inadequate, yet assenting to that part of the award, fixing the value of the improvements. Plaintiff claimed that defendant was estopped because he had not excepted to the assessment of the improvements. *Held* that, although a party cannot accept the benefit of an award and then contest its validity, the defendant was not estopped here because the case was tried de novo on his exceptions, his entire damages being in issue, and the burden of proof being upon him to establish them to improvements as well as land.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 627-629; Dec. Dig. § 243.*]

2. EMINENT DOMAIN (§ 239*)—PROCEEDINGS—APPRAISERS' AWARD—APPEAL—BURDEN OF PROOF.

Where defendant in condemnation proceedings, appeals from an award of appraisers, the burden of proof is upon him to show his damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 615-620; Dec. Dig. § 239.*]

3. APPEAL AND ERROR (§§ 691, 701*)—REVIEW—HARMLESS ERROR—EVIDENCE NOT IN RECORD.

Where the evidence is not in the record, assignments of error to the admission of evidence or giving of instructions will not be reviewed unless it affirmatively appears that the action of the lower court was necessarily erroneous and harmful.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2900-2904, 2933-2935; Dec. Dig. §§ 691, 701.*]

Appeal from Superior Court, Marion County; P. B. Bartholomew, Judge.

Condemnation proceedings by the Indianapolis Traction & Terminal Company against William I. Ripley and others. From a judgment for defendants reviewing appraisers' award, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

F. Winter and W. H. Latta, for appellant. Ralph Bamberger and Isidore Feibleman, for appellees.

MORRIS, J. Appellant filed its complaint in the superior court of Marion county against the appellees William I. Ripley and his wife to condemn certain land of the appellee William I. Ripley. The land is located on Washington street in the city of Indianapolis, with a frontage of 50 feet on said street. The proceeding was brought under the eminent domain act of 1905. Acts 1905, p. 59. The court appointed appraisers, who reported their assessment of appellees' damages sustained by reason of the appropriation of his land, described in the complaint, in the sum of \$60 per front foot for the real estate, and \$1,500 for the improvements thereon. The appellee William I. Ripley filed written exceptions to the appraisers' report as follows (omitting caption and signature): "Exceptions to appraisers' report. The above-named defendant, William I. Ripley, hereby excepts to the report and award of the appraisers herein on the following grounds: (1) The valuation of the land sought to be appropriated is reported by said appraisers to be sixty dollars (\$60.00) per front foot instead of giving the valuation of the entire tract taking fully into account the depth of said land. (2) The damages assessed in the finding as to the value of the land appropriated are entirely inadequate and that said land is worth very much more than the amount found and reported in said appraisers' report. Wherefore said defendant prays the court that that portion of the appraisers' report fixing the value of the land appropriated be set aside, and that the value of said land and the amount of damages sustained by the defendant by the appropriation of the land proper be assessed by the court, said defendant, however, accepting the valuation of the improvements at fifteen hundred dollars (\$1,500) as reported by said appraisers." The appellant filed no exception.

The cause was submitted to a jury for trial, and, at the close of defendants' evidence, appellant filed its motion to withdraw the case from the jury, which motion, omitting caption and signature, was as follows: "Now at the close of defendants' evidence plaintiff moves the court to withdraw this case from the consideration of the jury, and to enter judgment in favor of the plaintiff affirming the award of the appraisers heretofore filled in this cause, on the ground and upon each of the following separate reasons, to wit: (1) The court has no jurisdiction of this appeal. (2) The defendants and each of them have waived their right to appeal to this court and have waived their right to have their damages reassessed by heretofore accepting a portion of the damages awarded by said appraisers." This motion

was overruled by the court, and appellant excepted. At the proper time, appellant requested the court to instruct the jury as follows: "(1) Under the evidence in this case, it is your duty to find for the plaintiff. (2) The court instructs you that if you find from the evidence that the defendant has only excepted to a part of the report of the appraisers, and that he has claimed the benefit of a part of the said report, he has forfeited his right to have damages assessed by the jury, and is bound to accept the amount given him by the appraisers. (3) The court instructs you that the defendant did not have the right to accept a part of the finding of the appraisers and appeal from a part of their finding. He must have accepted or rejected the report of the appraisers as a whole. And that inasmuch as he claimed the benefit of the appraisers' report, and allowance in his favor for the value of the buildings, he thereby lost the right to have the report of the appraisers reviewed by you. You are instructed therefore to find the following values in this case as your verdict, to wit:

For the land \$60 per foot, or.....	\$3,000 00
For the improvements.....	1,500 00

Total damages \$4,500 00"

The instructions requested were refused, and appellant excepted, and a verdict was returned by the jury assessing appellees' damages at \$1,500 for improvements and \$4,750 for the land, or a total of \$6,250, on which judgment was rendered for appellees, and from which this appeal is prosecuted.

The errors assigned by appellant are the overruling of appellant's said motion to withdraw the case from the jury and overruling its motion for a new trial. This motion alleged six errors, viz.: The verdict was contrary to law; error in giving certain instructions on the court's own motion; giving one instruction requested by appellees; refusing to give the said instructions requested by appellant; refusing to sustain appellant's said motion to withdraw case from jury; overruling appellant's objection to a certain question asked of one of appellees' witnesses.

The principal ground of contention arises over the recital by appellee in his second exception to the appraisers' report wherein he says "said defendant however accepting the valuation of the improvements at \$1,500 as reported by the appraisers." On this recital, appellant based its said motion to withdraw the case from the jury. Whether or not this motion was made at the proper time, is unimportant in view of the conclusion reached by the court. It is well settled that a party cannot accept the benefit of an award or judgment and then contest the validity thereof. *Baltimore, etc., R. Co. v. Johnson*, 84 Ind. 420; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014; *Test v. Larsh*, 76 Ind. 452. But in this case appellant did

not receive any part of the award, so far as the record discloses. A fair construction of appellees' exceptions to the report of the appraisers is that he was demanding a review of the appraisers' award because the damages assessed were inadequate, though he expresses his assent to the item in the report fixing the value of the improvements at \$1,500. This, however, could not prejudice appellant. It in no wise lost thereby its right to a reduction in the damages for improvements below the \$1,500 awarded by the appraisers, and, in the absence of an exception by appellant to the award of the appraisers, the cause came up for trial de novo on appellees' exceptions. Nothing but appellees' damages being in issue, he had the burden of proof, and it was incumbent on him in the first instance to prove the amount of his damages, and this included damages to improvements as well as the land. 5 Ency. Evidence, 191; Indianapolis, etc., Traction Co. v. Shepherd, 35 Ind. App. 601, 74 N. E. 904; Indianapolis, etc., Traction Co. v. Wilces, 91 N. E. 161, and cases cited. No fact is disclosed by the record, that would estop appellee from having a review of the appraisers' award. The Marion superior court had jurisdiction of the appeal from the award of the appraisers, and it did not err in overruling appellant's motion to withdraw the cause from the jury.

The instructions requested by appellant, set out above, are based on the same theory as was advanced in said motion, and consequently, the court did not err in refusing each of them. The other assignments of error are based on certain instructions given by the court, and overruling appellant's objection to a question asked one of defendant's witnesses. The evidence is not in the record. In such case no question is presented for review unless it affirmatively appears that the action of the lower court was necessarily erroneous and probably harmful under any possible state of the evidence. The record in this case does not disclose such a situation, and the last-named errors assigned cannot be considered. Butt v. Ifert, 171 Ind. 554, 86 N. E. 961; Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229, and cases cited.

Judgment affirmed.

(49 Ind. App. 263)

TANSEL v. SMITH et al. (No. 7,698.)¹
(Appellate Court of Indiana, Division No. 2.
Jan. 13, 1911.)

1. WILLS (§ 88*)—CONSTRUCTION OF INSTRUMENT—DEED OR WILL.

An instrument which was signed, sealed, and witnessed provided that "this indenture witnesseth that" decedent "convey and warrant" to another for a certain sum the receipt of which was therein acknowledged, the real property described, and further provided that

"this deed" was subject to all liens on the described property, and that "the conditions of this deed" were that decedent retained possession of the property until his death, when it should go to the grantee. Held, that the instrument, on its face, was a deed and not a will, and vested a present fee-simple estate in the grantee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 208-217; Dec. Dig. § 88.*]

2. DEEDS (§ 208*)—EVIDENCE—SUFFICIENCY—GRANTOR'S INTENTION.

Evidence held to show that it was the intention of one executing an instrument in the form of a deed that title should pass to the grantee immediately upon delivery of the instrument to a third person.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.*]

3. DEEDS (§ 58*)—DELIVERY TO THIRD PERSON—SUFFICIENCY.

Delivery of a deed was complete when the grantor surrendered all dominion over it by giving it to a third person to retain until his death when it should be delivered to the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 180-185; Dec. Dig. § 58.*]

4. DEEDS (§ 194*)—DELIVERY—ACCEPTANCE—PRESUMPTIONS.

The acceptance of a deed delivered by the grantor to a third person, to be retained and delivered at grantor's death to the grantee, a minor grandchild of the grantor, is presumed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583; Dec. Dig. § 194.*]

5. EVIDENCE (§ 273*)—DEEDS.

Where a deed was delivered by the grantor to a third person, to retain possession and deliver it to the grantee upon the grantor's death, so as to pass present title to the grantee, testimony as to statements by the grantor after the delivery of the deed as to his being the owner of the property conveyed was not admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.*]

Appeal from Probate Court, Marion County; Frank B. Ross, Judge.

Proceedings by Robert B. Tansel, administrator, against Blanche Smith and others. From a judgment for defendant named, plaintiff appeals. Affirmed.

Charles B. Clarke, Walter C. Clarke, Wm. W. Spencer, and Edmond Spencer, for appellant. John W. Kern, for appellees.

IBACH, J. On the 3d day of May, 1909, Robert B. Tansel, administrator of the estate of Robert D. Myers, deceased, filed his verified petition in the office of the clerk of the probate court, of Marion county, Ind., alleging in substance that decedent died intestate; that he left no personal property with which to pay debts; but that at the time of his death he owned an undivided one-half interest in certain real estate in Marion county, Ind., the interest therein being valued at \$600, and prayed for authority to sell said interest to pay debts. He also averred in his petition that decedent left surviving him two granddaughters, Blanche Smith and Clara Alley, his sole and only heirs at law, who,

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
²Rehearing denied, 94 N. E. 890.

with their respective guardians, were made parties defendant. Defendant Alley answered in general denial, and Blanche Smith, through her guardian, filed a special answer, in which she averred that at the time of the death of her grandfather, Robert B. Myers, he had no title or interest in the land described in the petition, but that she held title thereto, by virtue of a certain warranty deed, executed by decedent in his lifetime to her; that after the deed was signed, it was placed in the hands of one Vance, who was at the time instructed to hold the deed until the death of Myers, and then deliver it to grantee; that said deed was delivered to her after the death of Myers. She also filed a general denial.

Appellant, the plaintiff below, filed three paragraphs of reply; the first in general denial, the second admitting that Myers signed and acknowledged the deed, referred to in the action, but that there was no consideration for said instrument but love and affection, and that he intended by the instrument to make a testamentary disposition of his real estate to the grantee; that he reserved to himself the right to recall and retake possession of the deed, and that he retained all right and ownership to the land up to the time of his death; that the deed was not recorded until March 8, 1909; that after he signed the deed he incurred debts, and left no other property with which to pay the same. The third paragraph of reply charges fraud, in this: That he executed the deed and delivered it to Mrs. Vance to be given to grantee after his death, for the purpose of defrauding those who might do service for him, or care for him during his last sickness; that he wrongfully concealed the fact of the execution of the deed from his creditors, but represented and claimed to them to be the owner of the land until the time of his death. The demurrer to this reply was overruled. The court tried the case below, and a judgment was finally entered in favor of the defendant Blanche Smith on her first paragraph of answer. Appellant then filed a motion for a new trial. The overruling of this motion is the only error presented for reversal.

The following is a copy of the deed, filed with the answer of appellee, Smith: "This indenture witnesseth, that Robert B. Myers, unmarried, of Marion county, in the state of Indiana, convey and warrant to Blanche Smith of Marion county, in the state of Indiana, for the sum of one hundred dollars in hand paid, the receipt of which is hereby acknowledged, the following real estate in Marion county, in the state of Indiana, to wit: Beginning at the southwest corner of the southeast quarter of the northwest quarter of section twenty-four (24) in township fifteen (15) north of range two (2) east; thence north 40 rods; thence east thirty-two (32) rods; thence south forty (40) rods; thence west thirty-two (32) rods, to the place of be-

ginning, containing eight (8) acres. This deed is subject to all the liens on the above-described property. The conditions of this deed are as follows, to wit: Robert B. Myers, to retain the possession of the above-described property until his death, then to go to the above-named Blanche Smith. In witness whereof, the said Robert B. Myers has hereunto set his hand and seal this _____ day of _____ A. D. 1910. Robert B. Myers. [L. S.] C. C. Vance. C. A. Oyler." The above-named persons signed as witnesses.

The conveyance under consideration contains none of the language or peculiarities of a will. All the requirements of a statutory deed are to be found contained in it, and it plainly vests present estate in fee simple in the grantee, unless the recital following the description of the land manifests a contrary intent. We do not think such an intent appears upon the face of the deed. "An instrument executed conformably to the statute which is to operate in the lifetime of the grantor, and which passes any estate in the property during the lifetime of the grantor, even though the absolute enjoyment of the estate passed is postponed until after the grantor's death, is a deed, and not a will." *In re Will of Dietz*, 50 N. Y. 88; *Spencer et al. v. Robbins et al.*, 106 Ind. 583, 5 N. E. 728.

It appears from the evidence in this case that Myers was an old man in failing health. He had lived with his granddaughter, the grantee, for a number of years upon this land. Decedent had the deed prepared, signed and acknowledged it, and then delivered it to Mrs. Vance. He said to her: "Here is the deed; that he had deeded the place to Blanche, and wanted her to take it, and, as soon as she heard of his death, have it recorded." She testified further that she brought the deed home with her, and kept it in her possession until Myers died, when she had it recorded. At the time he handed the deed to her, there was not a word said by him about retaining possession of the instrument, or retaining any control over it.

The undisputed facts in this case force the conclusion that it was the intention of decedent to so place the title of the property involved that it should at once pass to the grantee upon the delivery of the deed to Mrs. Vance. He deposited the deed unconditionally, relinquishing all authority and control over it, and we must conclude that the custodian received it then for the use and benefit of the grantee. The deed was absolute in its form, beneficial in its effect, and the delivery so made by him to the custodian for the grantee made it effective from the date of such delivery the same as if it had been delivered to the grantee by grantor in person. The delivery was complete when the grantor had surrendered all authority and dominion over the deed, and put it beyond his power to modify, reclaim, or take it, and an acceptance on the part of the

grantee, a minor grandchild, is presumed. *McCord v. Bright*, 44 Ind. App. 275, 87 N. E. 654-658; *Vaughan v. Godman*, 94 Ind. 191.

Appellant also alleges fraud in the execution of the deed, but says in his brief: "If the deed were effectual and valid, whether it related back or not, his conduct was either fraudulent, or he honestly believed he owned the real estate up to the time of his death; we believe the latter the more reasonable presumption." We have searched the record and we are unable to find any evidence which even tends to prove this paragraph of appellant's reply.

Concerning the objection which was made to the admission of evidence relative to what the grantor said after the deed was executed and delivered, about his being the owner of the property, we have concluded that it was clearly inadmissible, and the court committed no error in refusing it.

Considering the form of the deed, and all the evidence produced at the trial, it appears to be exceedingly clear that the grandfather had selected his infant grandchild as the object of his favor; that he desired to remember her for her many kindnesses and services extended to him, and determined to convey the land in question to her then; not to become effective in the future, but a present conveyance, and with a view of carrying out that purpose and intention he executed and delivered the deed in question. The court committed no error in overruling appellant's motion for a new trial.

Judgment affirmed.

MYERS, C. J., and LAIRY, HOTTELL, ADAMS, and FELT, JJ., concur.

(48 Ind. App. 183)

EPPERT v. GARDINER. (No. 7,701.)¹

(Appellate Court of Indiana, Division No. 2.
Jan. 10, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 443*)—CLAIMS AGAINST ESTATE—ACTIONS—SUFFICIENCY OF COMPLAINT.

The complaint in an action against an executor for services rendered decedent and his wife alleged that they were rendered under an agreement with decedent, plaintiff's father, that after she became 21 years of age she should keep house and care for her parents, and, in consideration thereof, her father would devise the homestead in fee to her; that he executed such a will, which plaintiff saw, and which induced her to remain at home and care for her parents for more than 12 years, but that shortly before his death her father, decedent, destroyed such will and executed another which did not devise the property to plaintiff, leaving his estate indebted to her in the sum named. *Held*, that the complaint alleged a cause of action.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 443.*]

2. APPEAL AND ERROR (§ 194*)—PRESENTATION BELOW—OBJECTIONS TO PLEADING—NECESSITY.

The sufficiency of a verified plea in abatement of the complaint could only be raised by demurrer and exception taken to the ruling thereon, if sustained, and its sufficiency will not be determined on appeal in absence of such demurrer and exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.*]

3. EXECUTORS AND ADMINISTRATORS (§ 206*)—CLAIMS—SERVICES RENDERED DECEDENT—PERSONS IN FAMILY RELATION—IMPLIED CONTRACT—NECESSITY.

A daughter who lived with her father as one of his family and worked for him without any express or implied understanding that she was to receive payment for services rendered could not recover therefor against the estate, but she could recover therefor if the circumstances reasonably justified an inference that the services were performed under an agreement by her father to pay for them.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

4. APPEAL AND ERROR (§ 1001*)—FINDINGS—CONCLUSIVENESS.

Where a question of fact is for the jury to determine, its finding will not be disturbed if there is any evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8922, 8928-8934; Dec. Dig. § 1001.*]

5. EXECUTORS AND ADMINISTRATORS (§ 206*)—ALLOWANCE OF CLAIMS—SERVICES RENDERED DECEDENT—PERSONS IN FAMILY RELATION.

A parent's promise to compensate a child for personal care by conveying land to her rebuts the presumption that her services were gratuitous which arises from the fact that they were performed while the child was a member of the family.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 733; Dec. Dig. § 206.*]

6. EXECUTORS AND ADMINISTRATORS (§ 221*)—ALLOWANCE OF CLAIMS—ACTIONS—SUFFICIENCY OF EVIDENCE—EXISTENCE OF CONTRACT.

In a daughter's action against her father's estate to recover for services rendered decedent, evidence *held* to sustain a finding that an understanding existed between decedent and plaintiff whereby plaintiff was to be paid for work done while living in the family, and that she expected pay therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

7. EXECUTORS AND ADMINISTRATORS (§ 451*)—ALLOWANCE OF CLAIMS—PROCEEDINGS—ISSUES.

In an action to recover for services rendered decedent, in his lifetime, by his daughter, under an alleged agreement by decedent to convey land to her in consideration of such services, where the answer was a general denial and plea of payment, the court was not required to construe decedent's will, and the refusal of instructions thereon was not error.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 451.*]

8. EVIDENCE (§ 271*)—ALLOWANCE OF CLAIMS—SELF-SERVING DECLARATIONS.

In a daughter's action against her father's estate for services rendered for him in his lifetime, under an alleged promise to compensate

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes
²Rehearing denied. Transfer to Supreme Court denied.

her therefor in his will, by devising certain property to her, any statement made by decedent that he did not consider himself indebted to plaintiff for her services, made out of plaintiff's presence, was a self-serving declaration, and was not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

9. EXECUTORS AND ADMINISTRATORS (§ 221*)—ALLOWANCE OF CLAIMS—ACTIONS—ADMISSION OF EVIDENCE.

In a daughter's action against her father's estate to recover for services rendered him in his lifetime, in which the issues were payment and the making of an agreement to compensate for the services, a question as to what witness had heard decedent say about holding an insanity inquest on plaintiff was properly excluded as immaterial.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

Appeal from Probate Court, Marion County; Frank B. Ross, Judge.

Action by Nancy C. Gardiner against Fred W. Eppert, executor of Francis M. Eppert, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Barrett & Barrett and Denny, Bowen & Denny, for appellant. Henry Clay Allen, for appellee.

IBACH, J. The appellee instituted this action against the appellant, Fred W. Eppert, executor of the estate of Francis M. Eppert, deceased, for services rendered to decedent and his wife from August 1, 1894, until May 26, 1898, and for the decedent alone from May 26, 1898, until April 7, 1907. It is alleged in the claim or the complaint that the services were rendered under an agreement or contract, made with Francis M. Eppert, appellee's father, wherein it was agreed that, after appellee became 21 years of age, she was to remain with her father and mother and keep house for them, and nurse them and care for them, and that, in consideration of her so doing, he would execute a will and make provisions therein devising to her the home in which they lived in fee simple. She further avers that he did execute such will, making such provision therein for her, and that she saw such will, and she was induced thereby to remain with him at his home, and care for her parents, and that she performed the services required of her for more than 12 years. She further alleged that in consideration of said agreement she was induced to and did advance to decedent for repairs on said property \$50. She also says that he preserved the will for a period of time, but that shortly before his death he destroyed it, and executed another, wherein said decedent wholly failed to will the property or any part thereof to her, and that therefore the estate is indebted to her in the sum of \$6,680. After some preliminary motions, made by appellant, had been disposed of by the trial court, the appellant filed his an-

swer in two paragraphs—the first in general denial, and the second a plea of payment. For reply to appellant's second paragraph of answer the appellee filed a general denial. The jury upon the trial found for the appellee, and she obtained a judgment in the court below for \$2,500.

The errors assigned by appellant are: (1) The court erred in overruling appellant's demurrer to appellee's complaint. (2) The court erred in overruling appellant's motion for a new trial. The complaint states a cause of action, and it does not appear from the pleading that there was another action pending between the same parties of the same cause, and the demurrer was properly overruled.

Counsel for the appellant also insist that the court pass upon the sufficiency of the verified plea in abatement filed, but this question is not presented. It could only be presented by demurrer and exception properly taken, and this was not done.

Sixteen grounds are set out in appellant's motion for a new trial, which, so far as they are argued, will be considered. The third cause stated is that the verdict of the jury is not sustained by sufficient evidence; the fourth that the verdict of the jury is contrary to law. These we will consider together. The evidence fairly tends to prove that the claimant remained at her father's house more than 12 years after she became of age, nursing his wife, claimant's mother, for three years; also looking after and taking care of her father, and performing the major portion of the housework during all of the time she lived with him; that some years before his death he made a will, devising to claimant the house where they lived in fee simple; that claimant saw the will. Sarah E. Bogardus testified that he said to her that he had helped Fred (meaning his son), and that he was going to leave the rest to Kate, this claimant. He stated to Emma Bogardus that Fred had had his share, and what he had was Katy's; that it was to be left to her; that he was going to leave the estate to her. Mary E. Long testified: "I heard him tell Mrs. Eppert on her dying bed that the property on Buchanan street would be devised to Kate, so that, in case of death, she would have an income as long as she lived; that he intended her to be well taken care of; that she had been a good faithful daughter, and he expected her to be well remembered and remunerated." Another witness testified as follows: "We were sitting on the porch one afternoon, and Kate came along. She was not feeling well, and sat down, and he said 'This is my baby,' and she started to cry; and he said, 'Never mind, Katy, I will pay you back some day.' And I said, 'You have Fred.' And he said, 'No matter, Fred does not come to my house, but Kate has always taken care of me, and

helped me to get what I have.' He said she had been a good girl to him, and that, 'If I had not had Kate to save for me, I would have nothing.' Other witnesses testified to hearing him acknowledge the value of appellee's services rendered. John Hugg, who prepared the two wills, testified that by terms of the first will the decedent devised one of the parcels of real estate to his daughter absolutely and the other piece to his son. The evidence also reveals the fact that in at least one instance he spoke of the property as being Kate's in her presence and in the presence of another person; that shortly before his death he burned this will, and executed another.

The validity of the claim of the appellee depends upon the question whether or not she rendered services for her father in his lifetime in pursuance to an agreement, either expressed or implied, that she was to be paid for such services. If appellee lived with her father as a member of his family, and worked for him, without any understanding, either express or implied that she was to receive pay for services rendered, then she could not recover against the estate; but it is equally true that, if the evidence shows facts and circumstances from which a contract might reasonably be inferred, then she can recover the value of her services rendered under such implied contract. *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *Kettry v. Thumma*, 9 Ind. App. 504, 36 N. E. 919; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611; *Smith v. Denman*, 48 Ind. 71; *James, Administrator, v. Gillen*, 3 Ind. App. 472, 30 N. E. 7; *Robinson v. Raynor*, 28 N. Y. 494; *Stewart, Administrator, v. Small*, 11 Ind. App. 103, 88 N. E. 826. This case is not unlike the case of *Crampton v. Logan*, 28 Ind. App. 408, 63 N. E. 52, wherein the court used this language: "And if the circumstances authorized the person rendering service reasonably to expect payment therefor by way of furtherance of the intention of the parties, or because reason and justice required compensation, the law will imply a contract therefor."

There is some evidence tending to prove a contract between the appellant and her father; at least, enough to rebut the presumption that the services were rendered by her gratuitously, and the rule is well settled that, where it is the province of the jury to decide questions of fact, that decision will not be disturbed, if there is any evidence presented to sustain the verdict. *Wallace v. Long*, 105 Ind. 522, 6 N. E. 666, 55 Am. Rep. 222; *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456; *Forester v. Forester*, 10 Ind. App. 680, 38 N. E. 426; *Stewart, Administrator, v. Small*, supra. It has also been correctly held that a promise on the part of a parent to compensate a child for nursing, care, and attention by conveyance of land will rebut

the presumption which arises because of the fact that the work was done while the child was living in her father's family that the work was performed gratuitously. *Wallace v. Long*, supra. Some evidence having been introduced by appellee to support the allegations of her complaint, the court committed no error in overruling appellant's request for a peremptory instruction.

The evidence introduced at the trial is not in all respects satisfactory. However, it may be said that it tends to establish the averments of the complaint, and as it has been passed by a jury, and they found in favor of the appellee, and the action of the jury has been approved by the trial court, this court is not authorized to disturb the verdict. After careful examination of all the evidence, we conclude that there were facts and circumstances proved in the trial of the lower court which justified the jury in drawing the inference that there was an understanding between the deceased and the appellee herein, that she was to be paid for the work done by her, and that she expected pay therefor.

Appellant is also earnestly contending that certain instructions given by the court to the jury were erroneous, but, after a full consideration of each of them, we are of the opinion that, when taken together, they clearly and fully state the law applicable to this case. The jury were given full, elaborate, and specific instructions bearing upon the material evidence in this cause.

Counsel for appellant is also earnestly insisting that the trial court committed error in refusing to give instructions requested. We have not been informed wherein such instructions were relevant to the case, and we are unable to find wherein the same would have been proper in view of the issues. Neither do we find that the appellant was in any manner harmed by the court's refusal to give the instructions asked, as the trial court was not, under the issues joined, required to construe the will and codicil of Francis M. Eppert, deceased. The will and codicil were introduced in evidence for what they were worth, and it is presumed were considered by the jury, so that, if the contents of the will and codicil were competent as tending to show payment, the cross-complaint filed in a different and other cause of action, in which a construction of the will was asked, would add nothing, and there was no harm done in excluding the evidence.

Again, it is insisted by counsel for the appellant that the court erred in excluding evidence offered by appellant. The reasons given for insisting upon this proposition is "that the evidence tended to show that the deceased entertained no thought that he was indebted to the appellee for the services rendered." It does not appear that any such statement, if made, was made in the presence of the claimant, and could not be con-

sidered anything more than a self-serving declaration uttered by the decedent.

The sixteenth cause assigned by the appellant for a new trial is that the court erred in refusing to permit a witness to answer the following questions: "What, if anything, did you ever hear Francis M. Eppert say about holding an insanity inquest on his daughter, Nancy Gardiner?" We fail to see how this matter was in any way material to a just conclusion of the case at bar, and it related entirely to an immaterial matter; and there was, therefore, no error in refusing to permit the witness to testify concerning it.

We have examined all the questions raised by this appeal, where the same have been argued, and conclude there is no error in the record.

Judgment of the court below affirmed.

FELT, J., does not participate in this opinion. MYERS, C. J., and HOTTEL, ADAMS, and LAIRY, JJ., concur.

(46 Ind. App. 705)

TREHARNE v. MATSON. (No. 6,769.)

(Appellate Court of Indiana, Division No. 1. Jan. 12, 1911.)

1. JUDGMENT (§ 822*)—FOREIGN JUDGMENT—FULL FAITH AND CREDIT.

A judgment rendered by a court in one state, having jurisdiction over the subject-matter and parties, is conclusive on the merits in other states, until set aside by appropriate proceedings in the state where rendered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1496-1500; Dec. Dig. § 822.*]

2. JUDGMENT (§ 826*)—FOREIGN JUDGMENT—JUSTICE OF THE PEACE.

Where a judgment rendered by a justice of the peace of another state is relied upon as a defense, the facts to show jurisdiction must be proved by the party pleading it.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 826.*]

3. RECORDS (§ 17*)—RESTORATION OF LOST RECORD—JUSTICE COURT RECORD—"JUDICIAL COURTS."

Const. Ill. art. 6, § 1, vests the judicial power in the Supreme, circuit and county courts, justices of the peace, and such other courts as may be created by law. Starr & C. Ann. St. 1898, c. 116, § 1, provides that when the record of any judgment or other proceeding of any judicial court, shall be lost, an order of the court shall be obtained authorizing the defect to be supplied by a certified copy of the original record. Section 2 provides for the supplying of the substance of a record, where complete restoration is impossible. *Held*, that a justice's court in Illinois is a "judicial court" with power to permit amendments, and to restore lost records, and that the publication notice is a part of the record of the judgment in an attachment suit, so as to be subject to amendment or restoration under the statute.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3847-3848.]

4. RECORDS (§ 17*)—RESTORATION OF LOST RECORD—PROCEDURE.

Starr & C. Ann. St. 1898, c. 116, § 2, relating to the supplying of lost records, provides for notice of application to supply such a record "as in chancery cases," where personal service is obtained, and that where the proceedings are in rem and notice is by publication, the court shall by order direct such notice "as nearly as may be as in the original proceeding." *Held*, that where the record in an attachment suit before an Illinois justice shows that notice of application to supply the substance of the original publication notice and the return thereon, alleged to have been lost, was given on the order of the justice, and that publication was by posting as in the original suit and by mailing "to each of the within named defendants" a copy thereof, at the place of residence named in the attachment affidavit, the attachment statute authorizing publication by posting and by mailing where the address was stated in the affidavit, the notice will be deemed to have been given "as nearly as may be as in the original proceeding," and to be sufficient to authorize the restoration of the record and amendment of the return to show the actual facts giving the justice jurisdiction of the proceeding, so as to authorize the introduction in evidence in Indiana of the judgment.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.*]

5. PROCESS (§ 162*)—AMENDMENT.

A void process cannot be amended to make it valid.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 162.*]

6. JUDGMENT (§ 518*)—COLLATERAL ATTACK.

An action of replevin by the former owner of a piano against the buyer thereof, from one who had bought it at a sale under a judgment in an attachment suit against the plaintiff in replevin, is a collateral attack upon the judgment in the attachment suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 961; Dec. Dig. § 518.*]

7. JUDGMENT (§ 497*)—CONCLUSIVENESS.

Recitals in the record in an attachment suit that due notice was given to defendants of an application to restore the lost publication notice, and the return thereon, are conclusive upon the parties to the judgment as against collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 937; Dec. Dig. § 497.*]

8. REPLEVIN (§ 8*)—TITLE TO SUPPORT ACTION.

Right of possession will sustain an action in replevin.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 48; Dec. Dig. § 8.*]

Appeal from Circuit Court, Steuben County; Emmett A. Bratton, Judge.

Replevin by Anna Treharne against Lewis I. Matson. Judgment for defendant, and plaintiff appeals. Affirmed.

Alphonso C. Wood, for appellant. F. Winter, A. P. Clark Matson, and Robt. W. McBride, for appellee.

FELT, J. This is an appeal from the Steuben circuit court in an action of replevin, brought by the appellant, Anna Treharne, against the appellee, Lewis I. Matson, for possession of a piano and stool, and for dam-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

ages for the unlawful detention of the property.

The complaint is in one paragraph, which was answered by the general denial. The record also shows that the parties to the action entered into an agreement that under the general denial all defenses might be proved to the same extent and for all purposes the same as if specially pleaded, and that appellant might prove any facts that would be admissible under a reply to a special answer. The cause was tried by the court without a jury, and the finding was for the appellee, and judgment rendered that the appellant take nothing by her action. The appellant filed a motion for a new trial, which was overruled, and the action of the court in overruling this motion is the error relied upon for a reversal of the judgment.

A new trial was asked on the ground that the decision was contrary to law and not sustained by the evidence. Also for alleged error of the court in admitting in evidence, over the objection of the appellant, certain statutes and decisions of the Supreme and Appellate Courts of the state of Illinois, and the transcript of the docket entries, proceedings, judgment, papers, and files in the case of Illinois College Hospital v. Daniel Treharne and Mrs. D. Treharne, before George H. Woods, a justice of the peace in and for the town of North Chicago, Cook county, Ill. Also the admission of a certain letter written from New York by the husband of appellant to one J. B. Belford, at Chicago, Ill., who was shown to have a business connection with the garnishee defendant in said suit.

It appears that the appellant in 1903 resided in the city of Chicago, Ill., and that in 1893 she had obtained from her mother, by gift, the piano and stool in question; that previous to October 30, 1903, she, in company with her husband, Daniel J. A. Treharne, left the city of Chicago with the intention of going to Wales, England, and did not return to Chicago until December, 1904; that in August, 1903, before leaving Chicago, they stored their household goods, including the piano and stool in question, with the Chicago & West Suburban Express Company, in the city of Chicago, that on October 30, 1903, the Illinois College Hospital commenced proceedings in attachment against the appellant and her husband upon a demand for the sum of \$49 before one George H. Woods, a justice of the peace for the town of North Chicago, in Cook county, Ill., and in this proceeding the piano and stool in controversy were attached and the storage company was summoned to appear to the attachment proceeding as garnishee defendant.

The record does not show that any summons was issued or served upon appellant. The plaintiff offered in evidence the transcript of the record of Justice George H. Woods, in said attachment suit, together

with a certified copy of attachment notice and the writ of attachment certified to by the justice on the 9th day of January, 1905, which notice so admitted in evidence shows the issuance of a writ of attachment in said suit against appellant and her husband, directed to any constable of said county, and that the cause had been continued for trial until the 11th day of December, 1904, at 1 o'clock p. m., and said defendants were required by the notice to appear at the office of the justice of the peace, No. 125 Clark street, in the town of South Chicago, city of Chicago, Cook county, Ill., which notice appeared to be signed by the justice on November 26, 1904.

The transcript further shows the publication of this notice by posting in three public places, according to the provisions of the Illinois Statutes, "and by mailing a copy of said notice at Chicago, Ill., addressed to the within named defendant, at New South Wales, Australia, being the place of residence stated in the affidavit for attachment herein," which proof was signed by A. M. Chase, constable of said court, and bore date of November 26, 1904.

The writ of attachment also shows the residence of appellant and her husband to be "New South Wales, Australia," and directed the constable to attach so much of the personal estate of the said Daniel and Mrs. D. Treharne as might be found in Cook county, sufficient to satisfy the debt and costs of the plaintiff in that action, and also directed the constable to summons the said Daniel and Mrs. D. Treharne to appear before the said justice in his office at the town of North Chicago, in the city of Chicago, in said county, on the 26th day of November, 1903, at the hour of 1 o'clock p. m., and that he summons as garnishee all persons whom the plaintiff or his agents might direct to appear before said justice. This writ of attachment bore date of October 30, 1903, and was signed by said justice.

The constable's return shows that he executed the writ by summoning as garnishee defendant, the Chicago & West Suburban Express Company, and the return thereof bore date November 5, 1903. The return also shows the levy of the writ of attachment upon the piano and stool and other personal property of appellant and her husband.

The record of the justice offered by the (plaintiff) appellant further shows that on October 30, 1903, the affidavit and bond of the plaintiff were filed before the justice; that on November 26, 1903, at two o'clock p. m. sharp, the cause was called and continued until December 11, 1903, at 1 o'clock p. m., for publication of notice issued to constable A. M. Chase, which notice returned by him shows the posting of three notices at the offices of three several justices of the peace at No. 27 North Clark street, city of Chicago, Ill., and the mailing of notices as

aforesaid. This transcript also shows that on December 11, 1903, before said justice, in his courtroom at 27 North Clark street, Chicago, at 1 o'clock p. m., the case was called and that "defendant defaults."

The record shows the swearing of one witness, the finding for the plaintiff in the sum of \$49, and the answer of the garnishee showing possession of household goods belonging to the defendants, which were by the judgment ordered to be turned over to the constable, A. M. Chase, to be sold to satisfy the judgment and costs.

The constable's return under date of January 23, 1904, shows the sale of the property; the proceeds amounting to \$102.40. The record further shows the sale of this property to A. P. Clark Matson, a member of the firm of Clark & Matson, attorneys for the Illinois College Hospital, and that thereafter said Matson claimed to sell the same to his father, the appellee, and the same was shipped to him at Pleasant Lake, Steuben county, Ind.

This action was commenced in the Steuben circuit court on June 22, 1905, after a demand upon the appellee for possession of the piano and stool. Appellee gave a delivery bond and retained possession of the property. On August 6, 1906, after appellant had commenced her action, A. M. Chase, constable in the court of said justice of the peace in Chicago, served notice upon appellant that he would upon August 7, 1906, before George H. Woods, justice of the peace, ask leave to amend his return upon said attachment notice as follows: "By inserting after the words 'by mailing' the word 'separately,' and by inserting after the words 'addressed to' the words 'each of,' and by adding the letter 's' to the word 'defendant.'" On October 20, 1906, on order of said justice, personal notice was served upon the appellant and also given by posting, as in the original attachment proceeding, and for the same time, of an application by A. P. Clark Matson, asking said justice of the peace to make an order in the case of Illinois College Hospital v. Treharne and Treharne, reciting what was the substance and effect of said notice and attachment issued by said justice of the peace in said cause of action on November 26, 1903. It was alleged in the application that the original attachment notice issued in said cause, and the return thereon by the constable, had been lost and could not be found. On November 16, 1906, notice was served upon the appellant, that upon November 17, 1906, a motion would be made before George H. Woods, justice of the peace, on behalf of A. M. Chase, constable, to amend his return on the attachment notice issued to him by said justice in said cause, on November 26, 1903. The motion was granted, amendment made, and return filed.

The appellant did not appear before the justice of the peace at the time set for hearing of these various motions and applica-

tions, and they were heard in her absence. On November 5, 1906, pursuant to the notice, said justice of the peace by his amended record showed that witnesses were sworn and examined and evidence introduced, from which he found that the defendants (one of whom was appellant) have had due notice of the said application and of the time set for the hearing of the same, in accordance with the statutes in such cases made and provided; that the statements in said application are true as therein set forth; that the said A. P. Clark Matson is interested in the judgment heretofore entered in this case, and that the original publication notice has been lost or destroyed without the fault or neglect of the said Matson, and that the same cannot be supplied by a duly certified copy thereof, and that loss or damage may result to him, unless supplied, or the "substance of the publication notice so lost or destroyed" be entered in the records, in accordance with the statutes in such case made and provided. Said justice of the peace also found what the substance of the original publication notice so lost or destroyed was.

This restored or amended record, leaving out the matters about which there is no controversy, shows "due notice of the application and time set for hearing thereof" to the appellant and her husband in said cause before said justice of the peace, demanding judgment for \$49 and costs, and that the writ of attachment had been issued and levied, and that the cause was set for trial on December 11, A. D. 1903, at 1 o'clock p. m. at the office of said justice of the peace in North Chicago, in said county and state. The amended return of the constable shows the publication of the notice by posting, according to the Illinois statutes.

It is contended by appellant that the original judgment before the justice of the peace in Chicago and the attachment proceedings resulting in the sale of the piano and stool, in question, were void, and that such being the case, no amendment could vitalize the proceedings as to divest the title of the appellant to the property in question. It is also contended by appellant that the law of the state of Illinois, permitting amendments to records and papers and restoring lost records, does not apply to courts of justice of the peace.

On behalf of the appellee, it is contended that due notice under the law of Illinois was given, and that the proceedings in attachment were regular, but that the notice was lost or destroyed, and the return upon the notice by the constable was not made according to the facts which existed at the time of the original trial; that the amendments which were permitted by the justice of the peace did not alter or change the record as to what actually occurred, but simply made it speak the truth as to what occurred in the proceedings in attachment. If the original proceedings were not void, but only voidable,

and the amendments to the notice and the constable's return and the record of the justice of the peace were authorized by law, then the records in the attachment suit were properly admitted in evidence and the trial court did not commit error by their admission. Judgments rendered by courts in other states, when such courts have jurisdiction over the subject-matter and parties, are conclusive on the merits in all other states, until the same are vacated or set aside by some appropriate proceedings in the state where the judgments were rendered. *American Ins. Co. v. Mason*, 159 Ind. 15, 64 N. E. 525. Where a judgment is rendered by a justice of the peace of another state and the same is relied upon as a defense, the facts necessary to show jurisdiction must be proven by the party pleading the judgment. *Louisville Ry. Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 122; *Draggou v. Graham*, 9 Ind. 212; *Railway Co. v. McNulty*, 34 Ind. 531; *Cone v. Cotton*, 2 Blackf. 82. A justice of the peace in Illinois has jurisdiction in cases of implied contract, where the amount does not exceed \$200, and in cases in attachment, where the sum sought to be recovered does not exceed said amount, and the plaintiff in an attachment proceeding may designate persons to be summoned as garnishees. In Illinois, an attachment proceeding may be begun directly, in the first instance, as an independent action. By the law of Illinois, judicial power is vested in "the Supreme Court, circuit court, county court, justice of the peace, and such other courts as may be created by law." Const. art. 6, § 1. The justice of the peace had jurisdiction of the subject-matter of the litigation, and of the person of the appellant for the purposes of the attachment suit, if the notice was sufficient.

The Illinois statutes make full provision for publication of notice by posting, for amending returns of officers and records of the court, and for restoring lost records, and give to the amended or restored records the same effect as they would have had if no amendment had been required or restoration found necessary. *Starr & C. Ann. St. Ill.*, edition of 1896; section 9, par. 51, of chapter 11; section 12, par. 54, of chapter 11; sections 2, 4, and 9 of chapter 7; sections 1 and 2 of chapter 116.

The appellant contends that we can only look to the notice found among the files, showing that the trial was to be held on December 11, 1904, at 125 Clark street, which was not within the jurisdiction of the justice and upon an impossible date under the statute which required a notice of not less than five nor more than thirty days.

Briefly summarized, what had taken place in the amendment of the justice's record was (1) permission to the constable to amend his return to the publication notices in the suit; (2) the finding of the court that the original publication notice had been lost or destroyed

and what its contents were; and (3) permission to the constable to amend his return to the publication notice and the actual mending thereof, and the filing of his amended return. For some reason the constable was given permission to amend his return both before and after the finding of the justice, as to the contents of the lost notice.

That the sale divested the title of appellant is not questioned, if the judgment of the justice was valid. After the sale, the purchaser transferred the property to the appellee. The questions to be determined, therefore, are, whether the amendments of the return of the officer and the restoration of the record were (1) authorized by the laws of the state of Illinois, and, if so (2), whether such authority has in fact been exercised in the manner provided by law.

Section 1 of chapter 116, *supra*, provides: "That whenever the record of any judgment or decree, or other proceeding of any judicial court of this state, or any part * * * shall have been or shall hereafter be lost or destroyed. * * *" Then follows the provision for amending defective and restoring lost records. The statutes we have cited settle the question that courts of justices of the peace in Illinois are "judicial courts." Their functions are judicial and not ministerial, and there seems to be no room for serious dissent upon the proposition. Being a "judicial court," the statutes conferred power upon the justice to permit amendments and to restore lost records. As supporting this conclusion, see *Ledford v. Weber*, 7 Ill. App. 87; *Major v. People*, 40 Ill. App. 323.

The purpose of the statute is not to validate a void judgment, for this cannot be done. The justice had jurisdiction of the subject-matter and of the persons of the defendants for the purposes of the attachment suit, granting that the notice was sufficient. The statute provides that the restoring order, when entered of record, "shall have the same effect as if the same had not been lost or destroyed." Process really void cannot be amended to make it valid. The whole theory of the statute and the proceedings to amend the return and record in the attachment suit is that the notice found to have been lost was before the court on the day of judgment, and its contents were shown by the restoring order, and that a separate copy was mailed to each defendant, at the address named in the affidavit. The facts have always been the same, and the amendment simply made the record speak the truth, and did not put into it any new statement or fact, but only such as should have appeared on the day the judgment was rendered.

In *Dunn v. Rodgers*, 43 Ill. 262, this proposition is clearly stated: "The indorsement made by the sheriff is not the service, but only affords evidence of the fact. Where the sheriff amends his return, he by no means changes the fact, but simply the evidence.

He makes the return and the amendment on his responsibility and at his peril. If false, as amended, he is liable to an action for a false return. There was therefore no error in the return as amended, upon which the decree sought to be reversed was based. When the amendment was made, the error was removed and could not be urged under the bill of review." See, also, *Spellmyer v. Gaff*, 112 Ill. 29-34, 1 N. E. 170; *Hinkle v. City of Mattoon*, 170 Ill. 319, 48 N. E. 908; *Smith v. Clinton Bridge Co.*, 13 Ill. App. 577; *Hogue v. Corbit*, 156 Ill. 544, 41 N. E. 219, 47 Am. St. Rep. 232.

The appellant argues that justices of the peace in Illinois do not have the power to amend their records, and cites in support of that contention *St. Louis, B. & S. Ry. Co. v. Gundlach*, 69 Ill. App. 192. In that case, the justice rendered judgment on October 19th, and after the same was duly entered and signed, on the 23th day of the month, at the request of the attorney desiring to appeal, changed the date of the entry of judgment to October 24th, and on the 26th of the month, when an appeal bond was tendered, refused to approve the same, having reconsidered his act and changed his entry, leaving the same as originally made. The court held that the justice had no right to change the date of his judgment. On the facts of that case, the decision was doubtless right. This was changing the fact, not furnishing evidence by the record to shew a fact already known to exist. While there may seem to be some conflict between this case and the conclusion reached in the one at bar, we think the conflict is only apparent and not real. Furthermore, no reference is made in the case to any statute on the subject. The case may readily be distinguished from the line of authorities in the same state holding that amendments may be made, some of which are cited in this opinion.

Some question is raised as to what is included in the record of the court, subject to amendment or restoration. Does it include the notice and the return thereon? The case of *Vail v. Iglehart*, 69 Ill. 384, had reference to this particular statute, but the question arose in a court of general jurisdiction. In that case, the court said: "What, then, is the meaning of the words 'record of any judgment,' as they are used in this act? It seems to be argued by appellee as if their meaning is, in his opinion, to be limited to the final entering of the judgment of the court by the clerk in the proper record. This, to our apprehension, is entirely too narrow a construction to accomplish the purposes of the act, nor do we understand that such is the plain and obvious import of the words used. The record of a judgment at common law was known as the 'judgment roll,' and this included, as well, the pleadings, process, etc., assigning judgment. Stephen on Pleading, 24 et seq.; Freeman on

Judgments, 51, art. 75. Under our practice, while the pleadings, process, etc., are not, as at common law, required to be copied on a parchment roll, nor in the record book in which final judgment is entered, they are required to be filed in the office of the clerk; and when a copy of the record of the judgment is required, for the purposes of bringing the case by appeal or writ of error into this court, or bringing suit upon it in another state, or as evidence under an issue of nul tiel record, or to establish a former adjudication of the same subject-matter between the same parties, and, indeed, all cases where it is essential to have a complete record of a judgment, the pleadings and process are an indispensable part of it." We therefore conclude that the publication notice was a part of the record of the judgment and subject to amendment or restoration under the statute.

We come, then, to the second phase of this question. Was this judicial power exercised in the manner provided by law? The principal objection raised relates to the notice. The statute provides for service of notice in the same manner as service in chancery suits. The record does not disclose the manner of service of such notices in chancery proceedings in the state of Illinois.

Section 2, c. 116, supra, on this subject of notice states: "And due notice of said application shall be given, as in chancery cases." Further on in the same section we find the following: "The record in all cases where the proceedings was in rem, and no personal service was had, may be supplied upon like notice and as nearly as may be, as in the original proceeding. The court in which the application is pending, may, in all cases in which publication is required direct, by order or orders, to be entered of record, the form of the notice and designate the newspaper or newspapers in which the same shall be published."

Thus it appears that provision is made for notice (1) "as in chancery cases," where personal service is obtained, and (2) "where the proceedings were in rem," and notice by publication, the court by order directs such notice, "as in the original proceeding." The record shows that such notice was given on the order of the justice of the peace, and that publication was by posting as in the original suit, and by mailing "to each of the within named defendants, a copy thereof at the place of residence named in the attachment affidavit, this 20th day of October, 1907." In addition to this, the record shows the actual service of notice upon the defendants, who at this time were in the city of Chicago. This we do not think aids appellee, as no provision therefor is found in the statute, but it was a matter of fairness between the parties.

The record does not show publication in any newspaper, but as the attachment stat-

ute authorized the publication by posting and by mailing, where the address was stated in the affidavit, we conclude that the notice was given "as nearly as may be, as in the original proceeding," and that the same was sufficient to authorize the amendment and restoration of the record as prayed for in the application, and as actually made.

Other questions are discussed by counsel, which, in view of the conclusions already announced, cannot enter largely into the decision of this case.

Was the proceeding in the Steuben circuit court a collateral attack upon the judgment of the Illinois justice of the peace? We hold that it was. Vol. 17, Am. & Eng. Law, p. 848. However, our conclusion that the amendments to the records were authorized and made according to the provisions of the statutes is the basis of this opinion.

What is the effect of the recitals in the record of the justice showing due notice to the defendants? Granting that the attack is collateral, the authorities in Illinois support the proposition that such recitals are conclusive upon the parties. *Reddish v. Shaw*, 111 Ill. App. 338; *Payne v. Taylor*, 34 Ill. App. 491; *Arnold v. Mangan*, 89 Ill. App. 329; *Reedy v. Camfield*, 159 Ill. 254-260, 42 N. E. 833. *Barnett v. Wolf*, 70 Ill. 76; *Matthews v. Hoff*, 113 Ill. 90; *Illinois Cent. R. v. People*, 189 Ill. 119, 59 N. E. 609. The admission of the letter in evidence shows that specification 57 of the motion for a new trial may have been error, but even if erroneous, it was harmless error. If it is admitted to show notice, having found the notice as amended and restored to be sufficient, no harm could result. If admitted on any other theory, we are unable to find that the rights of the appellants were in any way affected by its admission.

The question is raised that, in the absence of a showing to the contrary, the common law must be held to prevail in a sister state, and that the title to the property in question was therefore in the husband of the appellant, and she must fail because of the weakness of her own title. Right of possession will sustain an action in replevin and, furthermore, the appellee's title, if any, comes indirectly from appellant, and we are not impressed with the correctness of appellee's contention on this proposition as applied to the facts in this case. The gist of all objections to the evidence that can possibly avail the appellant relate to the alleged invalidity of the judgment of the justice and the proceedings amending and restoring parts thereof.

The conclusions reached show that the motion for a new trial was properly overruled, and the judgment is therefore affirmed.

MYERS, C. J., and HOTTEL, LAIRY, ADAMS, and IBACH, JJ., concur.

(46 Ind. App. 683)

KLAUSS, Treasurer, v. CITIZENS' NAT. BANK. (No. 7,772.)

(Appellate Court of Indiana, Division No. 1. Jan. 10, 1911.)

1. STATUTES (§ 159*)—TAXATION (§ 113*)—BANK STOCK—IMPLIED REPEAL OF STATUTE—INCONSISTENT ACTS.

Where two inconsistent statutes, relating to the same subject-matter, but passed at different times, are to be construed, the latter statute governs and the former is to be taken as repealed by implication, therefore Acts 1907, c. 281, which provides in sections 1, 3, and 5 that the shares of capital stock of any bank shall be assessed to the owners thereof, and that the bank shall retain so much of any dividend sufficient to pay the taxes assessed on such stock, etc., by implication repeals Acts of 1903, c. 29, § 10 (*Burns' Ann. St. 1908*, § 10,214), providing that taxes assessed upon the shares of stock of a bank shall be paid by the bank in the same manner that other individuals pay their taxes, etc., and the appearance of this previous act in *Burns' Ann. St.* gives it no force.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 229; Dec. Dig. § 159; * *Taxation*, Dec. Dig. § 113.*]

2. STATUTES (§ 161*)—TAXATION (§ 113*)—BANK STOCK—IMPLIED REPEAL OF STATUTE—GENERAL ACTS.

A new act covering the entire subject-matter of a former act impliedly repeals it, for the circumstances evince an intention that the old law in the form it was is no longer to exist. Therefore Acts 1907, c. 281, which covers the entire subject of taxation of shares of stock in banks, impliedly repeals Acts 1903, c. 29, § 10, providing that taxes assessed against the shares of stock of a bank shall be paid by the bank, etc.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 230-234; Dec. Dig. § 161; * *Taxation*, Dec. Dig. § 113.*]

3. TAXATION (§ 319*)—ASSESSMENT—CONFIRMITY TO AUTHORITY DELEGATED.

The power of taxation being an incident to sovereignty, and the right to tax being an extraordinary one, it must be exercised pursuant to the authority given, so that an assessment of bank stock against the bank in the manner prescribed by a repealed law and inconsistent with the existing law, which called for assessment to the individual owners, was invalid and unenforceable.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 319.*]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by the Citizens' National Bank to restrain Otto L. Klauss, treasurer, etc., from collecting certain taxes. From a judgment for plaintiff, defendant appeals. Affirmed.

Daniel H. Ortmeier and George A. Cunningham, for appellant. Robinson & Stilwell, for appellee.

ADAMS, J. This action was brought by appellee against appellant, as treasurer of Vanderburgh county, for the purpose of enjoining appellant from collecting or attempting to collect certain taxes claimed to be illegally assessed against appellee.

The material averments of the complaint

are that on the 1st day of March, 1909, the nominal capital stock of appellee was \$200,000, divided into 2,000 shares of \$100 each; that appellee was on said date the owner of certain real estate in Vanderburgh county, Ind., of the assessed value of \$46,030; that appellee was at the time of the filing of said complaint the owner of said real estate; that on the 10th day of May, 1909, one of the officers of appellee made out and delivered to the auditor of said county a statement purporting to show the amount of capital stock of appellee and its value on the first day of March, 1909; that the amount of surplus funds which said bank had on said date was \$40,000, and that the amount of undivided profits on said date was \$16,757.29; that said statement also showed that said bank owned real estate on said day of the value of \$46,030; that this statement was filed with the auditor of said county and by such auditor was placed before the county board of review of said county at the regular annual meeting of said board; that said board of review proceeded to determine and settle what it believed to be the true cash value of each share of capital stock of said bank, taking into consideration the nominal, capital, surplus, and profits, and fixed the value of said shares at \$133,700; that thereafter the said auditor placed upon the tax duplicate, pursuant to the order of the county board of review, said capital stock at a valuation of \$133,700; that taxes were assessed thereon for the year 1909 in the aggregate sum of \$3,609.12, and that said shares of capital stock of appellee were assessed to appellee bank and so placed upon the tax duplicate; that a copy of said tax duplicate was subsequently delivered to appellant.

It is further averred in the complaint that on the 1st day of March, 1909, and for more than six months prior thereto and for more than six months subsequent thereto, the capital stock of said bank had been and was impaired to the full amount thereof, and that said shares had no value whatever, and that said bank had no surplus and no undivided profits; that said assessment by said board of review was wrongful and unlawful, for the reason that at said time said bank had no capital, surplus, or profits. The complaint also avers that appellee on said 1st day of March, 1909, owned and still owns real estate in Vanderburgh county of the value of more than \$40,000, and that the same was assessed for taxes for said year at a valuation of \$46,030; that prior to the bringing of this action, on the 28th day of April, 1910, appellee paid to the treasurer of said county the sum of \$618.67 as and for the taxes assessed against said real estate, being the amount of taxes due and payable on said real estate for the year 1909; and that no taxes are legally due from appellee to appellant for any purposes. It is further averred that appellant is in possession of the tax duplicate of said county containing said un-

lawful assessment to appellee of the shares of capital stock, and that the same is a lien upon all the real estate and other property owned by appellee, and that said appellant is threatening to collect said taxes and will collect the same, unless restrained by order of court. The prayer is for a temporary restraining order and perpetual injunction upon final hearing. The cause was put at issue by an answer in general denial. Upon the hearing the court found for appellee, and appellant was perpetually enjoined from attempting to collect and from levying upon any real estate or other property of appellee any taxes assessed on the shares of capital stock of appellee for the year 1909.

At the trial appellee introduced the statement of the cashier of the Citizens' National Bank and filed with the auditor of Vanderburgh county, which set out the name and residence of each stockholder, the number of shares owned by each, and the par value thereof, showing the capital stock to be \$200,000, surplus \$40,000, and undivided profits \$16,575.29, and real estate of the value of \$46,030; also, the record and proceedings of the board of review of said county showing the assessment upon the value of the capital stock, surplus, and undivided profits of said bank to be \$179,730; also, certain pages of the tax duplicate of said county for the year 1909, showing the name and number of shares owned by each stockholder of said bank, assessed for taxation at \$179,730, less the real estate, \$46,030, leaving a balance of \$133,700. Appellee also introduced in evidence a statement coming from the office of the treasurer of said county, showing that personal property in the sum of \$133,700 was assessed to the Citizens' National Bank. The appellant offered in evidence certain pages of the tax duplicate of Vanderburgh county for the year 1909, showing real estate assessed to the Citizens' National Bank at a valuation of \$39,790. No other evidence was offered on the trial of the cause.

The only error relied upon by the appellant for reversal is the overruling of his motion for a new trial, in that the decision of the court is not sustained by sufficient evidence and is contrary to law.

There is but one question to be considered on this appeal, and that is the right of appellant to collect taxes against the appellee on the shares of capital stock owned by the stockholders of the appellee. The method of assessing bank stock has been the subject of numerous enactments by the Legislatures of this state. The last expression on this subject being the act of March 12, 1907 (Acts 1907, pp. 624-626). Section 1 of said act provides: "That the shares of capital or capital stock of any bank, banking association or trust company located within this state, whether organized under the laws of this state of the United States, or any other state or country, shall be assessed to the

owner thereof in the township, city or town where such bank, banking association or trust company is located and shall be taxed at the same rate as other property in the same locality is taxed and with reference to its value on the first day of March of the current year." Section 3 of said acts reads thus: "The president, cashier or other accounting officer of any bank * * * shall between the first day of March and the twenty-fifth day of March of each year make out a statement under oath, in duplicate, showing the number of shares, certificates of capital or capital stock of such bank * * * the name and residence of each stockholder with the number of shares owned by each stockholder or shareholder in such bank * * * and shall affix what he deems the true cash value of each of said shares and also the true cash value of the entire capital or capital stock of such bank * * * as of the first day of March and shall deliver said statements to the auditor of the county wherein such bank * * * is located, and said county auditor upon the meeting of the county board of review shall lay such statement before said board of review, who shall thereon value and assess the capital or capital stock of such bank * * * as provided for in this section, in all respects the same as similar property belonging to other corporations and individuals, and whenever any such bank * * * shall have acquired real estate, the assessed value of such real estate shall be deducted from the valuation of the capital or capital stock of such bank. * * * In making such statement of the true cash value of such shares, the credits shall be given and the bona fide indebtedness of such banks * * * deducted therefrom as in case of individuals. The county board of review shall determine and settle the true cash value of each share of stock after an examination of such statement and also an examination under oath of such officer if it be deemed necessary and in determining and fixing the true cash value of each of said shares of stock, it shall take into consideration the capital, surplus, undivided and individual profits, if any, just as it would with respect to other moneyed capital in the hands of individual citizens of the state." Section 5 of said act provides: "It shall be the duty of every such bank, * * * or the managing officer or officers thereof, after being notified in writing to do so by the county treasurer, to retain so much of any dividend or dividends belonging to such stockholders, as shall be necessary to pay any tax levied upon their shares of stock respectively, until it shall be made to appear to such bank, * * * or its officers, that such taxes have been paid, and any officer of any such bank * * * who shall pay over, or authorize the paying over, of any such dividend or dividends, or any portion thereof contrary to the provisions of this section, shall thereby become liable for such

tax, or the bank * * * may pay the tax due from any of its shareholders, and retain the amount thereof from any subsequent dividends."

It is conceded that the sections of statute, above quoted, were in full force and effect during all of the time covered by this controversy, but it is insisted by appellant that section 10 of the act of February 25, 1903 (Acts 1903, p. 54), was also in force during said time. Section 10 of said last-named act provided: " * * * Taxes assessed upon shares of stock of banks * * * shall become a lien thereon upon the first day of March of the current year, and such lien shall be in no wise affected by any sale or transfer of such stock. Such taxes shall be paid by the bank * * * in the same manner that other individuals or corporations pay their taxes, and subject to the same penalties." Said section was carried into Burns' Annotated Statutes of 1908 (Burns' Ann. St. 1908, § 10,214), and we do not find that it has been repealed by express statute. The appearance of this section in Burns' Annotated Statutes, however, adds nothing to its force. To the extent that it provides that "such taxes shall be paid by the bank in the same manner that other individuals or corporations pay their taxes, and subject to the same penalties," it is clearly inconsistent with the provisions of the act approved March 12, 1907 (Acts 1907, pp. 624-626). Where two inconsistent statutes relating to the same subject-matter, but passed at different times, are to be construed, the court will give effect to the latest expression of the Legislature, and will hold the earlier statute to be repealed by implication. *State ex rel. v. Board, etc.*, 170 Ind. 595, 85 N. E. 513; *State ex rel. v. District Court, etc.*, 107 Minn. 437, 120 N. W. 894; 1 Lewis, Sutherland, Stat. Const. (2d Ed.) § 247; Black, Interpretation Stat. p. 115; Endlich, Interpretation Stat. § 183. Where the new act covers the whole subject-matter of a former act, the evident intention is that the new act shall take the place of the old and the old law is repealed, because the circumstances evince an intention that the old law in the form it was is no longer to exist. *Thomas v. Town of Butler*, 139 Ind. 245, 249, 38 N. E. 808; *State ex rel. v. Board, etc.*, 104 Ind. 123, 128, 3 N. E. 807. The act of 1908, supra, being the only expression of the legislative will in respect to the listing and assessing of such taxes, the question arises: Can taxes assessed in a manner not authorized by statute be collected? Or, as in the case at bar, Can appellee be compelled to pay taxes which should have been assessed against its stockholders? The power of taxation is an incident of sovereignty, and the right to tax, being an extraordinary one, must be exercised pursuant to authority given, and must be in conformity with the provisions of the statute relating to the same. It is said: "The assessment being so important, the statutory

provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own, the most important security which has been devised for the protection of the citizens in tax cases might be rendered valueless." Cooley, Taxation (3d Ed.) p. 599. There being but one statutory method for listing and assessing bank stock in 1909, which was to list and assess the same to the individual owners of such stock, it follows that the shares held and owned by the individual stockholders could not be lawfully assessed to the bank corporation.

There was no error in overruling appellant's motion for a new trial.

Judgment affirmed.

MYERS, C. J., and HOTTEL, LAIRY, FELT, and IBACH, JJ., concur.

(48 Ind. App. 676)

CHICAGO & E. I. R. CO. v. COON.¹
(No. 6,858.)

(Appellate Court of Indiana, Division No. 1.
Jan. 12, 1911.)

1. RAILROADS (§ 313*)—CROSSING ACCIDENTS—NEGLIGENCE—FAILURE TO GIVE SIGNALS.
As a rule, a railroad company's failure to give the statutory signals at public highway crossings is negligence per se.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 813.*]

2. RAILROADS (§ 344*)—CROSSING ACCIDENTS—INJURIES—SUFFICIENCY OF COMPLAINT.

The complaint alleged that the view of defendant's track at a crossing as approached from the west was obstructed by trees and buildings, and that plaintiff approached from the west and when within 100 feet thereof checked his horse and looked and listened, and, hearing no signals and seeing no lights, started to drive across, and, while on the crossing, was struck by defendant's train which was carelessly and negligently run down grade at a reckless speed, and that the train employees carelessly and negligently failed to sound the whistle or ring the bell, and carelessly and negligently operated the engine without any sufficient headlight, and carelessly and negligently ran it at a dangerous, reckless, and unusual speed, to wit, 35 miles an hour; that by reason of the obstructions, the high wind, and the steam being shut off, the train did not make a noise which could be heard for any distance, and that when plaintiff's team was upon the track, "owing to said negligence and reckless, high rate of speed at which said train was running," he was unable to take his team out of reach of the train, and that the train employees so carelessly and negligently running it ran it against the team and injured plaintiff, and that such injuries were occasioned by defendant's negligence, without any fault of plaintiff. Held that, though the allegation as to the insufficiency of the headlight was a conclusion, by the allegations as to failure to give signals and in running the train at a reckless speed, which were each alleged to be a proximate cause of

the injury, the complaint stated a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1107-1112; Dec. Dig. § 841.*]

3. RAILROADS (§ 844*)—CROSSING ACCIDENTS—ALLEGATIONS OF COMPLAINT—CONTRIBUTORY NEGLIGENCE.

Such complaint does not affirmatively show contributory negligence, but affirmatively negatives it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1112; Dec. Dig. § 841.*]

4. RAILROADS (§ 344*)—CROSSING ACCIDENTS—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.

Since the enactment of Acts 1899, c. 41 (Burns' Ann. St. 1908) § 862, providing that in actions for negligence causing personal injuries or death plaintiff need not allege or prove the want of contributory negligence, it is sufficient if the facts alleged in the complaint do not affirmatively show contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1112; Dec. Dig. § 844.*]

5. APPEAL AND ERROR (§ 292*)—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS—RULINGS ON INSTRUCTION.

Alleged error in giving or refusing instructions must be set up in the motion for new trial to make it reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1697-1699; Dec. Dig. § 292.*]

6. APPEAL AND ERROR (§ 1001*)—REVIEW—EVIDENCE SUPPORTING VERDICT.

The appellate court indulges all presumptions in favor of the general verdict, and will set it aside only where there is a complete failure of evidence to support some material issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928; Dec. Dig. § 1001.*]

7. RAILROADS (§ 348*)—CROSSING ACCIDENTS—ACTIONS—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

In an action against a railroad company for injuries at a crossing, evidence held to sustain a finding that the statutory crossing signals were not given, and that the headlight on the engine was defective.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 848.*]

8. NEGLIGENCE (§ 119*)—ACTIONS—PROOF.

Proof of any act of negligence alleged, if the proximate cause of the injury, is sufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 203; Dec. Dig. § 119.*]

9. APPEAL AND ERROR (§ 882*)—RIGHT TO ALLEGE ERROR—THEORY OF CASE.

Defendant, by requesting an instruction that the complaint alleged four separate acts of negligence, one or more of which must be proven by the preponderance of the evidence, and if plaintiff fail to prove any of the acts the jury should find for defendant, acquiesced in the trial of the case on the theory that proof of either act of negligence charged was sufficient, if it was the proximate cause of the injury, and could not complain on appeal that plaintiff was not required to prove all the acts of negligence alleged.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3602-3604; Dec. Dig. § 882.*]

10. RAILROADS (§ 812*)—CROSSING ACCIDENTS—NEGLIGENCE—ABSENCE OF HEADLIGHT.

It may be negligence per se to operate a railroad train on a dark night without a headlight over a much-traveled public street, so as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

to make the company liable for injuries to a pedestrian struck without his own fault in crossing the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 989; Dec. Dig. § 312.*]

11. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

If there is any evidence to support the verdict, the appellate court cannot grant a new trial for insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928; Dec. Dig. § 1001.*]

12. RAILROADS (§ 350*)—CROSSING ACCIDENTS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for injuries at a crossing by the striking of plaintiff's buggy, evidence *held* to make it a question for the jury whether plaintiff's negligence contributed to the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166–1188; Dec. Dig. § 350.*]

13. APPEAL AND ERROR (§ 996*)—VERDICT—CONCLUSIVENESS.

Where the inferences from the evidence were such that reasonable men might differ thereon, the verdict will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908–3911; Dec. Dig. § 996.*]

14. TRIAL (§ 281*)—INSTRUCTIONS—OBJECTIONS—JOINT OBJECTION.

A joint objection to several instructions cannot be sustained, where some of them are correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 694; Dec. Dig. § 281.*]

15. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR—FAILURE TO ARGUE.

Appellant's failure to urge in argument on appeal error in instructions given, and to point out the defects therein, admits their correctness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

16. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A requested instruction was properly refused, where it was covered in substance by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

17. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

The fact that an instruction in an action against a railroad company for injuries at a crossing did not require the jury to find that, when plaintiff looked and listened, he failed to see and hear, did not make it objectionable, where the clause immediately following the requirement to look and listen required a finding that plaintiff then used care commensurate with the danger.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–718; Dec. Dig. § 296.*]

Appeal from Circuit Court, Newton County; Chas. W. Hanley, Judge.

Action by Percy Ooon against the Chicago & Eastern Illinois Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Homer T. Dick, Wm. Darroch, and Frank M. Ross, for appellant. Wm. H. Parkinson, Frank Davis, and Fred Longwell, for appellee.

HOTTELL, J. This is an action brought by appellee in the Newton circuit court against appellant, to recover damages on account of injuries sustained by appellee in being struck by one of appellant's trains at a crossing of the appellant's track with one of the streets of the town of Brook in said county.

The complaint is in one paragraph, to which a demurrer was filed and overruled, and the issues closed by an answer in general denial. There was a trial and verdict for appellee in the sum of \$1,500. Motion for a new trial overruled and exception. Judgment on the verdict.

The errors upon which appellant relies for reversal are: "(1) The complaint does not state facts sufficient; (2) overruling appellant's demurrer to the complaint; (3) the giving of instruction No. 2, on the court's own motion, and each of the instructions numbered 1, 2, 4, 5, and 6, requested to be given by the appellee; (4) refusing to give each of instructions numbered 5 and 17, requested to be given by appellant; (5) overruling appellant's motion for a new trial; (6) sustaining appellee's motion for a judgment on the verdict of the jury."

Inasmuch as errors 1 and 2 present the question of the sufficiency of the complaint, we will state the material averments of the same. The complaint alleges, in substance, that said railroad crosses East and West street in the town of Brook at an angle of about 45 degrees; that the street is 60 feet wide and the railroad runs northwesterly and southeasterly; that there are a number of buildings and trees obstructing the view of the track as it is approached from the west; that on January 18, 1907, appellee was driving a two-horse, single-seated, covered buggy, approaching the railroad from the west; that when within about 100 feet of the crossing of said street and approaching the same, he "checked his horses and drove in a slow walk and listened and looked for approaching trains; that he continued to look and listen while approaching said railroad crossing for any light or any sound of an approaching train; * * * that approaching said point from the north, there is a slight incline towards the south; that on said date and on the said hour, it being about half-past 8 at night, there was a continuous and brisk wind blowing from the southwest; that when approaching said crossing, and continuing to look and listen so far as the darkness of the night would permit, he looking and hearing no signals given, and seeing no light, plaintiff started to drive upon and across the track of this

defendant. Plaintiff avers that as plaintiff's horses were upon the track, the said defendant carelessly and negligently ran a train of cars on its said road from the northwest, coming down said grade and within said limits of said incorporated town at the reckless speed of 25 miles per hour; that the steam was entirely shut off; that the agents and servants in the operation and management of defendant's said train carelessly and negligently failed to sound the whistle or ring the bell, and carelessly and negligently operated said engine without any sufficient headlight, and carelessly and negligently ran said train and engine at a dangerous, reckless, and unusual rate of speed, to wit, 35 miles an hour at the time it struck said buggy and horses and injured this plaintiff, and carelessly and negligently failed to give any signal whatever of the said approaching train; that by reason of the surrounding obstructions and by reason of the wind and by reason of the steam being so shut off of the said engine, and by reason of the rapid and great speed at which the same was run, the said train did not make any sufficient noise in advance thereof that could be heard for any distance away from it; that said train approached said crossing in the said careless and negligent manner as aforesaid, and when plaintiff's team was upon said tracks of said defendant, said plaintiff avers that, owing to said negligence and reckless high rate of speed at (which) the said train was running, he was unable to get horses and his said buggy out of reach of said train and of said locomotive engine, but that defendant's agents and servants so operating said train, and so negligently and carelessly running the same, ran the same upon and against the plaintiff's said team and buggy, and the end of the pilot of said locomotive engine struck plaintiff's said team and buggy with great force and violence, thereby throwing and hurling this plaintiff at a great distance, and thereby greatly and severely bruising and injuring him in this, * * * that said injuries were occasioned by the negligence of said defendant, and without any fault or negligence on the part of this plaintiff."

As above indicated, the first and second errors assigned by appellant bring in review this complaint. The disposition of the second, viz., the error presented by the overruling of the demurrer to the complaint, necessarily disposes of the first, viz., the errors assigned that the complaint does not state facts sufficient.

Counsel for appellant, in their heading of "Points and Authorities," have quoted several propositions of the law applicable to this error assigned. Among these propositions are the following: "When a pleading is tested by a demurrer, it must stand or fall by its own averments. It can neither find weakness nor strength from other parts of the record. (2) In pleading, it is incumbent upon the plaintiff to state all facts essen-

tial to a cause of action, and if any material fact is lacking, the complaint will go down before a demurrer. (3) It is an old and well-settled rule of pleading that where doubts arise upon the pleading, they are construed most strongly against the pleader." "(5) In cases like the one under consideration, it must appear, from the material facts directly averred in the complaint, that there was some connection in the way of cause and effect, between the acts of negligence complained of, and the injury, or that such negligent acts of omission or commission * * * resulted in the injury complained of, and which result was the consequence of such negligent acts." These propositions correctly state the law, but do not state the law in its entirety, applicable to the determination of the sufficiency of this complaint. There are other principles equally important and necessary, to be kept in mind before adjudging this complaint bad on the grounds urged by counsel for appellant.

The first objection urged against the complaint is as follows: "The demurrer to the complaint should have been sustained, because it is not averred that the imputed negligence of appellant caused the injury complained of." In discussing the objection, counsel treat the complaint as though it proceeded wholly upon the theory that the only negligent acts of omission or commission of the appellant complained of by the appellee related solely to the speed of the train. Counsel entirely leave out of account the allegations relating to appellant's failure to give the signals required by statute, and the allegations relating to the insufficiency of the headlight used upon the train. These are important allegations, in view of the holdings of this and the Supreme Court of the state. The giving of the signals is required by statute, and, "as a general proposition, the failure of a railroad company to discharge its duty in regard to giving the signals at public crossings is negligence per se." *Burns' Ann. St. 1908, § 5431; Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524-526, 48 N. E. 352, 49 N. E. 452; *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357, 375, 380, 37 N. E. 150, 38 N. E. 594.

In commenting upon the section of the statute requiring the signals to be given, the Supreme Court, in the case of *Pittsburgh, etc., R. Co. v. Burton*, supra, at page 375, 139 Ind., at page 156, 37 N. E. (38 N. E. 594), says: "This expresses the legislative definition of the character and extent of warning which shall be required, and less than the warning required is not deemed reasonable, and constitutes negligence." While it is true that the allegation in the complaint, with reference to the insufficient headlight, is in the nature of a conclusion, the averments of the complaint in relation to the negligent failure of the appellant to give the signal required by statute, and the causative connection of this failure with appellee's injury,

we think, makes the complaint sufficient in this regard. The law in this class of cases seems to be well settled; but a more serious difficulty arises in its application to the particular case. It seems from the statement of the contents of the complaint in appellant's brief that counsel have labored under a misunderstanding as to its wording. The complaint, in charging the negligence of appellant that caused appellee's injuries, uses the following language, as evidenced by the record, viz.: "Plaintiff avers that owing to said negligence and reckless, high rate of speed at (which) said train was running, he was unable to get horses and his said buggy out of reach of said train, but that defendant's agents and servants so operated said train and so negligently and carelessly ran the same upon and against the plaintiff's said team and buggy, and the end of the pilot of said locomotive engine struck plaintiff's said team and buggy with great force and violence, thereby injuring," etc.

The appellant in their brief charge the language of the complaint upon this same subject to be as follows: "Plaintiff avers that owing to said *negligent* and reckless, high rate of speed said train was running," etc. While but one word of this sentence is incorrectly quoted, a complete change in meaning results. Under the wording of the complaint, as counsel for appellant understand and quote it, the sole and only proximate cause of plaintiff's injury was the negligent and reckless, high rate of speed at which said train was running; while, under the correct wording of the complaint, as shown by the record, the proximate cause was the said *negligence* and reckless, high rate of speed at which said train was running. The pleader, in fact, connects and includes the negligent acts before enumerated in this complaint with the speed of the train, as the proximate cause of the injury. With this interpretation of the complaint, the argument of counsel in their brief, as to its insufficiency, has little left to support it, because the said negligent acts before set out in the complaint include the negligent omissions of the appellant to give the signals or warning required by statute, the defective headlight, etc., which, we think, makes the complaint sufficient under the rules of this court as above quoted.

Counsel for appellant also insist that the complaint should have alleged that if the warning had been given, the injury would not have occurred, or that there should have been an averment that appellee could have seen the train, had there been a sufficient light, and heard it, if the required signal had been given. Upon this proposition, counsel have cited numerous authorities, most of which, however, are cases antedating the Acts of 1899, c. 41, being section 362, Burns' Ann. St. 1908, which shifted the burden of the issue of contributory negligence in actions of this character. Chicago, etc., R. Co. v. Turn-

er, 33 Ind. App. 264-269, 69 N. E. 484. Prior to that act, it was necessary for the plaintiff, either by his special averments to show or by a general averment, to allege that he was without fault and in no wise contributed to his injury. Baltimore, etc., R. Co. v. Young, 146 Ind. 374, 376, 377, 45 N. E. 479; Chicago, etc., R. Co., v. Thomas, 147 Ind. 35-39, 46 N. E. 73; Cincinnati, etc., R. Co. v. Voght, 26 Ind. App. 665-666, 60 N. E. 797. But since the act of 1899, supra, it is only necessary, in actions of this kind, that the facts pleaded do not affirmatively show contributory negligence. Southern Ry. Co. v. Davis, 34 Ind. App. 377, 72 N. E. 1053; Greenawaldt v. Lake Shore, etc., R. Co., 165 Ind. 219, 222, 223, 74 N. E. 1081; Van Winkle v. New York, etc., R. Co., 34 Ind. App. 476, 73 N. E. 157.

Measured by this test, the complaint in this particular is sufficient. It contains no averments affirmatively showing that the appellee by his own negligence contributed to his injury; but in fact does contain a general averment that the "injuries were occasioned by the negligence of said defendant, and without any fault or negligence on the part of this plaintiff." Taking the complaint as a whole, we think, it states facts sufficient to constitute a cause of action, and that the demurrer thereto was properly overruled by the court below.

Error in giving or refusing to give instructions is not properly presented by an assignment of error, assigning the giving or refusal to give such instructions as error; but such error must be stated as one of the grounds for a new trial. The third and fourth assignments of error need not therefore be considered.

The fifth error assigned is as follows: "The court erred in overruling appellant's motion for a new trial." Under this error assigned, counsel insist, first, "that the verdict is not sustained by sufficient evidence and is contrary to law." The argument of counsel for appellant upon this branch of their case is predicated upon the fact that the witnesses who gave an opinion as to the speed of the train generally put it at from "four to eight miles an hour," and that the plaintiff had an open and unobstructed view of the track from any point inside of the right of way extending 40 feet west of the track for 325 feet in the direction from which the train approached, and that both the appellee and the train were moving slowly while approaching the crossing, and the further fact that appellee stopped on the track and was looking and listening when he was struck by appellant's train.

Much of what we have already said in relation to the sufficiency of the complaint applies with equal force to this reason for new trial. Following their mistaken notion of the allegations of the complaint, counsel leave out of account entirely the fact that there were several witnesses who testified to facts that tended to show that the appellant's

trainmen failed to give the statutory signals and that there was proof that the headlight was so defective that it had the appearance of a switchlight or a lantern, and reflected but little or no light on the rails. In this connection, we deem it proper to quote from the testimony of some of the witnesses. One witness who was going in the direction of the train and was looking out for it, and met it near the whistling post, and who had every opportunity to hear the signals, testified that he heard no signals—neither the whistle nor the bell—either before or after the train passed him. This witness also says: “I observed there wasn't much of a headlight, *scarcely any*; that is what fooled me. I saw the light, *but thought it was a switchlight*. The light was very dim; *it did not make as much light as an ordinary lantern*. The train was almost on me before I saw it.” (Our italics.) Another witness testified that he did not hear the bell, and that he “observed the headlight at Brook. Could not see there was any light there, unless you got straight in front of the engine. The bull's eye was smokey.” Another witness testified: “In fact, I thought they had no headlight; stepped on the pilot and looked at the headlight. The lamp was an ordinary kerosene burner, and it was smoked down to within an inch and a half of the lower part of the globe *black as my hat*. * * * You could not observe a blaze from standing in front of the engine there. There was absolutely no reflection on the rails. * * * The lower one and one-half inch of the globe was not smoked, the rest was *perfectly black*.” Another witness testified: “Stepped in front of engine; saw glass, smokey and dirty from some cause, and the light was very indistinct. Did not seem to be any more light than from an ordinary lamp.” There were other witnesses who testified to not hearing the signals given. But in view of the well-established rule of this court, that indulges all presumptions in favor of, rather than against, the general verdict, and sets it aside only where there is a total failure of evidence on some material issue, we deem it useless to quote further from the evidence.

Among the negligent acts charged in the complaint against the appellant, as being the proximate cause of the appellee's injury, were the appellant's omission to give the statutory signals and the imperfect headlight used on the engine of the train that injured appellee, and these, together with the speed of the train, constituted the negligent acts of the appellant complained of. In view of the evidence above referred to, we do not think the speed of the train controlling in this case, but there was evidence from which the jury may have concluded that the speed of the train was faster than the witnesses generally put it. But for the purposes of this case, we think it was enough, if the jury believed from the evidence that the statutory signals

were not given, and that the headlight was of the character testified to by the witnesses. Proof on every averment in the complaint is not always necessary. This is true, we think, in the case before us.

The case of *Indiana Clay Co. v. Baltimore, etc., R. Co.*, 31 Ind. App. 258, at pages 262, 263, 67 N. E. 704, at page 707, we think in point in this case. In that case, this court uses the following language: “Proof of either act of negligence charged, if it was the proximate cause of the injury was sufficient.” This case was tried upon the theory that proof of either act of negligence charged, if it was the proximate cause of the injury, was sufficient, and this theory was adopted and acquiesced in by appellant, as evidenced by instruction No. 4 tendered by it and given by the court, which is as follows: “Plaintiff's complaint avers four separate acts of negligence on the part of the defendant, one or more of which negligent acts must be proven by the preponderance of the evidence, and if you believe from the evidence that the plaintiff has failed to prove the defendant's failure to comply with the statutory sounding of the whistle and ringing of the bell as the train approached the station at Brook, and that the headlight was burning, even if but dimly, and that the speed of the train was not unreasonable at the time of the collision with plaintiff's vehicle and team, then your verdict should be for the defendant.”

To run a railroad train, on a dark night, without a headlight, across a much-traveled public highway or street in a town, might of itself be an act of negligence, and, if such negligence resulted in injury to a traveler who was attempting to cross the track, and who was himself without fault and was injured solely on account of such negligence of the railroad, and without in any way himself contributing to such injury, such railroad would be liable for such injury. 23 Am. & Eng. Ency. Law, page 575; *East St. Louis R. Co. v. O'Hara*, 150 Ill. 580, 37 N. E. 917; *Ohio, etc., R. Co. v. Hill*, Adm'x, 7 Ind. App. 255-260, 34 N. E. 646. The failure to give the statutory signals at railway crossings is per se negligence and renders the railroad company liable for injuries to persons caused by such failure, where such person is himself without fault and in no wise contributed to such injury. *Pittsburgh, etc., R. Co. v. Burton*, supra; *Baltimore, etc., Ry. Co. v. Conoyer*, supra. If there is any evidence to support the verdict, this court cannot grant a new trial on the grounds that the evidence was insufficient. *Robbins v. Spencer et al.*, 140 Ind. 483-487, 38 N. E. 522, 40 N. E. 263; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19.

In view of the evidence above quoted, this court cannot say that there was no evidence tending to support the verdict; nor can this court say, as a matter of law, that the appellee was guilty of contributory negligence. This is so, notwithstanding the appellee's own statement that he stopped on the track

as he was crossing, and was looking and listening for a train when hit by the same. There was no evidence showing that the appellant, at the time he stopped, knew that he was in fact stopping on the track, and the jury may have concluded from the other evidence in the case that on account of the dark and stormy condition of the night, the appellee did not in fact know or realize that his horses were on the track until it was too late to get off, after discovering the approaching train.

There was also evidence from some of the witnesses to the effect that the appellee's memory, since the injury, was bad, and that his mind has been affected. It is so improbable that one in his senses would deliberately or knowingly stop his team upon the railroad track in front of an approaching train that the jury doubtless concluded from the evidence that the appellee either did not know that his team was on the track when he stopped, or that when he saw the approaching train he became excited and frustrated, and in a moment of indecision stopped his team, not knowing whether to go forward or backward; or they may have concluded that from the lack of mind or memory he failed to give an accurate account of what happened at the time of his injury. In any event, the jury had a right to take into account all the evidence as to conditions and surroundings of the appellee on the night of his injury; the darkness of the night; the wind and the rain; the obstructions to his view; the evidence upon the subject of the appellant's failure to give the statutory signals; the evidence that the train was moving down grade with little or no steam and making no noise that could be heard any distance; and the evidence that the appellant was operating said train with a headlight that was calculated to mislead and deceive the traveler about to cross the tracks, rather than to warn him of the approaching train. These facts were all testified to by witnesses and were proper matters to be considered by the jury in determining the proximate cause of the injury to the appellee, and whether or not the appellee himself contributed thereto. The conclusion to be drawn from this evidence was, to put it most favorable to appellant, one about which honest men might differ. In such case, the verdict of the jury should not be disturbed by this court.

Reasons 4, 5, and 6 for a new trial relate to the instructions given in the case. The ground for a new trial calls in question the instructions given by the court on its own motion, is joint, and is not argued by counsel. It is well settled by the decisions of this and the Supreme Court that unless all the instructions jointly alleged to be erroneous are bad, the contention that one, or some of them, are bad is not available. *Central Union Telephone Co. v. Sokola, Adm'r*, 34 Ind. App. 449, 73 N. E. 143; *Osburn v.*

State, 164 Ind. 262-269, 73 N. E. 601. By their failure to argue any of the instructions given by the court upon its own motion, and to point out any defects in either of the same, counsel admit their correctness. *Young v. Montgomery*, 161 Ind. 68, 69, 67 N. E. 684; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542-582, 26 N. E. 178; *Louisville & Nashville R. Co. v. Williams*, 20 Ind. App. 576-582, 51 N. E. 128.

What we have said as to grounds for a new trial, relating to instructions given by the court on its own motion, applies with equal force to the reasons for a new trial relating to the refusal to give those tendered by the appellant. Instruction numbered 5, tendered by appellant and refused by the court, was in all its material and essential parts covered by instruction No. 2, given by the court upon its own motion, and instruction No. 6, given at the request of the appellant, so that there was no error in refusing instruction No. 5. This being true, the joint assignment of error as to the instructions refused under the authorities, *supra*, would not avail counsel anything. But we have examined the other instruction refused, to wit, No. 17, asked by appellant, and are of the opinion that no error was committed by its refusal, because, in so far as it was proper and expressed an accurate statement of the law, it was covered by other instructions given by the court, and especially by instruction No. 14, given at the appellant's request. By ground 4 of their motion for a new trial, counsel assign as error the giving by the court of "each of the several instructions" requested to be given by the appellee. These instructions are lengthy, and we deem it unnecessary for the purposes of this opinion to incumber it with a copy of the same. Counsel's objection to appellee's instruction No. 1, "that it failed to require the jury to find that when appellee looked and listened, he failed to see and hear," if tenable, is, we think, met by the clause in the instruction which immediately follows the requirement therein to look and listen, namely, the clause that required the jury to find that appellee then "used care commensurate with the danger." There were also other instructions given at the request of the appellant that presented this phase of the case as favorable to appellant as the law warrants. Instruction No. 2 of appellee, complained of by appellant, sets out the statute requiring the statutory signals, and then follows with comments and observations thereon, which seems to be an exact copy of the expression of the Supreme Court of this state in relation thereto, in the case of *Pittsburgh, etc., R. Co., v. Burton*, *supra*, 139 Ind., at pages 375, 376, 37 N. E. 150, 38 N. E. 594. Instruction No. 4, given at the request of appellee and complained of by appellant, is in substance an exact copy of an instruction held sufficient by the Supreme Court in the case of *Terre Haute R. Co. v. Brunker*, *supra*, at pages

551 and 552, 128 Ind., 26 N. E. 178, and is not subject to the objection urged by counsel. So with instruction No. 6; it, in its essential features, is a copy of the language quoted with approval by this court in the case of Louisville, etc., R. Co. v. Williams, supra, at page 583, 20 Ind. App., 51 N. E. 128.

We have examined all the instructions given in this case, and, taking them as an entirety, their statement of the law is substantially correct and as favorable to appellant as the authorities warrant. There was therefore no prejudicial error in giving or refusing of any of the same. We have examined and considered all the errors assigned and discussed by appellant's counsel in their brief and find that no error was committed that prejudiced the rights of appellant.

Judgment affirmed.

MYERS, C. J., and FELT, LAIRY, ADAMS, and IBACH, JJ., concur.

(48 Ind. App. 351)

HINSHAW v. SECURITY TRUST CO.*
(No. 7,504.)

(Appellate Court of Indiana, Division No. 1.
Jan. 12, 1911.)

1. PLEADING (§ 34*)—EXECUTORS AND ADMINISTRATORS (§ 227*)—REVIEW—SUFFICIENCY OF COMPLAINT.

If the facts stated in a complaint are such that judgment thereon would bar another action for the same cause, such complaint will be held sufficient when first objected to on appeal; and a claim against an estate on two notes alleged to have been executed by decedent, not setting out a copy of the notes, nor accompanied with a copy thereof as an exhibit, and not showing affirmatively that such notes were signed by decedent in his lifetime, will be held sufficient when attacked for the first time in the Appellate Court, where it appears in the record that two notes signed by decedent, and corresponding in dates and amounts to those described in the claim, were put in evidence at the trial without objection and the signatures of decedent admitted, though the claim might have been subject to demurrer in the lower court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 74; Dec. Dig. § 34.* Executors and Administrators, Dec. Dig. § 227.*]

2. LIMITATION OF ACTIONS (§ 160*)—NEW PROMISE.

Burns' Ann. St. 1903, § 303, provides that no acknowledgment shall be sufficient to take the case out of the statute of limitations, unless in writing signed by the party to be charged. Section 305 provides that no indorsement of payment upon an instrument in writing by or on behalf of the party to whom the payment is purported to be made shall be sufficient to take the case out of the statute. Held, that indorsements on notes in the handwriting of the payee of part payment thereon are not sufficient to take the debt out of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 638-641; Dec. Dig. § 160.*]

3. APPEAL AND ERROR (§ 533*)—RECORD—CONTENTS—OPINION OF TRIAL COURT.

As the law does not require a trial court to deliver his opinion in writing, it is not part

of the record, and, even though copied into the record of the lower court, and embodied in the record on appeal, it cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.*]

4. APPEAL AND ERROR (§ 931*)—REVIEW—FINDINGS—CONSTRUCTION.

Where no request is made for special findings of fact, a finding of the court, stating a part or all the facts, will be treated on appeal as a general finding, and the facts specially found disregarded, and the same rule applies to a written opinion filed by the trial court, concluding with a general finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

5. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTION—CONDUCT OF TRIAL COURT.

On appeal, the trial court will be presumed to have considered all the evidence admitted, in the absence of anything in the record showing the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

6. EVIDENCE (§ 70*)—PRESUMPTIONS—EXISTENCE OF NOTE.

A note standing alone authorizes the presumption that it is evidence of a debt from the payor to the payee, but such presumption may be rebutted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 91; Dec. Dig. § 70.*]

7. DESCENT AND DISTRIBUTION (§ 116*)—ADVANCEMENT—INTENT.

An advancement from a parent to a child, as a general rule, is a question of intent which may be shown by the declarations of the parent on the subject, at or near the time when the money or other property was turned over to the child.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 427; Dec. Dig. § 116.* Evidence, Cent. Dig. §§ 1059, 1066, 1188.]

8. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

Findings of fact on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

9. EVIDENCE (§ 377*)—DECEDENT'S ESTATES—ALLOWANCE OF CLAIMS—INVENTORIES.

On trial of a claim against an estate presented by an administrator, exhibits alleged to be inventories of the property of claimant's decedent, in her handwriting, were properly excluded, in the absence of preliminary proof showing that the exhibits were in her handwriting, or evidence as to the time when, or the circumstances under which, the entries were made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1647; Dec. Dig. § 377.*]

10. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

On trial of a claim against an estate, where the executor filed a set-off, the exclusion of evidence offered by claimant, bearing upon the issues tendered by the set-off, was not prejudicial to claimant, where the finding on the issue was in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
*Rehearing denied. Transfer to Supreme Court denied.

Appeal from Probate Court, Marion County; Frank B. Ross, Judge.

Proceedings by the Security Trust Company, executor for Pierre Gray. From a judgment disallowing the claim of Benjamin E. Hinshaw, administrator de bonis non of Eliza J. Gray, and against the executor on a set-off, claimant appeals. Affirmed.

Morton S. Hawkins, Frank B. Jaqua, and Clarence R. Martin, for appellant. W. L. Taylor, L. B. Ewbank, and John W. Kern, for appellee.

LAIRY, J. This is an appeal from a judgment of the probate court of Marion county founded on a claim filed by the appellant against the appellee. The appellee is the executor of the last will and testament of Pierre Gray and the appellant is the administrator de bonis non of the estate of Eliza J. Gray, who in her lifetime was the mother of Pierre Gray. The claim filed in favor of the mother's estate was based upon two notes, one for \$3,000 and one for \$1,000, and was in words and figures as follows: "Estate of Pierre Gray, deceased, to estate of Eliza J. Gray, two notes payable to Eliza J. Gray, for \$1,000 and \$3,000 respectively, dated April 5, 1897, 6 per cent. interest after date, due one day after date, payable at the Indiana National Bank of Indianapolis, Ind." Notation on face of \$1,000 note: "Collateral Stock Certificate No. 94, 10 shares First National Bank, Noblesville, Ind." On \$3,000 note: "Collateral Stock Certificate No. 93, 50 shares First National Bank Noblesville, Ind." Three indorsements on backs: "Interest paid on December 24, 1897. Interest paid on June 24, 1898. April 24, 1908, principal and interest due, nine years and four months, \$6,240." The claim was properly verified.

To this claim, in addition to the answer that the law put in, the appellee filed an answer in set-off alleging in substance that the estate of Eliza J. Gray, at the time of her death, was indebted to Pierre Gray in the sum of \$6,240; that on the 14th day of February, 1905, and from that time forward until the death of Pierre Gray, on the 25th day of December, 1907, the said Pierre Gray, Eliza J. Gray, and Bayard Gray were the equal owners in fee simple of a residence property situate on North Pennsylvania street in Indianapolis, Ind., and that said Eliza J. Gray, who was the mother of Pierre Gray, resided in the same residence property with Pierre Gray and his wife; that a contract was entered into, whereby Pierre Gray was to pay one-third of the expenses of maintaining the property, Eliza J. Gray one-third, and Bayard Gray one-third; that after said contract was entered into, Eliza J. Gray continued to live in the residence property, and that all the expenses heretofore referred to were paid by Pierre Gray, amounting in the aggregate to about \$2,955; that Eliza J. Gray never paid the one-third of

said expenses in accordance with agreement, and that she was at the time of her death indebted in the sum of one-third of the aggregate of said expenses, which the defendant below asked to have set off against the claim filed by the administrator of the estate of Eliza J. Gray. The cause was submitted to the court without the intervention of a jury, the evidence heard, and a general finding rendered by the court against the claimant, and also against the defendant on the set-off. A motion for a new trial was filed by the claimant, which was overruled, and judgment entered in the court below against the estate of Eliza J. Gray on the claim filed by the administrator, and also against the estate of Pierre Gray in the set-off filed by his executor. From this judgment, the administrator of the estate of Eliza J. Gray appealed to this court.

Appellee has assigned a cross-error in which he alleges that the claim filed in the court below does not state facts sufficient to constitute a cause of action. The question presented on the cross-error will be first considered, for the reason that if the claim filed is insufficient to sustain a judgment in favor of appellant, the judgment below in favor of appellee must be sustained, regardless of any other question presented. There was no demurrer filed in the court below to the claim; its sufficiency being challenged for the first time by assignment of error in this court. Had the claim been challenged by demurrer, there might have been serious doubts as to its sufficiency, for the reason that no copies of the notes upon which the claim is based are set out in the claim or filed with it as an exhibit; nor does the claim show affirmatively that said notes were signed by Pierre Gray in his lifetime. We think, however, that the claim is sufficient when attacked for the first time in this court. It appears in the record that two notes signed by Pierre Gray, and corresponding in dates and amounts to those described in said claim, were introduced in evidence at the trial. No objection was made by appellee to the introduction of this evidence, and the signatures of Pierre Gray to these notes were admitted. It has been repeatedly decided that, if the facts stated in a complaint are such that a judgment thereon would bar another action for the same cause, such complaint will be held sufficient when first attacked on appeal.

The only error relied on for reversal is the overruling of the motion for a new trial. This motion is very voluminous, covering 50 pages of the record. In determining, therefore, what rulings of the lower court are relied on for reversal, this court will consider only such questions arising on the motion for a new trial as have been presented and discussed by appellant in his brief. All other questions will be considered as waived.

Before considering any of the questions presented, it is well to state concisely what the points were in issue at the trial. Under the

issues as formed, any evidence could have been offered that would tend to defeat the claim on any ground or to prove the set-off pleaded. The evidence, however, was directed to only three questions of fact, namely, the statute of limitations, the question of advancement, and the facts pleaded by way of set-off.

The notes described in the claim and introduced in evidence were due, as disclosed by the notes themselves, more than 10 years before the date on which said claim was filed. The notes were therefore prima facie barred by the statute, but the appellant sought to prove that interest had been paid by Pierre Gray on both of said notes within the period of the statute of limitation.

The first question presented by the appellant is the alleged failure of the court below to consider certain evidence admitted at the trial, in arriving at its finding. As tending to prove payments on the notes within the period of the statute of limitations, the appellant introduced in evidence certain indorsements on the back of each of the notes. These indorsements were in the handwriting of the payee of the notes and were not sufficient of themselves to take the debt out of the operation of the statute. Burns' Rev. St. 1908, §§ 303, 305.

The court also admitted in evidence, as bearing on this question, a book marked Exhibit 6, pages of which are copied into the record. As disclosed by the record, counsel for appellant at the time he offered this evidence, stated that the book was in the handwriting of Eliza J. Gray and showed interest collected by her, upon each of the notes in suit, from the year 1899 down to and including the year 1907. It is contended by counsel for appellant that, after admitting this evidence, the court refused to consider it in deciding the case, and that for this reason the appellant was deprived of the benefit of material and competent evidence in his behalf, as completely as though the court below had excluded it. If the record shows that the court did not consider this evidence in reaching his decision, this would constitute reversible error, provided, of course, that the evidence was material and in other respects proper to be considered.

The question then arises, Does the record show that the court below did not consider the evidence in question? A portion of the record is brought to this court, by a writ of certiorari, from which it appears that after the trial judgment had been rendered in the court below, a nunc pro tunc entry was made by which it was sought to embody in the record, as a part of the finding and judgment, an opinion of the trial court purporting to have been delivered in writing by the judge of said court at the time the judgment and finding were entered. We are asked to consider this opinion for the purpose of determining what evidence was considered and what evidence disregarded

by the court in reaching his decision. No special finding of facts was requested and none was made. The law does not require that a trial court shall deliver his opinion in writing. If such an opinion is delivered, it has no proper place in the record; and, even though such an opinion is copied into the record of the lower court and afterward embodied in the record on appeal, this court cannot consider it for any purpose. Where no request is made by any party for a special finding of facts, a finding of the court stating a part or all of the facts will be treated on appeal as a general finding, and the facts specially found disregarded. Northcutt v. Buckles, 60 Ind. 577; Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400. The same rule is applicable to a written opinion filed by the trial court, concluding with a general finding. The opinion must be disregarded and the finding treated as a general one. The court is presumed to have considered all of the evidence admitted and, as the record does not overcome this presumption, no available error is shown on this point.

It is next contended by the appellant that the decision of the court is not sustained by the evidence. It is strongly urged that the evidence bearing upon the question of the payment of interest within the period covered by the statute of limitations is uncontradicted and tends clearly to prove such payments. If no question were in issue other than the statute of limitations, and the decision of the trial court rested solely on that ground, a serious question would be presented as to the sufficiency of the evidence to sustain a decision in favor of the appellee on that issue. There was, however, another issue of fact presented to the court below, upon which there is a conflict of evidence. Mrs. Kate Gray, the widow of Pierre Gray, testified that after the death of Isaac P. Gray, his widow, Eliza J. Gray, received from the government a sum of money amounting to eight or nine thousand dollars; that she gave a part of the money to Pierre and a part of it to Bayard; that she said they were not to pay it back; that she also said that it might be a mistake for old people to divide their money with their children, as their children might get tired of taking care of them; that after that time the mother paid no part of the expenses of maintaining the house. In the cross-examination, the same witness testified that the matter was talked over a number of times before the money was turned over, and that Mrs. Eliza J. Gray said, in the presence of Pierre, Bayard, and the witness, at about the time the money was turned over, that it was never to be paid back. There was also evidence from which the trial court could infer that the money referred to by this witness in her testimony was the same as that evidenced by the notes in suit, and that the notes were executed as evidence of

an advancement, and not of a loan. It is true that a note standing alone would authorize the presumption that it was evidence of an indebtedness from the payor to the payee, but this presumption may be rebutted. An advancement of money or other property from a parent to a child, as a general rule, is a question of intention, and this intention may be shown by the declarations of the parent on the subject, made at or near the time when the money or other property was turned over to the child. There is evidence in the record to sustain the judgment of the trial court on this issue. It is not the province of this court to weigh conflicting evidence, and therefore we cannot disturb the judgment of the court below upon the ground that the decision is not sustained by the evidence.

Complaint is made of the ruling of the trial court excluding from evidence Exhibits 3, 4, and 5. These exhibits, according to the statements made by counsel at the time they were offered, were inventories of the property of Eliza J. Gray. The testimony of Ed. S. Jaqua shows that these exhibits are in the handwriting of Eliza J. Gray; but there is no proof as to the time when, or the circumstances under which, these schedules or memoranda were made. An examination of these schedules shows that they are not original accounts between Mrs. Gray and her son, in which entries had been made from time to time as the various transactions occurred; but they appear to be, rather, memoranda made by Mrs. Gray at some time for her own convenience and as an aid to her memory. Writings and memoranda so made are self-serving in their nature, and have never been considered as competent evidence in favor of the person making them. *Barber v. Bennett*, 58 Vt. 476, 4 Atl. 231, 58 Am. Rep. 565; *Harrison v. Cordle*, 22 Ala. 457; *Treadway v. Treadway*, 5 Brad. 478; *Johnson v. Zimmerman*, 42 Ind. App. 165, 84 N. E. 541; *Rouyer, Adm'r. v. Miller*, 16 Ind. App. 519; *Elliott on Evidence*, § 470.

Complaint is also made by appellant of the ruling of the trial court in excluding from evidence two bank books of Eliza J. Gray, trustee, in account with Fletcher's Bank, 1895-1908. The statement of counsel at the time these books were offered in evidence indicated that they were offered as evidence bearing upon the issue tendered by the set-off. As the finding on this issue was in favor of appellant, he could not have been harmed by this ruling.

We find no available error in the record.
Judgment affirmed.

MYERS, C. J., and FELT, HOTTEL, IBACH, and ADAMS, JJ., concur.

(207 Mass. 251)

COMMONWEALTH v. DE VICO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1911.)

ASSAULT AND BATTERY (§ 85*)—EVIDENCE OF CHARACTER.

In a prosecution for assault, the reputation of the person assaulted for being a quarrelsome man is admissible; and defendant may also show his good character, as tending to prove the improbability of his having committed the crime; but evidence as to whether he was of an excitable disposition, or whether he was a quarrelsome man, is inadmissible.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 133; Dec. Dig. § 85.*]

Exceptions from Superior Court, Suffolk County; Charles A. De Courcy, Judge.

Guiseppa De Vico was convicted of assault with a dangerous weapon, and brings exceptions. Exceptions overruled.

Michael J. Dwyer, Asst. Dist. Atty., for the Commonwealth. E. M. Shanley, for defendant.

MORTON, J. The defendant was indicted for an assault with a dangerous weapon. There was a verdict of guilty and the case is here on the defendant's exceptions to the exclusion by the presiding justice of the following questions: "Is he [meaning the defendant] a man that becomes excited quickly?" "Is he a man of excitable disposition?" and "Is he a man of quarrelsome nature?" The witness, who was the defendant's employer and who was called by him, was asked by the defendant what his (the defendant's) general reputation for peacefulness was, and answered: "I know him in the shop. I live out of town and he lives in the city." He was then permitted to testify without objection that the defendant worked every day from 7 in the morning to a quarter past 6 at night and that he never saw him drink. He was then asked without objection, "Is he a quarrelsome man?" and he answered, "Not in my place." The defense was that the defendant acted in self-defense. He so testified in effect. But manifestly the fact that he was of an excitable disposition had no tendency to show that he acted in self-defense. The most that it would tend to show would be that he might have acted more hastily and have been more easily provoked than would have been the case with a man of cooler temperament. But that would have had no tendency to show that he was acting in self-defense. If the offer had been to show that his alleged assailant had the reputation of being a quarrelsome man, the evidence would have been admissible. *Com. v. Tircinski*, 189 Mass. 257, 75 N. E. 261, 2 L. R. A. (N. S.) 102. But what the defendant offered to show was that he himself was of an excitable disposition, which as we have said had nothing to do with the question whether he acted in self-defense. As to the question whether he was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a man of a quarrelsome nature it perhaps would be enough to say that the same question, with a trifling variation in form, had been previously put and answered without objection, and the question to the exclusion of which exception was taken might well have been ruled out for that reason. But we prefer to rest our decision on the broader ground that, while the defendant in a criminal case may put in his good character as tending to show the improbability of his having committed the crime with which he is charged, that evidence must be limited to his general reputation in regard to the elements of character involved in the commission of the alleged offense. *Com. v. Nagle*, 157 Mass. 554, 32 N. E. 861; *Day v. Ross*, 154 Mass. 13, 27 N. E. 676; *Com. v. Madocks*, 207 Mass. 152, 93 N. E. 253; *State v. Roderick*, 14 L. R. A. (N. S.) 704, note; *State v. Hull*, 20 L. R. A. 609, note. The private opinion of a witness in regard to the matter is irrelevant and immaterial. The defendant was allowed to show what his general reputation for peacefulness was; but apparently he either was not satisfied with that or with the answer, and desired to have the witness go farther and state, in substance and effect, what conclusion he had himself come to or what opinion he had formed in regard to the defendant's disposition. This he could not do.

Exceptions overruled.

(307 Mass. 377)

KOSTOPOLOS v. PEZZETTI.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. LANDLORD AND TENANT (§ 25*)—LEASE—VALIDITY.

A lease for two years need not be under seal.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 69; Dec. Dig. § 25.*]

2. PRINCIPAL AND AGENT (§ 175*)—UNAUTHORIZED ACT OF AGENT—RATIFICATION.

A lease executed by an agent in his own name, not within his authority as agent of the conservator of the owner of the property, is invalid in the first instance; but where the conservator ratifies it, it becomes an ordinary agreement concerning real estate, binding on the conservator, and the tenant may not be ejected during the term of the lease, either by the conservator or one claiming under him.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 663; Dec. Dig. § 175.*]

3. LANDLORD AND TENANT (§ 180*)—WRONGFUL EJECTION OF TENANT—DAMAGES.

A tenant, wrongfully ejected by force from a store, could recover the damages directly resulting from the wrong done to him, and was not limited to the value of his leasehold interest.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 723-727; Dec. Dig. § 180.*]

4. LANDLORD AND TENANT (§ 180*)—WRONGFUL EJECTION OF TENANT—DAMAGES.

A tenant, suing for a wrongful ejection by force from a store where he conducted a retail fruit business, could show the nature and extent of his business, and the extent to which it had necessarily been interrupted, and the expense which he had incurred to establish his business elsewhere; but he could not show the amount of his weekly profits for a time imme-

diately preceding his eviction, since such profits might have been unusually large, or affected by exceptional circumstances.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 723-727; Dec. Dig. § 180.*]

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Action by Anastaseos Kostopolos against Joseph Pezzetti. There was a verdict for plaintiff, and defendant brings exceptions. Sustained, and new trial ordered.

This is an action of tort to recover damages for the unlawful ejection of plaintiff by defendant from a store wherein plaintiff conducted a retail fruit business. The premises were owned by Marion E. Donnell, and Arthur C. Stone had been appointed conservator of her property. Plaintiff had hired the premises of said Donnell as a tenant at will. Henry F. Logan collected the rent as agent for said Donnell. After the appointment of the conservator, Logan continued to collect the rent as agent for him. The said Logan, without authority of the conservator, executed to plaintiff a lease.

Wm. H. Brown and J. H. Coakley, for plaintiff. C. W. Cushing, for defendant.

SHELDON, J. The lease given by Logan to the plaintiff did not come within the scope of Logan's agency, and was at first invalid. But the jury have found on sufficient evidence that it was ratified by Stone. It was not and did not need to be under seal, and its parol ratification made it valid as against him, whether or not it could have been enforced against Donnell the owner of the property. It then became the ordinary case of an agreement concerning real estate made by an agent in his own name, but adopted by the principal as his agreement. *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309; *White v. Dahlquist Manuf. Co.*, 179 Mass. 427, 60 N. E. 791; *Duncklee v. Webber*, 151 Mass. 408, 24 N. E. 1082. The case is not like *Lewis v. Buttrick*, 102 Mass. 412. The rights of the defendant, claiming only under Stone, were no greater than those of Stone himself. It follows that the defendant had no right to eject the plaintiff, and his requests for rulings were rightly refused.

The plaintiff's damages were not necessarily limited to the value of his leasehold interest. He had been ejected by force from premises of which he was rightfully in possession, and the business which he was there carrying on had been interrupted. He was entitled to such damages as directly resulted from the wrong done to him. He could show the nature and extent of his business and the extent to which it had necessarily been interrupted and the expense which he had been obliged to incur to re-establish his business in another shop; but he ought not to have been allowed to testify to the amount of his weekly profits for the time immediately preceding his eviction. Those profits may have been unusually large, or may have been affected by exceptional circumstances. There was nothing to indicate that they afforded

a fair measure of the value of his business for the future. See *Barnard v. Poor*, 21 Pick. 378; *Thompson v. Shattuck*, 2 Metc. 615, 619; *Greene v. Goddard*, 9 Metc. 212, 231; *Waite v. Gilbert*, 10 Cush. 177; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *Stynes v. Boston Elevated Ry.*, 206 Mass. 75, 91 N. E. 998.

For the erroneous admission of this evidence, the exceptions must be sustained; but the new trial will be upon the question of damages only.

So ordered.

(207 Mass. 553)

BRISBIN v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 6, 1911.)

1. CARRIERS (§ 320*)—DUTY OF CARRIERS—NEGLIGENCE—QUESTION FOR JURY.

Where a street car was stopped at the station with the step opposite the curved end of the platform, the railway company having charge of both construction and management of the station, when it failed to bring the car wholly alongside the platform as usual, where access would be without danger, the question whether it was negligent, so as to render it liable for injuries to a passenger by stepping into the space left between the car step and the platform, was for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1815-1826; Dec. Dig. § 320.*]

2. CARRIERS (§ 347*)—INJURIES TO PASSENGERS—PERSONAL INJURIES—TAKING UP PASSENGERS—DUE CARE OF PERSONS—QUESTION FOR JURY.

In an action for injuries received by plaintiff in attempting to board a street car, which was not put in its proper place beside the platform, but was stopped with only eight inches of the car step adjacent to the straight part of the platform, the remaining two feet or more of the platform curving sharply away, whether the plaintiff used due care is a question for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1846-1897; Dec. Dig. § 347.*]

3. CARRIERS (§ 328*)—DUE CARE OF PERSONS INJURED—STANDARD FOR DETERMINING.

The rule for determining whether a person, injured in attempting to board a street car by stepping into the space between the curved end of a platform and the car steps, used due care, is not whether by looking she could have seen the open space, but whether, under the circumstances of the accident, an ordinarily prudent person would have discovered the opening.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1367-1369; Dec. Dig. § 328.*]

Exceptions from Superior Court, Middlesex County; Edgar J. Sherman, Judge.

Action by Frances A. Brisbin against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions sustained.

Louis S. Thierry, for plaintiff. Hugh D. McLellan, for defendant.

RUGG, J. The plaintiff was rightfully in the upper level of the Sullivan Square station of the defendant awaiting one of its

cars bound for Medford Hillside. This car arrived and departed on the same track, the rear of the car as it came in being the front as it went out. The platform, alongside which this car came, was of ample length as a stand for two cars without either being opposite its curve. It was straight, except that its outward end was the arc of a circle, whose radius was $23\frac{1}{4}$ inches. It was therefore $46\frac{1}{2}$ inches wide as it began to grow narrower. The custom of the defendant was to receive passengers into a car at this platform by the rear door as it came in. The place was light, and the plaintiff was one of a considerable number waiting. She was familiar with the station and the customs as to its use. As the Medford Hillside car came into the station, instead of moving along the platform far enough so that its entire length, including its rear step, would be opposite the straight part of the platform, it stopped so that of the rear step (which was about 3 or $3\frac{1}{2}$ feet in length) only about 8 inches was opposite the straight part of the platform. The result was that only 8 inches of the car step was adjacent to the station platform, and for its remaining 2 feet or more the platform curved away regularly from substantially nothing to $23\frac{1}{4}$ inches, and its extreme end was at or near the end of the step. According to the custom of the defendant, passengers were expected to board the car in this position. The plaintiff noticed that the car did not come up to its proper place, but she went to it immediately and tried to get on, and fell off the platform and received injury, to recover for which this action is brought. The plaintiff testified that there was "quite a crowd in front" of her, and that "there were people ahead of me, of course, so that I could not see the platform," and that she was not thinking of the end of the platform at all and did not look down to observe her footing, and "was aiming to get into the car," and to the question, "If you had looked down could you have seen that there was a place there that you would fall off?" answered, "If I had tried to peek around through the crowd I might possibly have seen it." The station was in the control of defendant, both as to construction and management. It might have been found to be negligent in failing to bring its car wholly alongside its platform as usual where access would be without danger.

Although the question of the plaintiff's due care is close, we incline to the opinion that it was for the jury. The evidence appears open to the construction that while the plaintiff was walking upon a platform less than 4 feet wide toward the car in the ordinary way with a crowd, which prevented her convenient view of the platform, and which may have somewhat impelled her movement involuntarily, and was in the act of getting

toward the car door, she suddenly found herself over the edge of the platform at or near its end. It is not certain from the evidence whether she fell off the end of the platform or in the space between it and the car which for some distance may have been found to have been 18 inches or more in width. Her eyes might have been found to be fixed on the car door all the time until the fall. By an unusual and negligent act of the defendant, the place where the plaintiff must go was perilously near the end of the platform, and the distance from the platform to the car step, which should have been and usually was uniform and reasonably short, was increased for a large part of its width so much as to require observation to avoid risk of injury. Yet people in front of her appeared to be passing in safety into the car. Commonly no particular circumspection was required. These circumstances may have been found to relieve the plaintiff of the obligation to exercise the closest scrutiny, and to warrant a finding that the reasonable conduct of an ordinarily prudent person did not require her so to look as to discover the danger. This case falls within the rule laid down in *Plummer v. Boston Elevated Ry. Co.*, 198 Mass. 499, at pages 508 and 509, 84 N. E. 840; *Anshen v. Boston Elevated Ry. Co.*, 205 Mass. 82, 91 N. E. 157.

In accordance with agreement of the parties let the entry be:

Judgment for the plaintiff in the sum of \$500.

(207 Mass. 457)

KINGSTON v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

CARRIERS (§ 318*)—INJURY TO PASSENGER— NEGLIGENCE—EVIDENCE.

Evidence in an action by a passenger for injuries received by slipping on the muddy step of the car while alighting, held sufficient to sustain a finding that it was the duty of the conductor under the carrier's rules to clean the step and put sand or sawdust on it, whenever necessary, so as to render the company liable for injuries due to his failure so to do.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 318.*]

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by Marie Kingston against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Coakley & Sherman and Roland H. Sherman, for plaintiff. Choate, Hall & Stewart, for defendant.

LORING, J. The plaintiff in this case testified that in alighting from one of the defendant's cars between 3 and 4 o'clock in

the afternoon of February 16, 1907, she slipped on slime or mud which she testified "was on all the step" and was an inch thick. The only exceptions now before us are exceptions taken to the refusal of the court to direct a verdict for the defendant and to rule that on all the evidence there was no evidence of negligence of the defendant or of its servants. The ground on which the defendant now seeks to support these rulings is that the car in question was taken out of the barn at Forest Hills at 2 o'clock and that it was then clean; that the accident happened on the second trip out from Boston; that on the whole of the first trip in to Boston and out to Forest Hills the step in question was not used, it being on the left side of the car, which was run on a double track; and that this step did not begin to be used until the crew changed ends at Forest Hills at the end of the first round trip. The argument put forward is that the slime or mud must have accumulated during this second trip and that a carrier cannot be held to be negligent for the natural tracking of mud upon its vehicle during the course of a journey.

There are some indications in the bill of exceptions that the case was tried on the footing that the car did leave the car barn at Forest Hills at 2 p. m.; that it was then clean, and that the condition of the step, if it was muddy, came from the mud tracked in upon it on the second round trip. We therefore consider the case on that footing in spite of the fact that this evidence came from one of the defendant's witnesses and might have been disbelieved within the rule in *Lindenbaum v. N. Y., N. H. & H. R. Co.*, 197 Mass. 314, 84 N. E. 129. Even under these circumstances we are of opinion that it could not be ruled as matter of law that there was no evidence of negligence on the part of the defendant.

The proposition of law on which the defendant relies finds support in *Riley v. Rhode Island Co.*, 29 R. I. 143, 69 Atl. 338, 15 L. R. A. (N. S.) 523. But we do not find it necessary to pass upon it in this case.

In this case the conductor of the car in question testified: "That he did not clean the step when he got to Park street on his first trip, although it would have been his duty to clean it off if it had been slippery and slushy; if it had been muddy and slippery and slushy so that a person might slip on it, he certainly would clean the step off if he could." "That the only broom was at Forest Hills—he did not think there was one at Park street; that if he saw the steps were dirty, slushy and slippery for passengers, he would get down and scrape them off with his foot. On a day like that there is a little sawdust at Park street, and he had often taken sawdust and put it down, and it was a rule of the company that he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

should keep the steps in a safe condition, and it was his duty to do that if it was in an unsafe condition." "He didn't remember when he looked at them if there had been slush and mud and a slippery condition; that he would clean it off, scrape it off with his foot if there had been mud there; that he didn't think he had scraped it off at any time that afternoon, because it wasn't necessary, although he did not remember now whether he did or not. If it had been in a slippery condition even if he had scraped it off he would have put sand on there from the sand box in the left-hand rear corner under the seat; he would have put sawdust on at Park street. At Park street it was his duty to get off the car onto the platform first, and if the step had been slippery he would have taken a handful of it and scattered on to the steps; that he could not remember whether he did or not on the day of the accident."

On this evidence the jury were warranted in finding that the defendant had made it the duty of the conductor to clean the step and put sand on it provided for the purpose, whenever that was necessary to prevent passengers from slipping even if it was caused by the natural tracking of mud on the journey. That brings this case within the principle of *Stevens v. Boston Elev. Ry.*, 184 Mass. 476, 69 N. E. 338.

Exceptions overruled.

(207 Mass. 228)

GILLIS v. CAMBRIDGE GASLIGHT CO.
(two cases).

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 3, 1911.)

MUNICIPAL CORPORATIONS (§ 809)—INJURIES TO PEDESTRIAN—NEGLIGENCE.

Defendant, under an order from the owner of premises abutting on a sidewalk, delivered a load of coke and put it in through a coal hole in the sidewalk. Defendant's employé was instructed by defendant not to touch the cover to the coal hole, and an employé of the owner of the premises removed the cover, and after the coal had been put in replaced it. Plaintiff stepped upon the cover, which gave way, and she was injured. *Held* that, in the absence of any custom, there is no rule of law requiring a coal dealer to see that the cover of the coal hole on a customer's premises is replaced, when the customer himself, as owner or occupant of the premises, undertakes to replace the cover, and that defendant was not liable for plaintiff's injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

Exceptions from Superior Court, Middlesex County; Lloyd E. White, Judge.

Actions by Mary Gillis and by Collin F. Gillis against the Cambridge Gaslight Company. A verdict was directed for defendant, and plaintiffs bring exceptions. Exceptions overruled.

J. B. Valley, for plaintiffs. Henry C. Sawyer, for defendant.

MORTON, J. This case was here on the plaintiffs' exceptions to a ruling directing a verdict for the defendant and is reported in 202 Mass. 222, 88 N. E. 779. The exceptions were sustained and the case was sent back for a new trial. At that trial the jury found for the defendant and the case is now here on exceptions by the plaintiffs to the refusal of the presiding justice to give certain rulings that were requested by them and to the instructions that were given in relation to the matter to which the rulings that were requested related.

The female plaintiff, whom we shall speak of as the plaintiff, in passing along Temple Place, a public street in Boston, slipped upon the cover of a coal hole, which gave way and precipitated her into the coal hole, causing the injuries complained of. Some four or five hours before the accident the defendant, pursuant to an order from the owner and occupant of the premises to which the coal hole belonged, had delivered a load of coke which had been put in through the coal hole into which the plaintiff fell. There was only one person, the driver, with the team that delivered the coke, and the uncontradicted evidence shows that he did not remove or replace or touch the cover, or attempt to sweep or clean the rim or rabbet of the hole into which the cover fitted, and that he was instructed by his employer not to do any of these things. It appeared that the cover was removed by one McElman, an engineer in the employ of the owner and occupant of the premises, to whom the coke was delivered, and was replaced and fastened by him after sweeping out the rabbet, and that in doing this he acted under and pursuant to the instructions given him by the owner and occupant of the premises. It also appeared that McElman stood by the coal hole while the coke was being put in. The plaintiff contends that notwithstanding the instructions that were given to the driver it was the duty of the defendant and its servants to see that the rabbet into which the cover fitted was cleaned out and that the cover was properly replaced and securely fastened after the coke was delivered; and that was in substance what she requested the presiding justice to instruct the jury. The presiding justice refused so to rule, and instructed the jury in substance that if the driver was instructed by the defendant not to take off the cover, or replace it, or clean out the rabbet, and did not do or attempt to do any of these things, but the servant of the owner of the premises did them under and pursuant to the owner's instructions, then the defendant would not be liable. We think that the instructions thus given were correct. The coal hole was not on the defendant's premises, and under the circumstances of the case it owed no duty to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the plaintiff in respect thereto. If contrary to his instructions the driver had undertaken to remove the cover and replace it, and had done so in a careless manner and the plaintiff had been injured in consequence thereof, the defendant would perhaps have been liable for the driver's negligence. But in the absence of any custom or understanding in regard to the matter there is no rule of law which requires a coal dealer to see that the coal cover on a customer's premises is replaced when the customer himself as owner or occupant of the premises undertakes in person or by his servant, in the exercise of his rights as such owner or occupant, to attend to the removal and replacement of the cover. Under such circumstances it is the owner's duty and not the coal dealer's to see that the cover is properly replaced and secured. The case would or might have stood differently if the driver had joined with the servant of the owner or occupant in replacing and securing the cover or if the accident had happened while the coke was being delivered. *French v. Boston Coal Co.*, 195 Mass. 334, 81 N. E. 265, 11 L. R. A. (N. S.) 993, 122 Am. St. Rep. 257; *Wakefield v. Boston Coal Co.*, 197 Mass. 527, 83 N. E. 1116.

Exceptions overruled.

(207 Mass. 548)

CRAIG v. BOSTON ELEVATED RY. CO.
(two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. CARRIERS (§ 298*)—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE.

A street car passenger was injured while sitting down by the car giving a sudden jerk. The car started, and then stopped, and then started again. No one else in the car was thrown over. *Held*, as a matter of law, that the motorman was not negligent in the operation of the car.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.*]

2. CARRIERS (§ 295*)—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE.

The constant starting and stopping of a car to avoid collisions with carriages crossing ahead of the car, or because of cars ahead of it, does not show negligence of the motorman in the operation of the car.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 295.*]

Exceptions from Superior Court, Suffolk County; Wm. Cushing Wait, Judge.

Actions by Jenetta Craig, and by Abraham Craig, prosecuted after his death by George Craig, his administrator, against the Boston Elevated Railway Company. There were verdicts for defendant in each case, and plaintiff in each case brings exceptions. Overruled.

George S. Littlefield and Calvin S. Tilden, for plaintiffs. John T. Hughes, for defendant.

LORING, J. The plaintiff in the first action (a woman 67 years of age) had been to the theater in company with her own daughter, a Mrs. Goodwin and Mrs. Goodwin's daughter. After the theater they waited for a car at the corner of Washington and Boylston streets. The car stopped. The plaintiff entered first, followed by Mrs. Goodwin, then by Mrs. Goodwin's daughter, and lastly by her own daughter. The plaintiff, her own daughter and Mrs. Goodwin testified at the trial; Mrs. Goodwin's daughter did not. The plaintiff's story was that she went to the forward end of the car because there was but one vacant seat at the rear. To quote her own words: "She was in the act of sitting down when the car gave a sudden jerk and threw her forward. She thought she was facing toward the side of the car at the time. She was just in the act of sitting down. She was thrown forward, first with a sudden jerk, and then jerked back, and fell, she thought on Mrs. Goodwin, * * * who had followed her into the car. When she sat down her left knee began to pain, and, as a result of what happened, she suffered from pain and has a weakness in the leg." The plaintiff further testified that Mrs. Goodwin was not thrown down, but "if she hadn't been holding onto a strap, she would have gone down too," and that no one else in the car was thrown over. Mrs. Goodwin testified that there were a number of jerks near together and "violent enough to take you off your feet," but that they did not take her off her feet; that the sudden jerks threw the plaintiff off her feet into a passenger's lap, and "jerked me some, but I recovered myself by taking hold of the strap." The plaintiff's daughter testified that "the car started and then stopped, not a dead stop, and then started again"; that one motion followed the other suddenly, and that the car went "a very, very little distance" on the first start before it stopped again; that she had to support herself "by taking hold of the door frame, or it would throw me in the car"; that she did not see her mother thrown and could not do so, being behind Mrs. Goodwin and her daughter. The testimony showed that all four were safely seated, that no other persons boarded the car at the time, and that those previously in the car were seated.

We are of opinion that the evidence did not go far enough to warrant a finding that the motorman was negligent, and that the case comes within *McGann v. Boston Elevated Ry.*, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 503, 127 Am. St. Rep. 509. A jerk such as is usual might well throw a passenger "just in the act of sitting down" into the lap of a passenger next to her if the passenger was not prepared for it, and a person might well take hold of a door frame to steady himself in such a case. In *Byron*

v. Lynn & Boston R. R., 177 Mass. 308, 58 N. E. 1015, one of the witnesses testified that the motion of the car there in question "knocked me over, my hand against the sash of the window, I came near falling over the lady I gave my seat to." In spite of that it was held in that case that the evidence did not go far enough to warrant a finding that the motorman was negligent.

Mrs. Goodwin's testimony gave the explanation of the series of jerks. She testified "that it was 11:30 and people were going home from the theater." If the constant stopping and starting was to avoid collision with persons or carriages crossing ahead of the car, or because of cars ahead of it, there was no negligence on the part of the motorman. See in this connection *Timms v. Old Colony St. Ry.*, 183 Mass. 193, 194, 66 N. E. 797, and *McGann v. Boston Elev. Ry.*, 199 Mass. 448, 449, 85 N. E. 570. 15 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509.

Exceptions overruled.

(207 Mass. 280)

SULLIVAN v. REED FOUNDRY CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 3, 1911.)

1. TRIAL (§ 140*)—PROVINCE OF JURY—CREDIBILITY OF EXPERT WITNESSES.

The credibility of an expert witness is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

2. MASTER AND SERVANT (§ 276*)—DEFECTIVE APPLIANCES—EVIDENCE.

The unexplained fact that a hook broke while holding a weight much less than a sound hook of the same size should hold is evidence of the hook's defective condition.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

3. MASTER AND SERVANT (§ 286*)—INJURY TO EMPLOYÉ—JURY QUESTIONS—CONDITION OF APPLIANCES.

Whether a hook, the breaking of which while suspending a casting injured an employé, was sound or suitable, *held* under the evidence a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 286*)—INJURY TO EMPLOYÉ—JURY QUESTIONS—NEGLIGENCE.

Whether an employer was negligent in failing to ascertain the defective condition of a hook, the breaking of which while suspending a casting injured an employé, *held* under the evidence a jury question.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 286*)—INJURY TO EMPLOYÉ—JURY QUESTIONS—NEGLIGENCE.

Whether an employé injured by the breaking of a hook, while it suspended a casting, acted under his superintendent's order in hitching a chain around the casting, and whether the order was negligent, *held* under the evidence jury questions.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

Exceptions from Superior Court, Worcester County; Franklin G. Fessenden, Judge.

Action by Thomas Sullivan against the Reed Foundry Company. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

D. L. Walsh, T. L. Walsh, and O. B. O'Toole, for plaintiff. O. C. Milton, G. A. Gaskill, and F. L. Riley, for defendant.

HAMMOND, J. While the plaintiff was at work for the defendant upon a heavy casting suspended by a hook and chain, the hook broke and the casting fell upon and injured him. Of the five counts in the declaration the case went to the jury upon only the second, third and fourth. The second was under the statute and charged a defect in the ways, works and machinery; the third, also under the statute, charged negligence of a superintendent; while the fourth was at common law, charging that the defendant furnished improper, dangerous and defective machinery. The jury found on the second count for the defendant, and on the third and fourth counts for the plaintiff; and the case is before us upon exceptions taken by the defendant at the trial.

The contention of the plaintiff was that the breaking of the hook was due either to its own weakness or to a sudden strain brought upon it by a slipping of the casting in the chain, or in other words that the cause of the accident was either a weak hook or an improper hitch. The second and fourth counts seem to be based upon the former theory and the third, in part at least, upon the latter. The defendant does not argue, as indeed it could not truly, that there was no evidence of the due care of the plaintiff or that he assumed the risk.

It is strenuously urged however that there was no evidence that the hook was weak. So far as respects the testimony of the experts and of those who had made a personal examination of the hook, it must be said that there is a very strong case made out for the defendant on this point. But after all there was some conflict in this part of the evidence, and it was for the jury to say what credit they would give to Miller, the expert called by the plaintiff. Moreover, one salient fact must not be lost sight of. The hook broke while holding a weight much less than a hook of that size, if sound, should have held. That fact unexplained is of itself evidence of a defective condition. *Doherty v. Booth*, 200 Mass. 522, 86 N. E. 945, and cases cited.

And the fact, if it be a fact, that the verdict for the defendant on the second count shows that the jury found that the hook was not defective is not material. Whether upon the evidence a question should be submitted to a jury manifestly cannot be dependent upon the result which they may finally reach upon the question when it is so

submitted. Whether there is any inconsistency between the verdict for the defendant on the second count and that for the plaintiff on the fourth count is not before us. The question of the soundness or suitableness of the hook was properly left to the jury.

The defendant further says that even if the hook was defective, there is no evidence that the defendant was negligent in not ascertaining that fact. The hook had been used several months. In view of the evidence as to the material of which the hook was made, as to the length of time it had been used, and the kind of use including its exposure to fire, as to the effect reasonably to be expected therefrom upon it by way of crystallization or otherwise, and as to the lack of inspection, the question of the negligence of the defendant was for the jury. The first and third requests were properly refused.

The evidence as to the kind of the hitching, while conflicting, would warrant findings that the chain was placed around the casting in the manner ordered by Kenney, the superintendent; that this manner was improper in that the casting was likely to slip in the chain, and the hook was unfavorably placed to sustain the sudden weight likely to come upon it by such slipping; that the breaking of the hook was due to a slipping of the casting by which the hook was suddenly subjected to a strain unusually heavy and coming at an unusual angle. While upon this branch the case is close, still the questions whether in all this the plaintiff, an experienced workman, acted under the order of the superintendent, and whether the order was negligent, were for the jury. The third count was properly submitted to the jury.

Exceptions overruled.

(297 Mass. 437)

SCHENCK v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1911.)

1. COURTS (§ 190*)—MUNICIPAL COURT—JUDGMENT—APPEAL—EFFECT.

An appeal from a judgment of the municipal court of Boston vacates the judgment, and, where no further effectual prosecution of the action is had, the action is in effect discontinued, and it does not bar a subsequent action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

2. COURTS (§ 190*)—MUNICIPAL COURT—JUDGMENT—APPEAL—EFFECT.

The failure of plaintiff, obtaining a judgment in the municipal court of Boston, to file a complaint of affirmation, under Rev. Laws, c. 157, §§ 22, 23, permitting a complaint for affirmation of the judgment within a year after the appeal should have been entered, is a discontinuance of the action, where defendant, appealing from the judgment, failed to enter the ap-

peal, and the action was not a bar to a subsequent action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by Anna W. Schenck, administratrix, against the Boston Elevated Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

C. W. Bond and H. E. Perkins, for plaintiff. R. A. Sears and C. S. French, for defendant.

KNOWLTON, C. J. The plaintiff brought a suit in the municipal court of the city of Boston and obtained a judgment against the defendant. From this judgment the defendant appealed to the superior court, but by an oversight, failed to enter its appeal. By a like oversight the plaintiff failed to file a complaint for the affirmation of the judgment until after the expiration of a year from the time when the appeal should have been entered. An application for leave to enter such a complaint, filed later, having been denied, the plaintiff brought the present suit. The defendant answered, setting up the former proceedings, and the plaintiff demurred to this answer. The plaintiff having afterwards obtained a verdict, the case is before us upon the defendant's exception to an order sustaining the demurrer to this answer.

The provisions of Rev. Laws, c. 157, §§ 22, 23, permitting an entry of an appeal or a complaint, for an affirmation of a judgment, by leave of court, within a year after the appeal should have been entered and not later, contain a strong implication that a remedy must be sought in this way, if either party, after an appeal, desires to have the case go to judgment. The appeal vacates the judgment, and the statute indicates that, unless the appeal is entered and prosecuted, a complaint must be entered to obtain an affirmation of the judgment, if any effect is to be given to the decision in the lower court. The decisions have settled the law accordingly. *Campbell v. Howard*, 5 Mass. 376; *Ewer v. Beard*, 3 Pick. 64; *Ball v. Burke*, 11 Cush. 80-82; *Rice v. Nickerson*, 4 Allen, 66-68; *Wells v. Stevens*, 2 Gray, 115.

The right of a plaintiff to discontinue his action is the same after an appeal as before. *Derick v. Taylor*, 171 Mass. 444, 50 N. E. 1038; *Carpenter v. New York, New Haven & Hartford R. R. Co.*, 184 Mass. 98, 68 N. E. 28.

The appeal having vacated the judgment in the former suit and no further effectual prosecution of that suit having followed, it is as if the former action had never been brought. The plaintiff's failure seasonably to make a complaint for an affirmation of

the judgment was a discontinuance of the action. No final judgment having been entered in the case, it is not a bar to the present suit. See *Curtiss v. Beardsley*, 15 Conn. 518.

Exceptions overruled.

(207 Mass. 318)

VICKERY v. RITCHIE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. PAYMENT (§ 76*)—BY NOTE—QUESTION FOR JURY.

Plaintiff, an owner of land, and defendant, a contractor, without having a personal meeting, signed duplicate contracts for the erection by defendant of a building on plaintiff's land, and intrusted them to the architect. Through the fraud of the architect the one delivered to plaintiff stated the price to be \$33,721, while the copy delivered to defendant stated the price to be \$23,200. Plaintiff completed the building, and while in process of construction the architect delivered to him certain notes, signed by himself, on account of sums due under the contract held by plaintiff at a time when there was nothing due according to defendant's contract. The architect had no authority to make the payments, and defendant had no knowledge of them until long afterward, and repudiated all liability for any sum beyond the amounts paid by himself. The notes were subsequently applied by direction of the architect upon another contract. *Held*, in an action to recover a balance due on the contract, that the court correctly instructed the jury that the receipt of a note upon a debt is prima facie to be deemed a payment, but that it was for the jury to say whether the ordinary presumption was overcome by the facts.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 240-248; Dec. Dig. § 76.*]

2. PAYMENT (§ 39*)—INSTRUCTIONS.

Instructions, requested by defendant, that notes received by plaintiff and applied to defendant's account amounted to a payment to that extent, even if the architect subsequently directed that they be applied to some other account, provided the direction was given without the authority or consent of defendant, were properly refused, as calling for an erroneous statement of the law.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

3. DAMAGES (§ 85*)—PENALTY FOR DELAY—RIGHT TO ENFORCE.

Plaintiff and defendant signed duplicate contracts in writing, by which plaintiff agreed to construct a building on defendant's land. Plaintiff and defendant did not meet until after the contracts were signed; but the contracts were delivered to an architect, and the architect fraudulently changed the contract price, so that the contract delivered to defendant specified a much smaller sum than the one delivered to plaintiff, and defendant's contract also contained a provision allowing him \$10 per day for delay after the date at which the contract was to be completed. *Held*, in an action to recover a balance due on the contract, that the contract never took effect between the parties, and therefore defendant could not enforce his claim for delay.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 179-187; Dec. Dig. § 85.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Edward J. Vickery against John

Ritchie, Jr., upon a building contract. Plaintiff's fifth, eighth, and ninth requested instructions were to the effect that notes transferred to the contractor by the architect and applied to defendant's account amounted to a payment, even if the architect subsequently directed that they be applied to some other account, provided this direction was given without the authority or consent of defendant. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Robert W. Light, for plaintiff. Edward F. McClennen, Austin T. Wright, and Brandeis, Dunbar & Nutter, for defendant.

KNOWLTON, C. J. This case was before this court after its first trial, and was reported in 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810, where the principal facts are stated. It is now presented on the defendant's exceptions, which, as he says in his brief, relate to four subjects, namely: "First, the right of the plaintiff to recover; second, the right of the defendant to a credit of \$3,000, the amount of certain notes given in payment and subsequently paid; third, the right of the defendant to a credit of \$1,500 for certain other notes given in payment and subsequently dishonored; fourth, the right of the defendant to a credit of \$1,000 as liquidated damages for the delay from March 5, 1903, to August 13, 1903, at \$10 a day."

The right of the plaintiff to recover upon the facts found by the jury was established, upon full consideration, by our former decision, and the defendant's requests for instructions on this part of the case were rightly refused.

The various requests upon the second and third subjects to which the defendant's argument was addressed were rightly refused.

The evidence to which the requests related was that the architect fraudulently delivered to the owner and contractor what purported to be duplicate contracts signed by the parties, for the construction of a bath house, in which the price to be paid was stated as \$33,721 in the copy delivered to the contractor, and as \$23,200 in the copy delivered to the owner, and afterwards volunteered to give the contractor certain notes, signed by himself, on account of sums apparently due under the contract held by him, which stated the larger price, at a time when there was nothing due according to the terms of the contract held by the owner, which stated the smaller price. All the dealings of the parties pertaining to the contract, from first to last, until the building was substantially completed, were through the architect. The plaintiff and defendant never met. When these notes were received by the plaintiff from the architect the plaintiff supposed that they were to be applied in part payment of the price stated in his contract. Upon all

the evidence the architect had no authority to make these payments or any of them for the defendant, and the defendant had no knowledge of them until long afterward, when they had been applied by direction of the architect upon the Richardson contract, in his charge, on which the plaintiff was entitled to receive payments. There is no evidence that the defendant ever ratified the giving of these notes by the architect for the purposes for which they were given; but, on the contrary, he repudiated all liability, at any time, for any sum beyond the amounts paid by himself. Upon this evidence the judge correctly stated the law, that the receipt of a note upon a debt is *prima facie* to be deemed a payment; but he left it to the jury to say whether the ordinary presumption in the case of a payment by one who ought to pay was overcome by the facts in this case, where the notes were given by a volunteer, whose acts in this particular could have no effect upon the rights of the defendant, and were received by one who supposed they were to be applied on an express contract to pay him \$33,721, when in fact there was no such contract. Under these circumstances, the jury were not bound to find that the notes were to be taken as a payment upon the account upon a quantum meruit for labor and materials. The judge could not give the last part of the second request, that there was "no evidence tending to control this presumption in the present case." The third and fourth requests were not applicable to the case of a payment by a volunteer without knowledge of the defendant, and to a second application made before the debtor had any knowledge of the payment. The fifth, eighth and ninth requests on this subject called for an erroneous statement of the law. The judge told the jury that they had a "right to consider what were the further relations between Dwight and the plaintiff as to the change of the notes, that is, applying them on another account," and said he ruled against the defendant on the proposition maintained by him that, "as long as there was some application of these notes to the payment of his account, they could not afterwards change the application to the Richardson account." Upon the evidence, this ruling and the submission of these questions to the jury were sufficiently favorable to the defendant.

The next subject to which the defendant's argument relates arises under the tenth request for a ruling, that "the defendant is entitled to a credit of at least \$1,600 for late completion." This is founded upon a provision in the supposed contract that the plaintiff should pay \$10 per day for all time after the date at which the contract was to be completed until it was in fact completed. This contract never took effect between the

parties, and there was no foundation for the defendant's claim of this credit. The real question was what was the value of the labor and materials furnished by the plaintiff at the time and place when and where they passed to the ownership of the defendant. The instruction to the jury that they should allow to the defendant \$10 for each day of unreasonable delay of the plaintiff, if they found that there had been unreasonable delay and no waiver on the part of the defendant, was too favorable to him.

Exceptions overruled.

(207 Mass. 187)

INHABITANTS OF HAMPDEN COUNTY v. MORRIS.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 2, 1911.)

1. ALIENS (§ 68*) — NATURALIZATION — POWER OF CONGRESS.

Under Const. U. S. art. 1, § 8, giving Congress power to establish a uniform rule of naturalization and to make all laws necessary and proper for carrying the power into execution, Congress has exclusive jurisdiction over the subject of naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 117, 118; Dec. Dig. § 60.*]

2. ALIENS (§ 68*) — NATURALIZATION — JURISDICTION OF COURTS.

The courts of a state may, with the consent of the Legislature, exercise the jurisdiction conferred by Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477), providing for the naturalization of aliens, and conferring jurisdiction on courts of record in any state; but the jurisdiction must be exercised under and in conformity with the federal statute, not only in matters entering directly into the subject of naturalization, but also in matters of congressional legislation fairly incidental to the exercise of the constitutional power to deal with naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-146; Dec. Dig. § 68.*]

3. ALIENS (§ 68*) — NATURALIZATION — STATUTES.

The amount and disposition of the fees in naturalization cases may be regulated by congressional legislation, as incidental to the establishment of a system of naturalization, and a state statute in conflict therewith must yield to it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 138; Dec. Dig. § 68.*]

4. CLERKS OF COURTS (§ 35*) — FEES — NATURALIZATION PROCEEDINGS — ACCOUNTING.

St. 1908, c. 253, requiring that the fees received by the clerk in naturalization cases shall be paid over to the county treasurer, conflicts with Act Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477), providing for naturalization, conferring jurisdiction on courts of record in any state, and requiring the clerk to account for one-half of the fees collected by him, and permitting him to retain the other half, first paying the fees for any additional clerical force, and a clerk of the state court need not pay over to the county treasurer fees received in naturalization cases.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 62; Dec. Dig. § 35.*]

Report from Superior Court, Hampden County; Henry A. King, Judge.

Action by the Inhabitants of the County of Hampden against Robert O. Morris. Case reported to the Supreme Judicial Court. Judgment for defendant.

Stephen S. Taft, Dist. Atty., for plaintiff. A. P. French, U. S. Dist. Atty., and Brooks & Hamilton, for defendant.

KNOWLTON, C. J. This is an action for money had and received. The defendant is the clerk of the courts for the county of Hampden, and he has in his hands certain fees received officially for services in connection with the naturalization of aliens. The question is whether he is bound to pay over to the county treasurer the balance in his hands, in accordance with the provisions of Rev. Laws, c. 165, § 81, as amended by St. 1908, c. 253, or whether his conduct is to be governed by the statute of the United States in regard to the naturalization of aliens.

The Constitution of the United States provides (article 1, § 8) that "Congress shall have power . . . to establish a uniform rule of naturalization throughout the United States"; also "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. It is entirely clear, under this provision, that the Congress has jurisdiction over the subject of the naturalization of aliens, and that this jurisdiction is exclusive. *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *Dred Scott v. Sanford*, 19 How. 393-405, 15 L. Ed. 691; *United States v. Wong Kim Ark*, 169 U. S. 649-700, 18 Sup. Ct. 456, 42 L. Ed. 890; *Gladhill, Petitioner*, 8 Metc. 168; *Stephens, Petitioner*, 4 Gray, 559-561.

The act of Congress of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1909, p. 477]), is "An act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." This contains very full and elaborate provisions covering the whole subject, and makes many new requirements to prevent fraud, and to insure results in the interest of good citizenship. It confers jurisdiction, for the purposes of the act, upon the United States Circuit and District Courts in every state, upon the district courts for the territories, upon the Supreme Court of the District of Columbia, and upon all courts of record in any state or territory, having a seal, a clerk and jurisdiction in actions at law or in equity, or at law and in equity, in which the amount in controversy is unlimited.

If we assume that Congress could not compel the courts of a state to take jurisdiction of matters in regard to which the federal government has the exclusive right to legislate (see *Kentucky v. Dennison*, 24 How. 66-107, 16 L. Ed. 717; *Ex parte Virginia*, 100 U.

S. 339-348, 25 L. Ed. 676; *Stephens, Petitioner*, 4 Gray, 559-562), there is no doubt that such courts, at least with the consent of the Legislature of the state, may exercise this jurisdiction if it is conferred upon them by a law of the United States. *Gladhill, Petitioner*, 8 Metc. 168; *Stephens, Petitioner*, 4 Gray, 559-561; *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715; *United States v. Nisbet* (D. C.) 168 Fed. 1005; *State v. Libby*, 47 Wash. 481, 92 Pac. 350.

In this commonwealth the superior court has been exercising jurisdiction of this kind since the passage of the act of Congress of 1906, as well as before, and St. 1908, c. 253, seems to give legislative consent to this action of the court.

It is plain, however, that the jurisdiction must be exercised under and in conformity with the federal statute. All the authority of the court is derived from that statute, and no proceedings can be taken by the state court or by any officer of it in a case of naturalization, that is at variance with the statute. As to all matters that enter directly into the subject of naturalization, this is too plain for argument. It is equally true of all matters of legislation by Congress that are fairly incidental to the exercise of the power given by the Constitution to deal with this subject.

The fees prescribed by the federal statute are not all the same as those prescribed by the law of Massachusetts under which naturalization was previously conducted. The disposition of the fees is not the same under the two statutes, and the methods of procedure are very different. As all authority for action is derived from the federal law, this authority permits only such action as that law prescribes. The fees must be regulated by that law, and unless the disposition of them is a matter not fairly belonging to the general subject referred to in the Constitution, the disposition of the fees must also be as therein provided. We are of opinion that the disposition of the fees, as well as the amount of them, may properly be regulated by congressional legislation, as incidental to the establishment of a system with a view to the accomplishment of good results. Under this federal statute the clerks of the courts are required to account to the Bureau of Immigration and Naturalization for one-half of the fees collected by them, and to pay them over to the disbursing clerk of the Department of Commerce and Labor; and the other half the clerks may retain for themselves, first paying from these fees all additional clerical force that may be required in performing the duties imposed by the act. There are additional provisions for special conditions, such as the collection of fees in excess of \$6,000 in one year, which we need not consider.

The law of Massachusetts (St. 1908, c. 253) requires that all fees received by the clerk in naturalization cases, except sums expended for additional clerical assistance, shall be paid over to the county treasurer. This statute is in conflict with the federal law, and in our opinion must yield to it. This has been expressly decided by the Supreme Court of Utah in a similar case. *El dredge v. Salt Lake County*, 106 Pac. 939.

If the courts or Legislature elect to exercise the jurisdiction conferred by the federal statute, they must exercise it upon the terms and with the limitations stated in the statute. We assume that they may decline to exercise it at all; but if they choose to exercise it, they cannot depart from the statute in any particular upon which it is within the constitutional power of Congress to legislate. The amount of the fees to be charged is a proper subject for congressional regulation. So, too, in our opinion, is the disposition of the fees. Congress well might require a part of them to be paid into the treasury of the United States, where they would be available for the payment of a part of the expenses of maintaining the bureau. It cannot reasonably be contended that a state can take these fees away from the government of the United States. Congress well might think that the elaborate proceedings required by the statute impose such duties upon clerks of the courts that the interests of the public will be promoted by giving them special compensation to be taken from the fees. As this is the policy of the law under which the court is acting, the Legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer. *Farmers' National Bank v. Dearing*, 91 U. S. 81, 23 L. Ed. 196; *Davis v. Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700; *Central National Bank v. Pratt*, 115 Mass. 539, 15 Am. Rep. 138; *Griswold v. Pratt*, 9 Metc. 16; *Parmenter Manufacturing Company v. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

St. 1908, c. 253, relied on by the plaintiff, and other similar statutes, have for their object the limitation of the compensation of the clerks for all official services to the salaries prescribed by law. If the Legislature had seen fit, in reference to the fees for services in naturalization cases, to declare that the statutory salary elsewhere provided should be diminished by the amount received as fees in proceedings for naturalization, the provision might have been enforced. But the statute before us is not of this kind. It does not assume to change the salaries, but attempts to deal directly with the fees received under the law of the United States. In this respect it goes beyond the power of the Legislature.

Judgment for the defendant

(207 Mass. 256)

IN RE HORAN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. EXCEPTIONS, BILL OF (§ 55*)—ALLOWANCE—MISSTATEMENT OF PROCEEDINGS.

A bill of exceptions was properly disallowed which stated that an exception was taken which was not in fact taken.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 90-93; Dec. Dig. § 55.*]

2. EXCEPTIONS, BILL OF (§ 13*)—ALLOWANCE.

A bill of exceptions, which contains much evidence which is unnecessary to present the questions raised, included for the purpose of affecting the court's sympathies and inducing it to revise the findings at trial, was properly disallowed.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 13; Dec. Dig. § 13.*]

3. EXCEPTIONS, BILL OF (§ 20*)—FORM.

Counsel should present a bill of exceptions in such form that it may be allowed without injustice to the opposing party, and so that it can be amended, if necessary, without prejudicing the rights of the other party.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 21-23; Dec. Dig. § 20.*]

4. EXCEPTIONS, BILL OF (§ 55*)—PROOF.

Proof of a bill of exceptions before the Supreme Judicial Court by the appointment of a commissioner is only proper where the excepting party has attempted intelligently and in good faith to obtain the allowance of a bill of exceptions which is in general correct and made with due regard to the rights of the opposite party; and where it appears that a bill of exceptions, as prepared, misstates the exceptions taken at the trial and contained a large amount of unnecessary evidence, included for the purpose of inducing the appellate court to revise the findings at trial, a petition before the Supreme Judicial Court to prove the bill of exceptions will be dismissed.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. §§ 90-93; Dec. Dig. § 55.*]

Exceptions from Superior Court, Suffolk County; William C. Wait, Judge.

Petition by Helen F. Horan, the libelee in a divorce action, to prove a bill of exceptions. Petition dismissed.

Lee M. Friedman and Morse & Friedman, for petitioner. James E. McConnell, for libellant.

KNOWLTON, C. J. This is a petition to prove a bill of exceptions which was disallowed as not conformable to the truth. It appears by the commissioner's report that there was but one exception taken at the trial, and that another was afterwards taken to the consideration of certain evidence by the judge, which consideration he disclosed by his memorandum of his findings. Besides these two exceptions, the bill, as filed, set forth another as having been taken at the trial. In his certificate of disallowance the judge said: "The bill does not make a truthful statement of the case, as the narrative throughout is distorted by the view which the counsel takes of the proper interpretation of the evidence. The only exception claimed at the trial relates to the exclusion of cer-

tain testimony of witnesses as to the reputation for truth and veracity and for chastity of the libelee Mrs. Horan. No extended statement of the evidence, in my judgment, is necessary to a truthful statement of this exception. Counsel for the libelee have desired to insert the substance of all the testimony offered in the case." The bill of exceptions is very long and the evidence is voluminous, the trial having occupied five days. There is no reason why everything necessary to present properly the question of law involved in the exception to the exclusion of a certain class of testimony, relating to the reputation of a witness, could not have been stated very briefly. The same is true of the facts bearing upon the other exception relative to the consideration by the judge of a certain writing, material to the issue, which was discovered by him upon blotting paper, bound in as one of the interleaves in a hotel register that was put in evidence and taken away by the judge for examination at the close of the trial, he having heard the case under our practice without a jury. This writing had not been discovered by counsel in their examination of the book.

The commissioner has indicated, by erasures and insertions throughout the evidence, what should be admitted and what added to make the report of the testimony an impartial statement of that which was presented at the trial. The report shows that the bill, as filed, was colored by the zeal of counsel to present the case in a form as favorable as possible to his client. The judge was plainly right in disallowing this bill of exceptions. In the first place, probably by an unintentional error on the part of the libelee's counsel, it stated that an exception was taken that was not taken. Next it contained a long report of evidence which was wholly unnecessary to a proper presentation of the legal questions raised, and was therefore irrelevant and objectionable. Such a statement of testimony, if made with a view to affect the court, through the sympathies or feelings of the judges, and to incline them to a revision of the findings of fact made at the trial, is not for a legitimate purpose. Thirdly, the picture of the case that it presented was much changed in color, probably without deliberate purpose, by the strong feeling of the advocate for the client whom he represented.

It is the duty of counsel to present a bill of exceptions in such a form that the judge may properly allow it without injustice to the opposing party. If, through misunderstanding or mistake, a bill of exceptions needs amendment, as will often happen, it ought to be put in proper form, so that it can be allowed by the judge without jeopardizing the rights of any party. Proof of a bill of exceptions before this court through the appointment of a commissioner is a remedy that sometimes may be necessary; but it is intended only for cases in which the except-

ing party has attempted, intelligently and in good faith, but unsuccessfully, to obtain the allowance of a bill of exceptions which, in general, is a correct statement of the material questions, made with due regard to the rights of the opposing party. While this court has sometimes dealt liberally with parties who have made slight unintentional errors, when afterwards they have asked to prove a bill of exceptions, it is important that the rights of parties having a verdict or finding in their favor should be protected, so that they may be saved unnecessary litigation and expense.

In the present case we are of opinion that the bill of exceptions presented to the justice was not conformable to the truth, within the meaning of the statute. It follows that it was rightly disallowed, and that the petition before us must be dismissed.

We reach this result with less regret than we should feel in a case where it was apparent upon the record, as it is not here, that there had been an error of law at the trial, and that a party would suffer from a wrong decision.

Petition dismissed.

(207 Mass. 231)

SNOW et al. v. RICE et al.

(Supreme Judicial Court of Massachusetts.

Suffolk. Jan. 4, 1911.)

LANDLORD AND TENANT (§ 200*) — RENT — AMOUNT—ASSESSMENT ON PROPERTY.

Under Rev. Laws, c. 50, § 8 (Pub. St. 1882, c. 51, § 8), codified from St. 1871, c. 382, § 9, providing that when an assessment is made on an estate, the whole or part of which is leased, the owner shall pay the assessment, and may collect of the lessee an additional rent for the portion so leased, equal to 10 per cent. per annum on that proportion of the whole sum paid which the leased portion bears to the whole estate, after deducting any amount he may have received for damages above what he has necessarily expended by reason of such damages, the liability of the tenant for the additional rent does not accrue until the payment of the assessment by the owner, and will be computed from that time prospectively, and not from the levying of the assessment.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 200.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Henry C. Snow and others against Frederick B. Rice and others, executors. Heard on exceptions by plaintiffs. Exceptions overruled.

Gaston, Snow & Saltonstall and A. A. Ballantine, for plaintiffs. El. R. Thayer and R. G. Dodge, for defendants.

SHELDON, J. The plaintiffs, being the owners of an estate in Boston, leased a portion thereof to one Rice, the defendant's testator, for a term running from January 1, 1898, to April 1, 1906, and Rice's occupation continued for a month longer.

On December 24, 1900, during Rice's tenancy and while he was in possession under his lease, a betterment assessment of \$11,089.33 was duly levied upon the plaintiffs' estate. They did not then pay this assessment, but filed a petition in the superior court for its reduction or abatement. On December 7, 1906, after Rice's tenancy and possession had ended, a judgment by agreement between the plaintiffs and the city of Boston was entered for the sum of \$8,500 without interest, and on December 13, 1906, they paid that sum to the city. They seek in this action to recover from the defendants ten per cent. upon the proper proportion of this sum from the time when the assessment was levied to the end of Rice's tenancy.

The plaintiffs' right of action is based upon the provisions of Rev. Laws, c. 50, § 8, formerly Pub. St. 1882, c. 51, § 8. The original statute which was successively codified into these sections of the Public Statutes and of the Revised Laws was St. 1871, c. 382, § 9. Some verbal changes were made in the codification; but we prefer to look to the language of the original act, as it is properly agreed that its construction has remained unchanged. *Great Barrington v. Gibbons*, 199 Mass. 527, 529, 85 N. E. 737. That language is as follows: "When an assessment is made upon an estate, the whole or any portion of which is leased, the owner of the estate shall pay the assessment, and may thereafter collect of the lessee an additional rent for the portion of the estate so leased, equal to ten per centum per annum on that proportion of the whole sum paid, which the leased portion bears to the whole estate, after deducting from the whole sum so paid, any amount he may have received for damages to the estate, above what he has necessarily expended on such estate by reason of such damages."

It is manifest that the owner cannot collect this additional rent from his tenant until after he has himself made payment to the city. Until then, the tenant is not required to pay anything. And while the question is not free from doubt, we are of opinion that not only is the time of payment by the tenant thus delayed, but that his obligation to pay does not come into being until the owner's payment shall be made, and that the liability then becomes merely a future liability to be reckoned from that time, not a liability also for a past time.

Under the construction contended for by the plaintiffs, Rice had after December, 1900, no possible means of determining for what amount of rent he was liable; he knew only that it could not exceed what he had agreed to pay plus 10 per cent. on what after years

of litigation might be found by a jury within the limit of the original assessment to be the correct betterment, or on whatever other sum within the same limit the city and the owners might agree. A construction which thus would leave the amount of a tenant's liability in the air ought not unnecessarily to be adopted. Nor can the tenant in such a case know whether the owner will avail himself of his right to pay the assessment in three or in ten annual installments under Rev. Laws, c. 50, §§ 5, 15. If the owner should so elect, and if the tenant is under the fixed liability to pay 10 per cent. of the amount of the assessment, even though the payment be postponed it is yet an absolute liability, and it is difficult to see how the tenant's rights could be protected if the owner after paying one or more of the delayed installments should default upon the others, leaving the property to be sold under the lien thereon. Rev. Laws, c. 50, § 17.

The owner, moreover, if he fears that he will not receive from his tenant a proper return for the increased value of the estate, can protect himself by at once paying the assessment and thus fixing the starting point of the tenant's obligation. No such mode of protecting himself is available to the tenant.

The words of the statute, while they do not absolutely preclude the possibility of sustaining the plaintiffs' contention, are more in harmony with the view which we have taken. A provision that after the happening of a certain event one may collect a sum to which but for that provision he would have no right at all, naturally indicates that the liability is to accrue only upon such happening and is to cover only the future. The owner's obligation, or rather the charge upon his estate, does date from the levying of the assessment; but that of the tenant arises only from the terms of the statute that creates it, and cannot be extended beyond the proper scope of those terms. Nor is it material that it may be for the interest of the owner to seek by petition under Rev. Laws, c. 50, § 6, to reduce the amount of the assessment and for that reason to delay making his payment, and that he thus may lose the opportunity to gain from his tenant a return upon his involuntary investment. This simply gives him one more consideration to weigh in determining what course it will be for his interest to adopt.

The result is that as the defendants' testator was not a tenant at all when the liability of the plaintiffs' tenants accrued, this action cannot be maintained; the defendants' third request for rulings was rightly given; and the other questions argued need not be considered.

Exceptions overruled.

(307 Mass. 394)

M. STEINERT & SONS CO. v. TAGEN et al.
(Supreme Judicial Court of Massachusetts.
Suffolk: Jan. 4, 1911.)

1. MASTER AND SERVANT (§ 29*)—STRIKES—JUSTIFICATION.

A strike to obtain higher wages and shorter periods of labor is justifiable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 29; Dec. Dig. § 29.*]

2. MASTER AND SERVANT (§ 338*)—INTERFERENCE WITH EMPLOYMENT—ADVERTISING STRIKE.

Driving through the streets a wagon bearing placards announcing a strike, without picketing, the blocking of streets, or actual interference with the employer, or with the men employed in place of the strikers, is not wrongful, in view of St. 1910, c. 445, imposing on an employer, while a strike lasts, the duty to inform persons, whom he solicits to take the place of the strikers, of the existence of the strike.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 338.*]

3. TORTS (§ 10*)—STRIKES—TERMINATION.

Where, soon after a strike was declared, the employer secured men to take the place of the strikers, and has ever since had an adequate force, and is not taking any new men, and of the eleven men who left the employment eight soon secured other employment in the same kind of work, and three have left the commonwealth, and the international organization with which the strikers' labor union was affiliated ceased to aid their efforts any further, the strike was ended.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

4. TORTS (§ 10*)—INTERFERING WITH BUSINESS—ADVERTISING STRIKE—"MALICIOUSLY."

Driving a wagon through the streets, bearing a placard announcing the existence of a strike, long after the strike had in fact ended, was manifestly intended to injure the employer, and was done "maliciously," within the legal meaning of that word.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 10; Dec. Dig. § 10.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4811-4818; vol. 8, p. 7714.]

5. INJUNCTION (§ 55*)—SUBJECT OF RELIEF—PERSONAL RIGHTS.

Driving through the streets a wagon bearing placards announcing the existence of a strike, long after the strike has in fact ended, though not shown to have caused any damage to the employer, will be enjoined; the case not coming within the doctrine that equity will not enjoin the publication of a libel.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.*]

Report from Superior Court, Suffolk County; J. B. Richardson, Judge.

Suit by the M. Steinert & Sons Company against George F. Tagen and others for injunction. Heard on report of a justice of the superior court. Decree for plaintiff.

Plaintiff is a corporation engaged in the sale and moving of pianos. All the defendants are members of a certain voluntary association, called "Piano and Furniture Movers' and Helpers' Union 343," which is a labor union affiliated with the International

Brotherhood of Teamsters and the American Federation of Labor. Plaintiff employed a number of teamsters for the delivery of pianos to purchasers, and for moving pianos belonging to its customers from place to place, and all of these teamsters were members of said union. In April, 1910, the union to which defendants belonged endeavored to secure an increase in wages for the teamsters employed by plaintiff and shorter hours of labor, and failing to do so, on May 2, 1910, declared a strike. The teamsters, eleven in number, at once ceased work. Plaintiff within a few days secured men to take their places, and has had since then and has now an adequate force and is not seeking any new men. After a short time the International Brotherhood of Teamsters ceased to aid the strikers any further on account of an alleged failure of the union to comply with the regulations (which were not shown to have been broken) of the Brotherhood in calling the strike, and the strikers sought other employment. Of the eleven men who struck, eight at once secured positions in Boston as piano movers or teamsters, and have continued in such employment, and the other three have left the state. October 14, 1910, defendant Tagen, acting in pursuance of a vote of the union, hired a horse and wagon and attached strips of canvas to the rear and sides of the wagon. The canvas strip on each side of the wagon bore the following inscription in conspicuous letters six inches high:

"The union teamsters are on strike for hours and wages at the following places:

"Hunter & Ross, Haymarket Place.

"M. Steinert & Sons Co., 162 Boylston St."

On the rear of the wagon was the following inscription:

"I. B. of T.

A. F. of L."

The defendant Tagen employed the defendant Kelley to drive this wagon through the streets of Boston every day for one week, passing in front of plaintiff's place of business and through Carver street once each day, and twice on one day in sight of the place where the teamsters of plaintiff when not in actual service congregated, and generally throughout the city, and the defendant Kelley so drove it. No crowds followed the wagon, or assembled in front of plaintiff's store, and no attempt other than by the use of this wagon was made by the defendants, or other members of the union or their sympathizers, to interfere with the plaintiff or to intimidate its employés. Plaintiff offered no evidence that any of its employés had left its employment or that any person had refrained from patronizing it on account of the display of these signs.

Hudson & Nichols, for plaintiff. Frederick W. Mansfield, for defendants.

SHELDON, J. The strike of the plaintiff's employes in May was for the purpose of obtaining higher wages and shorter periods of labor. It was a justifiable strike. *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 113, 114, 130, 85 N. E. 897, 23 L. R. A. (N. S.) 1236. It does not appear to have been carried on in any respect in an unlawful manner or by the use of any unfair coercion or wrongful means. Nor could we say that the particular act charged in the bill to have been done by the defendants would be in itself an unlawful means of publishing the fact that a strike was going on. There was no picketing, no blocking of the streets, no actual interference with the plaintiff or with the men whom it employed in place of the strikers. We see nothing more than an attempt to inform the public, including probable applicants for work with the plaintiff, of the fact of the pending strike. Even if this were before doubtful, we could not now condemn it, in view of the provisions of St. 1910, c. 445, which imposed upon the plaintiff while the strike lasted the duty to give this information to any persons whom it solicited to take the place of the strikers. Of course, what we have said would not be applicable to a case presenting different circumstances from those which existed here, such as appeared for example in *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30, *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689, and similar cases.

But in the case at bar the strike was over. Although this fact was not expressly found in the superior court, in our opinion it is necessarily to be inferred from the facts which are found, and must be taken to be a fact. *Knowles v. Knowles*, 205 Mass. 291, 294, 91 N. E. 213. The strike was declared May 2, 1910. The plaintiff within a few days secured men to take the places of the strikers, has had ever since an adequate force, and is not seeking any new men. Of the eleven men who left the plaintiff's employ eight soon secured and still have new employment in the same kind of work as before, and three have left this commonwealth. Moreover, a short time after the strike began, the International Brotherhood of Teamsters, the organization with which the defendants' labor union was affiliated, ceased to aid the strikers any further. It is difficult to imagine a case, short of a formal agreement of both parties, in which it could be more manifest that a strike had come to an end.

The defendants' act in driving the wagon through the streets with the placards complained of began on October 14, 1910, long after the end of the strike, and has since

been continued. We can see no justification of it. It is a false announcement, not adapted in any way to benefit the defendants or their union, but likely to embarrass the plaintiff whenever it may need to employ additional men. It manifestly was intended merely to injure the plaintiff. This shows that it was done maliciously within the legal meaning of that word. *McGurk v. Cronenwelt*, 199 Mass. 457, 461, 462, 85 N. E. 576, 19 L. R. A. (N. S.) 561. The law will give a remedy for such an act. *Martell v. White*, 185 Mass. 255, 257, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Hartnett v. Plumbers' Supply Association*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194.

The case does not come within the doctrine that equity will not enjoin the publication of a libel. There is here a wrongful act maliciously done, continuing and repeated day by day, which, although it is not shown to have caused as yet any damage to the plaintiff, is manifestly intended to produce that result, is liable at any time in the future to do so, and may cause real and substantial damage of which it would be certainly difficult and might be impossible to prove either the existence or the quantum of loss. It is like a boycott declared and maintained without cause. In such a case equity will give relief. This is the real doctrine of many of our own decisions. *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272; *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232; *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236; *Davis v. New England Railway Publishing Co.*, 208 Mass. 470, 89 N. E. 565, 25 L. R. A. (N. S.) 1024, 133 Am. St. Rep. 318. The same principle has been maintained in other courts. *Emack v. Kane* (C. C.) 84 Fed. 46; *Lewin v. Welsbach Light Co.* (C. C.) 81 Fed. 904; *A. B. Farquhar Co. v. National Furrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 49 L. R. A. 755; *Dittgen v. Racine Paper Goods Co.* (C. C.) 164 Fed. 85; *National Life Ins. Co. v. Myers*, 140 Ill. App. 392; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Brace v. Evans*, 35 Pittsb. Leg. J. 399; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

A decree must be entered giving to the plaintiff the relief prayed for.

So ordered.

(207 Mass. 172)

GILE et al. v. PERKINS et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 2, 1911.)

TOWNS (§ 46*)—EXPENDITURES—TAXATION.

Since the statutes make full and exclusive provision for assessing and taxing property, a town cannot legally expend money to take a special valuation, to promote a just and legal assessment for the forthcoming year.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 81; Dec. Dig. § 46.*]

Report from Superior Court, Essex County; J. B. Richardson, Judge.

Action by William H. Gile and others against George H. Perkins and others. Injunction ordered.

N. P. Frye, for plaintiffs. John P. S. Mahoney and C. J. Mahoney, for respondents.

KNOWLTON, C. J. It appears from this record that the assessors of the town of North Andover made a valuation of all the taxable property of the town as of April 1, 1910, and assessed the taxes in accordance therewith and committed their warrant for the collection thereof to the tax collector. It is fairly to be inferred that on or about the 1st day of October of this year, they deposited with the tax commissioner a copy of their valuation books as required by St. 1909, c. 490, pt. 1, § 60, and a copy of the table of aggregates from the lists of valuation and assessments, as required by section 59 of this chapter. They seem to have performed all their regular official duties for this year. It also appears that since completing this assessment they have set to work to prepare a new valuation of the taxable property of the town, with a view to its publication. It is not suggested that any use is expected to be made, or can be made of this intended valuation in the assessment of taxes for the current year, for this assessment has already been completed. Such a valuation cannot be made the basis of taxation for next year, or for any time hereafter; for under the statute a new valuation must be made by the assessors as of April 1st in each year. The proposed valuation cannot be returned to the tax commissioner under the statute, for it is not a valuation upon which the annual assessment is made or can be made. The reason for attempting to make it seems to be that, because of the labor and the practical difficulties involved, the last valuation and former valuations are incorrect and incomplete, and the valuation upon which the next assessment is to be made ought to be different. So it is thought to be convenient to do work and publish results that may be used by the assessors next year, to save a part of the labor that otherwise will be involved at that time in making a correct valuation as of April 1, 1911.

At a meeting of the inhabitants of the

town held in March, 1910, an appropriation of \$750 was made for the assessors' department, which is conceded by the parties to cover the compensation of the assessors for the performance of their regular official duties in making the usual valuation and assessing the taxes. An appropriation of \$1,500 was also made for "taking the valuation." In view of the action of the assessors and of the town in making and publishing a similar valuation in the years 1860, 1870, 1880, 1890 and 1900, it may fairly be assumed that this appropriation was intended to cover the expenses of preparing and publishing such a valuation as the assessors have lately been attempting to make; so we come to the question whether this is an expenditure that the town can lawfully incur.

All the provisions for taxation and for valuing property as a basis for it are statutory. The machinery and the methods of using it are prescribed with great particularity. If these methods are rightly followed, everything will be accomplished that needs to be done for the proper assessment of taxes. The business is put in the charge of public officers whose duties are carefully defined. Nothing is left to be done by cities or towns, outside of the channels which lead directly to the desired outcome. Nor is there occasion for direction by a city or town to the assessors themselves, to perform other duties than those that pertain directly to their office for the purpose of promoting a just and legal assessment of taxes. The whole subject is covered by legislation. *Cox v. Segee*, 206 Mass. 380, 92 N. E. 620; *Welch v. Emerson*, 206 Mass. 129, 91 N. E. 1021.

The evidence indicates that in connection with the next annual assessment more work should be done by the assessors to make the valuation such as the statute contemplates, than they have been accustomed to do in recent years. Whether it would be reasonable for the town to add to the compensation which the statute gives them for their services, is a question which does not arise in this case. See *Welch v. Emerson*, *ubi supra*. But for reasons above stated we are of opinion that the town under the circumstances disclosed by this record cannot legally expend money under the votes in question for the purpose of taking this valuation.

It does not appear that the plaintiffs have been guilty of laches.

Writ of injunction to issue.

(207 Mass. 368)

KINNEY v. STEVENS, Treasurer.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 4, 1911.)1. TAXATION (§ 864*)—LEGACY—SUCCESSION
—TAXES—STATUTES—CONSTRUCTION.

St. 1909, c. 527, § 1, making all property within the jurisdiction, corporeal or incorpore-

al, subject to the succession tax, indicates an intention to tax all property that can be taxed by the commonwealth.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1879; Dec. Dig. § 864.*]

2. MORTGAGES (§ 137*)—ESTATE OF MORTGAGEE—LEGAL TITLE.

A mortgagee takes, not merely a lien upon the land as security, but the legal title, subject to redemption by the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 270-276; Dec. Dig. § 137.*]

3. TAXATION (§ 867*)—SUCCESSION TAXES—PROPERTY LIABLE—SITUS.

As the mortgagee has the legal title of land mortgaged, and the mortgage thus has a local situs, the debt has a situs within the jurisdiction where the land lies, for the debt is a part of the mortgage, and must exist to give it validity; therefore notes which belonged to a nonresident testator, and are secured by mortgages upon realty within the state, have a situs within the state, and are therefore property within the state subject to the succession tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1681-1684; Dec. Dig. § 867.*]

4. TAXATION (§ 867*)—SUCCESSION TAXES—PROPERTY LIABLE—SITUS—EQUITABLE INTEREST.

The above rule applies where the notes in question were secured by the assignment of a real estate trust by way of mortgage.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1681-1684; Dec. Dig. § 867.*]

Case Reserved from Supreme Judicial Court, Middlesex County.

Petition by Phineas C. Kinney, executor, against Elmer A. Stevens, Treasurer and Receiver General. From a judgment for petitioner in probate court, respondent appeals to the Supreme Judicial Court, where the case was reserved for the full court. Reversed.

Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for appellant. Frank Gaylord Cook, for appellees Rugg and others.

KNOWLTON, C. J. This is a petition brought by the executor of a foreign will for instructions as to whether certain promissory notes secured by mortgages upon real estate in Massachusetts, and one note secured by an assignment of an interest in a real estate trust, all belonging to the testator at the time of his death, are subject to a succession tax under the laws of this commonwealth. The notes were all in his possession at his domicile in New Hampshire.

St. 1907, c. 563, § 1, as amended by St. 1909, c. 268, and by St. 1909, c. 527, § 1, under which the respondent claims the tax, includes "all property within the jurisdiction of the commonwealth, corporeal and incorporeal, and any interest therein, whether belonging to the inhabitants of the commonwealth or not," and makes it subject to a tax upon the succession, if it passes by will or the laws regulating intestate succession,

with certain exceptions which we need not consider. This language indicates an intention on the part of the Legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the commonwealth. The question before us is whether these securities are property within the jurisdiction of the commonwealth, in reference to taxation upon the succession.

Under the laws of Massachusetts a mortgagee takes, not merely a lien upon the land as security, but he holds the legal title to it, subject to a right of redemption in the mortgagor. The interest of the mortgagee is made subject to taxation by our statutes, and the property taxable to the mortgagor is diminished by a deduction of the value of the interest held by the mortgagee. St. 1909, c. 490, pt. 1, §§ 16, 18, 45; *Sullivan v. Boston*, 198 Mass. 119-124, 84 N. E. 443. While, for general purposes, the interest of the mortgagee is treated as the personal property, it has a local situs, and carries with it an ownership of the land until it is redeemed by the payment of the debt in performance of the condition. The debt, which is the obligation of the debtor to pay, and the land, which is the security for the payment of the debt, are individual parts of a single valuable property in the mortgagee, which may be made available in different ways. The debt belongs with the mortgage, and it must co-exist to give the mortgage validity. For that purpose it has a situs within the jurisdiction of the state where the land lies. It was held in *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 381, 16 L. R. A. (N. S.) 329, that the tax upon the succession to real estate in this commonwealth, which belonged to a decedent in another state and was subject to a mortgage, was to be assessed only upon the value of the property above the mortgage. This was upon the ground that what passed upon the death of the mortgagor was only the value of his interest, which was the value of the real estate less the amount of the debt that was a charge upon it. This was equivalent to holding that, upon the death of the mortgagee, his interest in the real estate, to the amount of his debt, would pass in succession to his representatives.

The same doctrine has been held in states where the mortgagee has only a lien upon real estate. It is the law of the Supreme Court of the United States. *Savings and Loan Society v. Multnomah County*, 169 U. S. 421, 18 Sup. Ct. 392, 42 L. Ed. 803; *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701. It is also established by well-reasoned opinions of courts in several states. *Allen v. National State Bank*, 92 Md. 509, 48 Atl. 78, 52 L. R. A. 760, 84 Am. St. Rep. 517; *In re Merriam's Estate*, 147 Mich. 630, 111 N. W. 196, 9 L.

R. A. (N. S.) 1104, 118 Am. St. Rep. 561; In re Rogers' Estate, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. Rep. 677; Mumford v. Sewall, 11 Or. 67, 4 Pac. 585, 50 Am. Rep. 462. The fact that the laws of the state and the jurisdiction of its courts must be invoked for the preservation and enforcement of rights under the mortgage is an important consideration leading to this result. Upon the facts of this case, we are of opinion that the notes and mortgages are property in the jurisdiction of this commonwealth, within the meaning of the statute, although they were held by the trustee at his domicile in New Hampshire at the time of his death. We are also of opinion that they were in this jurisdiction so as to subject them to a succession tax here, within the doctrine of the Constitution of the United States that allows states to impose taxes only upon persons or property within their jurisdiction.

The note secured by the conveyance of the deposit book in the Cambridge Real Estate Associates differs from the others only in the nature of the property conveyed as security. This property was a valuable interest in real estate in Cambridge, the legal title to which was held by trustees. The testator held an equitable interest in it as security for the note at the time of his death. This interest passed under the will, for the use of his legatees at the time of his death, just as the mortgaged property did. It passed to the executor for purposes of administration, and to be turned into money which was to be paid by the executor to those for whose use it was collected. Although the testator held only an equitable interest in this real estate, instead of a legal interest, we perceive no difference in principle between the passing of this interest in succession and the passing of his interest under a mortgage held in like manner as security for a debt. We are of opinion that all this property is subject to the tax upon succession prescribed by our law.

There is strong ground for the respondent's contention that, because the debts in all of these cases could only be enforced, in the ordinary way, against the debtor by the aid of our courts, we ought to hold that they are property within the jurisdiction of the commonwealth, and subject to taxation under this statute. See *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *Matter of Daly*, 100 App. Div. 373, 91 N. Y. Supp. 858, affirmed in 182 N. Y. 524, 74 N. E. 1116; *Rothschild v. Knight*, 176 Mass. 48-54, 57 N. E. 337. The question raised by this part of the argument, except so far as it bears upon the other part of the case, we do not decide.

Decree of probate court reversed.

(207 Mass. 359)

SMALL et al. v. CAHOON et al.

(Supreme Judicial Court of Massachusetts.
Barnstable. Jan. 4, 1911.)

1. RELIGIOUS SOCIETIES (§ 18*)—ORGANIZATION AND SUPPORT—SALE OF PEWS—RIGHTS OF PEW-HOLDERS.

Where a church building was erected with the proceeds of a sale of pews, and the pewholders and their successors became members of a voluntary unincorporated religious society, the expenses of which were met by taxes and rentals on the pews, the pewholders under the constitution being the society, the title and beneficial interest in the church is in the pewholders.

[Ed. Note.—For other cases, see *Religious Societies*, Dec. Dig. § 18.*]

2. RELIGIOUS SOCIETIES (§ 25*)—INJURY TO REAL PROPERTY—CHURCH BUILDING—PEW-HOLDERS—REMOVAL OF CHURCH BUILDING—ACTION.

Complainants in a petition to enjoin the removal of a church building were pewholders in a religious society, which had erected a church building in 1857 from the proceeds of a sale of pews, and which was supported by taxes upon the pews until 1875, after which date the society was supported by voluntary contributions, though the terms of the vote making this change were not set out; but thereafter, as before, the pewholders exercised the exclusive right to vote at meetings of the society, and there was nothing to indicate any abandonment by them of their rights of property in the society or in its church building. On December 4, 1906, a warrant was issued for a meeting on December 13th to act on authorizing a new religious society to remove the building, and at an adjourned meeting it was voted to remove the building. The first meeting was not called as required by the constitution of the society, and the posted notice of it had not been seen by complainants, and they had not been present. Held, that complainants' title and beneficial interest were not bound by such vote, and that they were entitled to an injunction to restrain the removal of the church building.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 154-167; Dec. Dig. § 25.*]

Report from Superior Court, Barnstable County; James B. Richardson, Judge.

Suit by Samuel Small and others against Alonzo F. Cahoon and others to restrain removal of a church building. Reference was made to a master, and the cause was reported to the Supreme Judicial Court on the master's report and exceptions. Injunction awarded.

Petition to enjoin the removal of a church building from its present location in South Harwich to the adjoining village of South Chatham, a distance of about 3,000 feet. Complainants derive their title from original pewholders by inheritance. Respondents are the building committee of a recently organized religious society in South Chatham called the "Bethel Society." The respondents are in favor of evangelical preaching, while complainants favor so-called liberal preaching. The church was built in 1857, the organization being voluntary, undenominational, and unincorporated, known throughout its history as the "Bethel Society." Money to pay for

the church was raised by the sale of pews and the pewholders became members of the Bethel Society. On December 4, 1909, a warrant was issued for a meeting to be held December 13th to act upon an article to authorize the new society to move the church; but no action was taken at that meeting, an adjournment being had to December 23d, and at that meeting it was voted to remove the church, but no members of the society or pewholders from South Harwich were present at this meeting.

H. H. Baker and John H. Paine, for complainants. Charles Bassett, for respondents.

SHELDON, J. Upon the facts found by the master and the statements made at the argument by the defendant's counsel, it appears that before the year 1875 the title to this church was in the pewholders. The building seems to have been erected on the land of some third person with his consent. It was paid for out of the funds obtained from the sale of pews. It was the pewholders who held the beneficiary interest in the building and were entitled to its enjoyment. In re New South Meeting House, 13 Allen, 497, 508. The constitution under which the original society was organized is to the same effect. It provides for the meetings of "the Society (or pewholders)." It recognizes only pewholders, or persons renting pews. The expenses of the church were to be met by taxes upon the pews. Since 1875, however, the church has been supported by voluntary contributions, and not by such taxes. But we have not before us the terms of the vote by which this change was made; and there is nothing to indicate that the pewholders have abandoned any of their rights of property. On the contrary, these rights were still recognized as they had been before. The right to vote at meetings of the society and thus to control its affairs was still, as before, conceded only to pew owners, or to persons who at the time rented pews. The plaintiffs are pewholders.

A new religious society calling itself the Bethel Society has been organized in the neighboring village of South Chatham, and the purpose of the defendants is to move this building into that village and appropriate it to the use of the new society, thus permanently depriving the plaintiffs of their proprietary rights in the building as it now stands. *Stebbins v. Jennings*, 10 Pick. 172. Manifestly this cannot be done without their consent, unless they are concluded by the terms of the vote passed at the meeting of the old society on December 23, 1909. But the meeting at an adjournment of which this vote was passed, was not called as required by the first article of the constitution, the plaintiffs had not seen the notice which was posted in the church in attempted com-

pliance with that article, and one of them had no knowledge at all that the meeting was to be held. None of them was present at that meeting or at the adjournment thereof. Even if a vote properly passed at a duly called meeting to remove the building to an adjoining village in another town and there turn it over to a new society would have been valid and effectual against the objection of persons who, like the plaintiffs, had rights of property in the building (*Baker v. Fales*, 16 Mass. 488), they cannot be bound by this vote (*Reformed Methodist Society of Douglas v. Draper*, 97 Mass. 349; *Canadian Religious Society v. Parmenter*, 180 Mass. 415, 52 N. E. 740).

None of the exceptions taken by the defendants to the master's rulings upon the admission or exclusion of evidence has been argued, and we treat them as waived.

The plaintiffs are entitled to a decree against the defendants as prayed for.

So ordered.

(207 Mass. 386)

BOYD v. TAYLOR et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 4, 1911.)

1. APPEAL AND ERROR (§ 999*)—VERDICT—CONCLUSIVENESS.

A verdict determining questions of fact is final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8912-8924; Dec. Dig. § 999.*]

2. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE.

A decision of the Supreme Judicial Court sustaining exceptions to a directed verdict for defendant is the law of the case, and on a subsequent trial plaintiff on substantially similar testimony is entitled to go to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

3. TRIAL (§ 143*)—EVIDENCE—QUESTION FOR JURY.

A conflict in the evidence presents only a question of fact for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 842, 843; Dec. Dig. § 143.*]

4. MASTER AND SERVANT (§ 270*)—EVIDENCE—SIMILARITY OF CONDITIONS.

The testimony of a servant, suing for injuries while operating a meat chopper in a sausage factory, as to what he observed several months later while looking into the machine when running as it used to be run, was admissible as against the objection that there was no evidence that the machine was running under similar conditions as when he was injured; the machine being in the same place, apparently set up in the same way, and operated for the same purpose.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917; Dec. Dig. § 270.*]

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Action by Charles W. Boyd against Edwin Taylor and another. There was a verdict for plaintiff, and defendants bring exceptions. Overruled.

Loring, Coolidge & Noble, for plaintiff. P. S. Maher and Edgar S. Hill, for defendants.

RUGG, J. This case has been here twice on its merits upon the plaintiff's exceptions to verdicts directed in the superior court in favor of the defendants, and the exceptions have been sustained each time. 195 Mass. 272, 81 N. E. 277; 202 Mass. 213, 88 N. E. 777. Now it comes up on the defendants' exceptions, the jury having found a verdict for the plaintiff. No new question of law is presented. The testimony in its fundamental aspects is the same now as before. In the respects in which it differs only questions of fact were presented touching the credibility of witnesses or weight of evidence. As to these matters the verdict is final. The decisions heretofore made in the cause are decisive in favor of the right of the plaintiff to go to the jury. They have become the law of the case. On their authority all the requests for rulings presented by the defendants were properly refused.

The only points now argued not distinctly referred to in the opinion in 195 Mass. 272, 81 N. E. 277, are whether the plaintiff was a volunteer and whether the injury was not caused by his slipping. Plainly these are covered by inference from what is there said. The plaintiff testified that he was acting under the direction of Dunton, and that he did not slip. Although there was evidence to the contrary, this conflict presented no question of law, but only one of fact. If the plaintiff was believed, the verdict was warranted.

The plaintiff was allowed to testify against the exception of the defendants that when he returned to the place of his injury several months after it occurred, on looking into the machine to see the feed screw, when the machine was running as it used to be run, there was not much that could be seen other than a kind of blur. The only ground urged in support of this exception is that there was no evidence that the machine was running under similar conditions as when he was hurt. It was in the same place, apparently set up in the same way, being operated for the same purpose. The conditions in the absence of anything to show a changed situation might well have been found to have been nearly enough like those at the time of the injury to afford a basis for the observation made.

These exceptions appear to be frivolous, and they are overruled with double costs from the time when these exceptions were allowed.

So ordered.

(207 Mass. 184)

PARROT et al. v. MEXICAN CENT. RY. CO., Limited.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1911.)

1. CORPORATIONS (§§ 399, 400*)—AGENTS—BUYERS.

The general passenger agent and the passenger traffic manager of a railroad company, with duties to exercise direct charge over the work of soliciting passenger traffic for the road, and making arrangements for that purpose, and to supervise generally the work of the passenger department, have apparent authority to contract for the publication, for a money consideration, of a guidebook to make known and popularize the hunting and fishing regions along the line of the railroad, and a party dealing with them in reliance on their ostensible authority is not affected by secret limitations that they must obtain permission from an executive officer before expending money.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1602-1610; Dec. Dig. §§ 399, 400.*]

2. COURTS (§ 99*)—DECISIONS—CONCLUSIVE-NESS.

The presiding justice on a subsequent trial is not bound by any intimations or expressions of opinion of the judge at the former trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.*]

3. APPEAL AND ERROR (§ 860*)—EXCEPTIONS—QUESTIONS REVIEWABLE.

Where the presiding justice in an action for breach of contract refused requests for a directed verdict for defendant, and for a ruling that there was no evidence of any breach of contract, without asking counsel for defendant to point out more particularly the propositions of law on which he relied, any question of law actually involved in the requests and refusal, though not referred to or thought of by the judge or counsel at the trial, is reviewable in the Supreme Judicial Court on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 860.*]

4. EVIDENCE (§§ 80, 81*)—PRESUMPTIONS—LAWS OF OTHER COUNTRIES.

The law of a foreign state or country must be established as a fact, either by direct proof or by a proper presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 101, 102; Dec. Dig. §§ 80, 81.*]

5. EVIDENCE (§ 81*)—LAWS OF FOREIGN COUNTRIES—PRESUMPTIONS.

The court will not presume that the people in foreign countries have adopted the statutory provisions in force in the state where the court sits.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

6. EVIDENCE (§§ 80, 81*)—LAWS OF FOREIGN COUNTRIES—PRESUMPTIONS.

The court may presume that all states or foreign countries governed by the common law regard the common law in all its details; but countries governed by a different system of law will not be presumed to be governed by the provisions existing only through precedents established by the courts, and it will only be presumed that they recognize fundamental principles of right and wrong lying at the foundation of human society, and that a direct violation of such principles, to the injury of another, creates a legal liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 101, 102; Dec. Dig. §§ 80, 81.*]

7. EVIDENCE (§ 81*) — LAWS OF FOREIGN COUNTRIES—PRESUMPTIONS.

The court, in an action on a simple contract executed in a foreign country, to be governed by its laws, will presume, in the absence of evidence of the law of the foreign country not governed by the common law, that the contract creates a liability in force in the foreign country, and that a party thereto may recover for a breach of the contract by the adverse party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

8. CONTRACTS (§ 75*)—CONSIDERATION.

The rule that a promise to pay one for doing that which he is under a prior legal duty to do is not binding for want of consideration does not apply where a party, having entered into a contract with the adverse party to do certain work, refuses to proceed with it, and the adverse party, to secure to himself the actual performance of the work in place of a right to collect damages from the party, promises to pay an additional sum, for in that case there is a new consideration for the promise.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.*]

9. CONTRACTS (§ 75*)—CONSIDERATION.

Where one was required, by a binding written contract made with an agent of a railway company, to publish a guidebook for the company, a subsequent oral agreement, made in a foreign country with other agents of the company, for the publication of the book, was without consideration, and was not enforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 273-285; Dec. Dig. § 75.*]

10. CORPORATIONS (§ 521*) — ACTIONS — EVIDENCE—INSTRUCTIONS.

Where there was evidence that a contract made by an agent of a railway company for the publication of a guidebook was not binding on the company, because not within the scope of the power of the agent, the court could not rule as a matter of law that a subsequent contract for the publication of the book, made by other agents of the company, was without consideration; but the court must submit the issue of the validity of the first contract, and, on the jury finding the same invalid for want of authority, they must find the second contract binding, because executed by agents having authority to bind the company.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 521.*]

11. CONTRACTS (§ 321*) — BREACH OF CONTRACTS—REMEDY.

Where a railroad company agreed to provide for the expenses incurred by plaintiff in publishing a guidebook to popularize the hunting and fishing regions along the line of the railroad, and the general passenger agent of the company told plaintiff to send the bills for his personal expenses to him, and plaintiff incurred large expenses, which the company refused to pay, though requested, and denied liability, plaintiff could refuse to go on with his contract, and sue the company for damages for breach of contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1506-1527; Dec. Dig. § 321.*]

12. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS.

A question asked an agent of a corporation as to whether he had authority to spend money for a specified purpose is properly excluded, as calling for a conclusion of the agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

13. CORPORATIONS (§ 521*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

A statement of the court that the answers of the vice president of a railroad company to questions as to the powers of its general passenger agent and passenger traffic manager were evidence of facts showing the authority or want of authority of the agents, but not evidence so far as the answers stated the conclusion of the vice president from the facts as to the extent of their powers, was not objectionable, as misleading, as to the effect of the testimony of the vice president.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 521.*]

14. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of a part of an answer of a witness to an interrogatory was not prejudicial, where there was nothing material in the part excluded that had not been fully stated in the earlier part of the answer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145; Dec. Dig. § 1048.*]

Exceptions from Superior Court, Suffolk County; Henry A. King, Judge.

Action by Edward G. Parrot and another against the Mexican Central Railway Company, Limited. There was a verdict for plaintiffs, and defendant brings exceptions. Overruled.

A. H. Russell and T. H. Russell, for plaintiffs. H. S. Davis, for defendant.

KNOWLTON, C. J. In this case there was evidence from the two plaintiffs that an oral agreement for the payment of money was made with them by one McDonald, the defendant's general passenger agent in the City of Mexico, which, if it was binding upon the defendant as a contract, justified and required a finding for the plaintiffs. McDonald was not called as a witness, nor was Murdock, the defendant's passenger traffic manager, who was said by the plaintiffs to have been present when this agreement was made in Mexico, and to have participated in making it and to have acted under it.

The defense was a general denial that this agreement was made, and a denial that either McDonald or Murdock had authority to make it, and a contention that such an agreement could not be proved by oral testimony because the previous negotiations between the parties touching the subject had been reduced to the form of a contract in writing, and that, if there was any binding contract, it was this writing which could not be contradicted, varied or enlarged by evidence of an oral agreement. The writing was in the form of a letter from one Carson, the defendant's Eastern agent in the city of New York, to the plaintiffs. The plaintiffs wrote a letter in reply accepting the terms stated by Carson.

The subsequent oral agreement made in Mexico, relied on by the plaintiffs, was to make a payment in money of a reasonable sum, probably \$2,000 to \$3,000, towards the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series, & Rep'r Indexes

expenses of the plaintiffs in publishing a sportsman's guide to the Mexican Central Railway, which was the subject to which the previous writing related.

We assume, in accordance with the defendant's contentions, that the writing did not call for the payment of any money by the defendant to the plaintiffs, that it purported to cover the whole subject of the publication of this guidebook, that it was in such a form as merged all previous negotiations between the parties, and that the testimony of what occurred in these negotiations was not competent to show that the writing was incomplete and that the parties contemplated making some further arrangements in regard to the expenses involved in the project. Some of these matters are not plain, and the justices are not unanimous in their view of them.

The exceptions are to the refusal to give numerous instructions requested, to instructions given so far as they were inconsistent with those requested, and to rulings upon evidence. There was a series of requests as to the authority of McDonald and Murdock to make the oral agreement relied on. According to the testimony, McDonald made the agreement, although Murdock was present some of the time, and took part in the conversation. As the case was submitted to the jury it becomes necessary to consider whether there was evidence that either or both of these persons had authority to make such a contract.

There was evidence from the answers of the defendant's vice president to interrogatories that McDonald was the defendant's general passenger agent, with offices in the City of Mexico, and was held out to the public as such by the use of his name on letterheads and otherwise; that his duties "were to exercise direct charge over the work of soliciting and securing passenger traffic for the road, and to make arrangements for that purpose." It also appeared that the proposed guidebook was intended to "make known and popularize the hunting and fishing regions" along the line of the railroad, and that the defendant, before making this arrangement with the plaintiffs, had planned to publish a similar guidebook entirely at its own expense. It appeared from the answers of the vice president that the defendant, at and about the time of making this arrangement, advertised in various newspapers and magazines, and that contracts for such advertising were made either by Murdock or McDonald. Murdock's duties as passenger traffic manager "were generally to supervise the work of the passenger department." The evidence tended to show that these two men represented the defendant generally at the head of this important department of a great railway corporation, and that their duties could not be properly performed without the frequent expenditure of substantial sums

of money. Included in their charge was the advertising department, and the vice president answered that they contracted for the advertising, and had authority to give in return for it a certain amount of free or reduced rate transportation over the defendant's lines. But he said that neither of them had authority to make any contract for any purpose that involved the expenditure of money, without first having obtained special authority from an executive officer of the company. The jury might or might not believe this. If it was true, it was in the nature of a secret limitation of the general authority that these men were held out as possessing. Apparently, they were the general and highest representatives of the corporation that had any direct dealings with the public in reference to the business of the passenger department. They seem to have had all the authority that anybody dealing with the public had to bind the corporation by contracts for the expenditure of money in their department. The business which they had in charge called for the expenditure of money. A secret instruction to them, as general agents in charge of such business, that they should obtain permission from an executive officer before expending any money, was not binding upon persons dealing with them in good faith, in reliance upon their ostensible authority. *Fay v. Noble*, 12 Cush. 1; *Merchants' National Bank v. Citizens' Gaslight Company*, 159 Mass. 505, 84 N. E. 1083, 38 Am. St. Rep. 453; *McNeal v. Boston Chamber of Commerce*, 154 Mass. 277-286, 23 N. E. 245, 13 L. R. A. 559; *Cincinnati, etc., Railroad Company v. Davis*, 128 Ind. 99, 25 N. E. 878, 9 L. R. A. 506. Upon the evidence in this case, the requests for rulings in regard to the authority of McDonald and Murdock were rightly refused.

The thirteenth request, relative to the effect of proceedings at the former trial, was rightly refused. The presiding justice was not bound by any intimations or expressions of opinion of the judge at that trial.

The other requests were for the direction of a verdict for the defendant, and for a ruling "that there was no evidence that the defendant committed any breach of any contract with the plaintiffs, and the verdict must therefore be for the defendant." Upon the refusal of such requests, if the judge does not ask the requesting counsel to point out more particularly the propositions of law upon which he relies, it is possible to raise in this court any question of law actually involved in the request and refusal, even though it was never referred to or thought of by the judge or counsel at the trial.

The defendant now contends that the oral agreement was made in Mexico, a country which has not inherited the common law of England, that no evidence was introduced of what the law is in Mexico, that there is no presumption in regard to the law of a for-

sign country unless it is one which is known to be governed by the common law, and that therefore the plaintiffs cannot prevail because the court cannot find a rule of law applicable to the case. If this view was in the mind of counsel at the trial, it does not seem to have been stated; but we are obliged to consider it.

The question is, By what presumption, if any, will the court be governed under such circumstances? In Story on Conflict of Laws (8th Ed.) 637, in a long and elaborate note is this language of the learned editor: "Presumption has a proper place, within limits, in regard to foreign laws. Thus it could not be necessary to give evidence that in a foreign country breach of contract, battery, conversion or damage caused by fraud or negligence, would give a right of action." In *Whitford v. Panama Railroad Company*, 23 N. Y. 465-468, Judge Denio says in the opinion: "Hence, if one bring a civil action for false imprisonment, or for an assault and battery committed abroad, he need not in the first instance offer any proof that such acts are unlawful and entitle the injured party to a recompense in damages in the place where they are inflicted, for the courts will not presume the existence of a state of the law in any country, by which compensation is not provided for such injuries." Chief Justice Redfield, speaking for the court in *Langdon v. Young*, 33 Vt. 136, used these words: "But in the absence of all proof, courts assume certain general principles of law as existing in all Christian states, as that contracts are of binding obligation and that personal injuries are actionable." In the note of Dean Bigelow to which we have referred, he discusses many decisions of the courts, and criticises those that hold, in the absence of any evidence of the law of a foreign country, that there is a presumption that such country has the same law as the state or country of the forum; or, to put the proposition a little differently, that in the absence of any evidence of the law of a foreign country, the court will administer the law of the forum, thus putting the burden of proof upon the party who would avoid the application of the law of the forum to his case. He treats the whole subject as depending upon presumptions of fact which the court will apply according to common knowledge and experience.

Mr. Wigmore, in his work on Evidence, also says in sections 25-36 that presumption may, within certain limits, be resorted to. He adds: "If the foreign state is not one whose system is founded in the common law, a presumption (that its law is the same as that of the forum) will probably not be made unless the principle involved is one of the law merchant, common to civilized countries." Here is an implication that universal rules or principles, known to be common to

all civilized countries, will be presumed to be recognized by the courts of all nations.

In the application of the law there has been a great diversity in the decisions. Some things seem to be generally settled. The law of a foreign state or country is to be established as a fact, either by direct proof or by a proper presumption. It is not to be presumed that the people in other states or countries have made the same statutory provisions that were made by the people of the state where the court sits. These statutes depend upon the views of the legislators, which may differ in different places. So of the common law, that has grown up through judicial decisions into an elaborate system, going very far beyond the fundamental principles that may be supposed to be recognized everywhere. All states and countries that have grown up under this system, or have inherited it, may be presumed to regard it in all its details. But other countries that live under a different system are not presumed to be governed by these provisions that exist only through precedents established by the courts. There is every reason why they should be presumed to recognize fundamental principles of right and wrong which lie at the foundation of human society, and to hold that a direct violation of these principles, to the injury of another person, creates a legal liability. If one should sue on a contract for goods sold and delivered in France, upon a promise to pay a certain price for them, it would seem unreasonable that a plaintiff should be obliged to bring evidence from that country that a breach of such a contract there creates a liability. So if one should sue for damages suffered from an assault and battery, or from a larceny committed there. There ought to be a presumption from common knowledge that a liability exists everywhere in such cases.

Some courts have gone further, and have held that, in the absence of any proof of the foreign law, the court will administer the law of its own jurisdiction. This is the law in New York, and in the Supreme Court of the United States. *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *The Scotland*, 105 U. S. 24, 29, 30, 26 L. Ed. 1001.

In this commonwealth a plaintiff was permitted to recover under a contract governed by the law of Scotland, where no evidence was introduced to show what the law of that country was. *Chase v. Alliance Insurance Company*, 9 Allen, 311. In *Rau v. Von Zedlitz*, 132 Mass. 164-170, the court said: "It is conceded that, in the absence of any evidence of the law of Saxony, the question of duress or undue influence is to be determined by the law of this commonwealth." The case was decided upon this view of the law. Upon the question whether a protest of a draft was necessary to charge a party under the law of Turkey, it was said in *As-*

lanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348, that the court would not presume that the rules of the law merchant, or of the common law relative to such a matter as the protest of commercial paper, prevailed in Turkey, although this is not the principal ground of the decision. In *Harvey v. Merrill*, 150 Mass. 1-5, 22 N. E. 49 (5 L. R. A. 200, 15 Am. St. Rep. 159), the court said: "The rights of the parties are to be determined by the law of Illinois; but there is no evidence that the common law of Illinois differs from that of Massachusetts." This is given as the reason for deciding the case under the law of Massachusetts. *Mittenthal v. Mascagni*, 183 Mass. 19-23, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, was an action upon a contract made in Italy, in which no evidence of the law of Italy was introduced. The court said: "Assuming this, we must also assume that the law of Italy is like our own," and the plaintiff was permitted to recover. *Bayer v. Lovelace*, 204 Mass. 327, 90 N. E. 538, was an action involving the rights of a party summoned as a trustee in an action of contract, in which he set up, as a ground for his discharge, the judgment of a court in Colombia, South America. The court said: "We are not informed as to what the law of Colombia is in reference to such conditions as appear in this case, but there is no reason to think that it is different from that of this country." The case was decided against the trustee, according to the law of this country, but the burden was upon the trustee to prove the effect of the judgment, and to establish the law of Colombia if he relied upon it for his discharge.

In the present case the law upon which the plaintiffs rely is that creating a liability upon a simple contract to pay money for a valuable consideration. We are of opinion that in a suit upon a simple contract of this kind, there is a broad general presumption of fact that such a contract creates a liability in all civilized countries, which presumption is sufficient to entitle the plaintiff to recover, if no evidence is introduced of the law of the place where the contract is made. In so deciding we do not go so far as the cases which hold that, in the absence of evidence of the foreign law, the court will in all cases apply the law of the forum. We treat this, not as a presumption that the law of the foreign country is the same as the law of the forum, but as a presumption that all countries, in their courts of justice, will give effect to universally recognized fundamental principles of right and wrong in deciding between contending parties.

The defendant contends that there was no consideration for the promise to pay money to the plaintiffs, because they were already bound by the writing to do all that they undertook to do under the oral agreement. As a general proposition, it is settled in this

commonwealth that a promise to pay one for doing that which he was under a prior legal duty to do is not binding for want of a valid consideration. *Smith v. Bartholomew*, 1 Metc. 276, 35 Am. Dec. 365; *Com. v. Johnson*, 3 Cush. 454; *Pool v. Boston*, 5 Cush. 219; *Warren v. Hodge*, 121 Mass. 106. It has often been said that the principle involved is the same that lies at the foundation of the doctrine that a promise to accept or pay a less sum in discharge of a debt for a greater amount is not binding. In connection with the general proposition see also *Cabot v. Haskins*, 3 Pick. 83, 92, 93; *Tobey v. Wareham Bank*, 13 Metc. 440-449; *Lester v. Palmer*, 4 Allen, 145; *Harlow v. Putnam*, 124 Mass. 553.

A limitation of the general proposition has been established in Massachusetts, in cases where a plaintiff, having entered into a contract with the defendant to do certain work refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation is not intended to affect the rule that a contract cannot be binding without a consideration; but it rests upon the doctrine that, under these circumstances, there is a new consideration for the promise. *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Holmes v. Doane*, 9 Cush. 135; *Peck v. Requa*, 13 Gray, 407; *Rollins v. Marsh*, 128 Mass. 116; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Allen, J., in Abbott v. Doane*, 163 Mass. 433-435, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465. In *Rollins v. Marsh*, 128 Mass. 116-120, the court said: "The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfill unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforce whatever remedy he had for the breach, against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement." In such a case the new promise is given to secure the performance, in place of an action for damages for not performing, as was pointed out by this court in *Peck v. Requa*, 13 Gray, 407, 408.

This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the states in this country. See *Abbott v. Doane*, 163 Mass. 433-435, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; *Leake on Cont.* (4th Eng. Ed.) 434-436; *Pollock on Cont.* (7th Eng. Ed.) 184-186; *Harriman on Cont.* §§ 117-120. See also 8 *Harvard Law Review*, 27; 12 *Harvard Law Review*, 515, 521, 531; 13 *Harvard Law Review*, 319; 17 *Harvard Law Review*, 71. While it is well established in Massachusetts, the doctrine should not be extended be-

yond the cases to which it is applicable upon the recognized reasons that have been given for it. A majority of the court are of opinion that it is not applicable to the evidence in this case, and that the defendant is right in its contention that, upon the assumption that the parties were bound by the written contract, there was no consideration for the new promise of the defendant.

But the judge could not give either of these two rulings without assuming, and virtually ruling as matter of law, that the writing was a binding contract. For the defendant, it was signed by Carson, the defendant's Eastern agent. The defendant's answer was a general denial of all the plaintiffs' averments. The defendant's vice president's answers to interrogatories were in evidence, in which he said that, "Outside of contracts involving the transportation of freight or passengers, the general Eastern agent had no authority whatever to enter into any contract of any kind or character in behalf of the company, without securing authority from his superior officers, either in the passenger or the freight department." This evidence was uncontradicted. While there was testimony indicating that Carson communicated by letter with some superior officer in Mexico before completing the negotiations with the plaintiffs, there was nothing more than the possibility of an inference in regard to what authority he obtained. While the principal dispute between the parties was in regard to the oral agreement made in Mexico, the authority of Carson to bind the defendant by the writing was a fact to be proved in the case before either party could avail himself of the writing as a contract, and the judge, in his charge, submitted to the jury the question of Carson's authority, as he did also questions as to the authority of McDonald and Murdock. A majority of the court are of opinion that, in dealing with the requests of the defendant, the judge could not assume or rule as matter of law that Carson had authority to bind the defendant by the writing, and he therefore could not rule that there was a valid contract in writing by which the parties were bound when the agreement was made in Mexico, and that the oral agreement was without consideration because the plaintiffs were to do no more under it than they had previously contracted to do. If the jury failed to find that the writing was authorized by the defendant, they might find that an oral agreement was made in Mexico which adopted and included the provisions that pre-

viously had been reduced to writing, and that then for the first time became binding, because made a part of the general agreement between the plaintiffs and the defendant's representatives. Under such a possible finding, this question which the defendant now argues could not arise, and the defendant would be liable.

The defendant contends that the plaintiffs cannot recover because they did not completely perform their contract. The declaration is for damages for a breach of the contract. There was evidence that the defendant agreed to provide for the expenses incurred by the plaintiffs in the prosecution of the work; that McDonald told the plaintiffs to send the bills for their personal expenses to him; that they incurred large expenses, and that the defendant, though requested, refused to pay any money and denied its liability to pay anything or to make any provision for the payment of the expenses. This justified the plaintiffs in refusing to go on with their contract, and in suing the defendant for damages for its breach of the contract.

The question to Carson, "Did you yourself have authority to spend any money for advertising purposes?" put by the defendant, "expecting the witness to answer that he had no such authority," was rightly excluded. It called for a conclusion of the witness as to the legal effect of his relations with the defendant, and not merely for facts which would show whether he had authority. So far as appears, he was permitted to testify fully as to the facts.

We are also of opinion that the language of the judge in regard to the interrogatories and the rulings upon them, when rightly interpreted, was not erroneous. The first part of his statement was, in substance, that the answers were evidence of the facts tending to show the authority or want of authority of the agents; but not evidence so far as they stated the opinion or the conclusion of the vice president from these facts, as to the extent of their powers or duties. While the meaning of the judge was not very clearly expressed, we are of opinion that the jury were not misled in regard to it.

The defendant did not suffer from the exclusion of the last two sentences of the answer to the fourteenth interrogatory. There was nothing material in these sentences that was not fully stated in the earlier part of the answer.

Exceptions overruled.

(207 Mass. 304)

TOBIN v. KELLS.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)**1. APPEAL AND ERROR (§ 967*)—DISCRETION OF TRIAL COURT—RECOMMITTING REPORT OF AUDITOR.**

A motion to recommit the auditor's report, with instruction to report all the evidence on which he based a finding, is addressed to the discretion of the court, and no exception lies to the denial of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3841, 3842; Dec. Dig. § 967.*]

2. REFERENCE (§ 101*)—DISCRETION OF TRIAL COURT—RECOMMITTING REPORT OF AUDITOR.

The court may, in a proper exercise of judicial discretion, recommit an auditor's report, where it appears that he has made an erroneous ruling, which will likely deprive a party of important rights; but the mere fact that an auditor erred on an abstract question of law does not make it necessary to recommit.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 180-180; Dec. Dig. § 101.*]

3. APPEAL AND ERROR (§ 967*)—DISCRETION OF TRIAL COURT—RECOMMITTING REPORT OF AUDITOR.

The court, though possessing authority to review the discretion of the trial judge denying a motion to recommit an auditor's report, with instructions to report the evidence on which he based a finding, cannot do so, where it does not know what facts, if any, were shown or agreed to before the trial judge, and where it cannot say that his action was wrong, on the face of the report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3841, 3842; Dec. Dig. § 967.*]

4. REFERENCE (§ 99*)—PROCEEDINGS BEFORE AUDITOR—REPORT.

The report of the auditor, in an action on account, that the contract for the work had been annulled by the parties, is prima facie evidence in favor of the contention that the contract had been annulled.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.*]

5. CONTRACTS (§ 352*)—BUILDING CONTRACTS—ANNULMENT.

Whether a contract to remodel houses had been annulled by the parties, by the contractor abandoning the work and the owner consenting thereto, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 352.*]

6. CONTRACTS (§ 237*)—MODIFICATION—CONSIDERATION.

Where a contractor to remodel houses informed the owner that, since he was unable to obtain money from a third person for use on the work, he would have to abandon the contract unless the owner modified the terms thereof as to payments, a modification agreed on by the parties was supported by a good consideration, and was valid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1118-1122; Dec. Dig. § 237.*]

7. CONTRACTS (§ 282*)—BUILDING CONTRACTS—PERFORMANCE—"PERFECT SATISFACTION."

A contractor, agreeing to remodel houses to the "perfect satisfaction" of the owner, must perform the work in such a manner that

the owner, acting as a reasonable man under the circumstances, must be satisfied with it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. § 282.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6328-6334; vol. 8, p. 7794.]

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by Thomas J. Tobin against Christopher Kells. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action on account annexed for labor and materials alleged to have been furnished by plaintiff to defendant in the remodeling of houses. Plaintiff contracted to remodel the houses to defendant's "perfect satisfaction" for \$5,777, payable in five installments. Plaintiff claimed that the contract was modified, so as to require defendant to make weekly payments of \$250. The testimony of plaintiff showed that there was a dispute about the work, that defendant refused to make a weekly payment then due, and stated that he would not perform the modified agreement. Plaintiff replied that, under the circumstances, all he could do was to quit. Defendant replied, "Quit and be damned." Plaintiff thereupon quit and brought the action.

The court charged that the stipulation in the contract that the work was to be done to the perfect satisfaction of defendant did not mean that defendant had a right to say under all circumstances that the work was not satisfactory, but meant that the work must be satisfactory and that the materials must be satisfactory to defendant, acting as a reasonable man under the circumstances, and that, if the work and materials were of such a character as a reasonable man ought to have been satisfied with, plaintiff performed his duty in that respect.

Meehan & Donahue, for plaintiff. Stebbins, Storer & Burbank and A. G. Tibbetts, for defendant.

SHELDON, J. 1. The defendant's motion for the recommitment of the auditor's report with the instruction to the auditor to report all the evidence upon which was based the finding that the special contract had been annulled by the parties was addressed solely to the discretion of the court, and the defendant had no right of exception to the denial of the motion. This has been so often declared that we cite only a few of the later cases. *Butterworth v. Western Assurance Co.*, 132 Mass. 489; *Carew v. Stubbs*, 161 Mass. 294, 37 N. E. 171; *Craig v. French*, 181 Mass. 282, 63 N. E. 893; *Tripp v. Macomber*, 187 Mass. 109, 110, 72 N. E. 361; *Allwright v. Skillings*, 188 Mass. 538, 74 N. E. 944. No doubt it would be a proper exercise of judicial discretion to recommit a report if it

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appeared that the auditor had made an erroneous ruling which would be likely to deprive a party of important rights. But ordinarily the opportunity given to try a case fully before a jury and thus to raise all questions of law, with the fact that the auditor's findings are not conclusive, will enable both parties to safeguard their rights on all material questions. The mere fact that an auditor may have erred on some abstract questions of law would not make it necessary to recommit his report. But upon these exceptions, as in *Hunneman v. Phelps*, 190 Mass. 15, 85 N. E. 169, even if we had authority to review the discretion of the judge below, we have not the means of doing so. We do not know what facts, if any, were shown or agreed to before him; we could not say that his action was wrong upon the face of the report, and nothing else is before us.

2. Under the clear and distinct instructions given them, the jury must have found that the written contract between the parties was no longer in force; that either the defendant had prevented the plaintiff from performing that contract and so the latter had a right to treat it as no longer binding (*Bailey v. Marden*, 198 Mass. 277, 79 N. E. 257; *Posner v. Seder*, 184 Mass. 331, 333, 68 N. E. 385; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327), or else that it had been annulled by the consent of both parties. But the defendant contends that such a finding was unwarranted upon either ground.

The auditor found and reported that the contract had been annulled by the parties. This furnished prima facie evidence in favor of that contention. *Fisher v. Doe*, 204 Mass. 84, 39, 40, 90 N. E. 592. The jury had a right so to find. And the plaintiff's testimony indicated that his proposition to abandon the work had been assented to by the defendant. *Nickerson v. Weld*, 204 Mass. 343, 357, 90 N. E. 589. An assent would be sufficient though given angrily and with an oath. This too was for the jury.

But the verdict may have been based merely upon the ground that the plaintiff was not at fault for not having completed his contract, but was prevented from doing so by the wrongful conduct of the defendant. Was such a finding warranted?

The plaintiff claims that the defendant on June 7th wrongfully refused to make a payment which he was then under obligation to make, and without which, as the defendant knew, the plaintiff could not go on with the work. This payment was not due under the terms of the original contract. But the plain-

tiff claimed and testified that shortly after the contract was made he told the defendant that he, the plaintiff, had been disappointed in obtaining some money to use upon the work, and that it would be very hard for him to keep on with the contract; and that a verbal agreement was then made between the parties, changing the terms of the written contract as to the payments to be made by the defendant, so that the defendant should pay to the plaintiff the sum of \$250 per week, if the payments thus to be made did not exceed the next installment fixed by the contract. The defendant denied this claim; the plaintiff's testimony was somewhat weakened on cross-examination, and the auditor's report did not fully sustain the contention; but the question was for the jury. They could find that the modification was made, and that it was made in consequence of the plaintiff's statement to the defendant, which was understood by both parties to be in substance a statement that the plaintiff could not go on with his work and must and would abandon the contract unless it was modified. This makes it necessary under our decisions to say that the modification had, or could be found to have had, a good consideration and that it was valid. *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Holmes v. Doane*, 9 Cush. 135; *Peck v. Requa*, 13 Gray, 407; *Hastings v. Lovejoy*, 140 Mass. 281, 284, 2 N. E. 776, 54 Am. Rep. 462; *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520; *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 324, 91 N. E. 388; *Parrot v. Mexican Central Railroad* (Suffolk, Jan. 3, 1911) 93 N. E. 590.

It follows that the jury could find that the defendant did unjustifiably prevent the plaintiff from going on with his work under the written contract. They could find that the defendant's refusal to make the payment due on June 7th, or any future payments under the modified agreement, was not justified by the disputes that had arisen about plastering or the excavations to be made, or by the claim that the plaintiff's work had not been done to the defendant's "perfect satisfaction." These words are no stronger than the expression "entire satisfaction," which was considered in *Handy v. Bliss*, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673. The instructions given conformed to the rule laid down in that case, and were correct.

These considerations make most of the defendant's requests for instructions immaterial. So far as necessary, they are covered by what has been said.

Exceptions overruled.

(207 Mass. 352)

FAIRFIELD v. LOWRY et al.

(Supreme Judicial Court of Massachusetts.

Suffolk. Jan. 4, 1911.)

1. GOOD WILL (§ 6*)—CONTRACTS—RIGHTS ACQUIRED.

A contract for the sale of the insurance business of the late "H. A. S.," "H. A. S. & Co.," and "M. S. L." recited that the seller, "M. S. L.," for a specified sum, agreed to sell and deliver on a specified date all right, title, and interest in the insurance business. The language of the agreement was chosen by the buyer. The seller permitted the buyer for a while to use the names because of the friendly relations existing between the parties, while the seller was in the buyer's employ. *Held*, that the buyer did not acquire the right to use the designated names in his business, and under Rev. Laws, c. 72, § 5, prohibiting a person carrying on a business from assuming the name of another without written consent, the buyer could not use such names.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6;* Contracts, Cent. Dig. § 920.]

2. TRIAL (§ 105*)—FAILURE TO OBJECT—EFFECT—EVIDENCE IMPROPERLY ADMITTED.

Parol evidence of preliminary negotiations merged in a written agreement has no probative force, though received without objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 265; Dec. Dig. § 105.*]

3. GOOD WILL (§ 6*)—CONTRACTS—RIGHTS ACQUIRED.

A seller of an insurance business is not thereby deprived of the right to engage in that business; but he cannot solicit business from former customers, or so conduct his own business as to injure the business of the buyer.

[Ed. Note.—For other cases, see Good Will, Cent. Dig. §§ 2-5; Dec. Dig. § 6.*]

4. JUDGMENT (§ 232*)—ISSUES—RIGHT TO OBJECT.

A party putting matters in issue cannot complain of the action of the court in passing on them and entering a decree reciting the findings on the matters.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 411; Dec. Dig. § 232.*]

Appeal from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Suit by Herbert G. Fairfield against Edward F. Lowry and another. From a decree of dismissal, plaintiff appeals. Affirmed.

The following is the contract of the sale of the insurance business of the late Henry A. Smith, Henry A. Smith & Co., and Marlon Smith Lowry to H. G. Fairfield & Co.:

"Henry A. Smith, General Insurance.

"Room 441 Exchange Building, 53 State Street.

"Residence: 26 Chestnut St., Stoneham, Mass.

"Telephone Main 2082.

"Boston, Mass., August 5, 1907.

"In consideration of one thousand dollars (\$1,000) cash (the receipt whereof is hereby acknowledged), and the agreement to pay the sum of eight hundred dollars (\$800) additional on December 1st next, we hereby

agree to sell and deliver, on October 1st next, all our right, title and interest in the insurance business of the late Henry A. Smith, Henry A. Smith & Co., and Marlon Smith Lowry, to H. G. Fairfield & Co.

"Mrs. Lowry to continue in interest until October 1st, and the remaining 10% to be paid within 2 years from date.

"[Signed] Marlon Smith Lowry,

"For Henry A. Smith & Co.

"[Signed] H. G. Fairfield & Co."

Frederick W. Brown and Walter L. Came, for appellant. Frank M. Forbush and Jesse W. Morton, for appellees.

SHELDON, J. The plaintiff does not deny that upon the findings made at the hearing his bill was rightly dismissed. His contention is that the right to use the names "Henry A. Smith," "Henry A. Smith & Co.," and "Marlon Smith Lowry" in carrying on the insurance business, did pass to him by the agreement between himself and Mrs. Lowry and that the respondents have no right to use those names in such business; and also that Mrs. Lowry is bound not to compete with him in that business, and not to solicit for herself or any other person the patronage of her former customers or of the former customers of Smith or Smith & Co., and not to interfere in any way with the plaintiff's peaceful enjoyment of the business which he purchased from her.

The written agreement between the plaintiff and Mrs. Lowry did not purport to give to him the right to use the names in question. The effect of this material circumstance is in no wise weakened by the fact that the language of this agreement was chosen by the plaintiff himself. The fact that she allowed him to use those names for a time is sufficiently accounted for by the friendly relations that existed between the parties while she was in his employ, and does not necessarily show an understanding on her part that he had acquired the right to use them. Nor is the language of the instrument doubtful. Such cases as *Winchester v. Glazier*, 152 Mass. 316, 323, 25 N. E. 728, 9 L. R. A. 424, and *Insurance Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410, have no application here. Under the provisions of Rev. Laws, c. 72, § 5, the plaintiff has no right to use in his business either of these names without the written consent respectively of Mrs. Lowry or of Smith's personal representative.

We have not considered the finding that before the execution of the written agreement Mrs. Lowry had told the plaintiff that she would not sell to him the names in question; for it may well be doubted whether it was open to the defendants to prove this fact, as the preliminary negotiations were merged in the written agreement. If so, the

fact that the evidence was received without objection would not give to it any probative effect. *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 132, 133, 89 N. E. 189, 133 Am. St. Rep. 283, and cases cited.

After the sale by Mrs. Lowry to the plaintiff of her interest in the insurance business, she had not the right to derogate from the effect of what she had done by attempting to deprive the plaintiff of any part of the business which she had sold to him. But this did not prevent her from engaging in the same business herself, or from using her own name or that of her father in carrying on such business, although she would not be allowed to solicit business from the former customers of herself and her father. She could not so conduct her own new business as to injure the business which she had sold to the defendant. *Foss v. Robey*, 195 Mass. 292, 81 N. E. 199; *Hoxie v. Chaney*, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149.

The plaintiff does not rely upon Mrs. Lowry's engagement made in January, 1908, not to engage in the insurance business for five years. He concedes the correctness of her claim that this promise was invalid for lack of consideration. So we need not consider whether under our decisions the obtaining of the actual money due to her instead of being put to suit to enforce her rights would not have been an adequate consideration for a new promise by her. *Hastings v. Lovejoy*, 140 Mass. 261, 265, 2 N. E. 776, 54 Am. Rep. 462; *Abbott v. Doane*, 163 Mass. 443, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; *Tobin v. Kells* (Mass., Jan. 4, 1911) 93 N. E. 596.

The recitals of the decree were properly made. *Braman v. Foss*, 204 Mass. 404, 410, 90 N. E. 563. Certainly the plaintiff, having put those matters in issue, cannot complain of the court's passing upon them.

Decree affirmed.

(207 Mass. 198)

WILCOX et al. v. ATTORNEY GENERAL et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 3, 1911.)

1. CHARITIES (§ 22*)—VALIDITY—CERTAINTY AS TO PURPOSE OF GIFT.

The will devised the residue of the estate, "in trust, nevertheless, to carry out certain other purposes of mine mentioned," to the trustee and another, "and relating to certain benevolent and charitable institutions and associations, to a clock tower and clock in memory of my sister, * * * to the use of our old homestead estate as a memorial to my mother, * * * to be known as the B. Park playgrounds," and further authorized the trustee to sell other lots and use the proceeds "in carrying out said designated plans and purposes," and to use the personal estate as the trustee might "consider best for the interests of my estate and the foregoing plans and purposes referred to." *Held*, that while the trust would have been valid as a charitable trust if created for such charitable

purposes as the trustee might in his discretion select, or if the will had specifically stated that the trust was for the erection of a clock tower, and the construction of a memorial park, etc., for the public benefit, as the provision relating to testator's previous oral instruction could have been treated as descriptive in such case, the charitable trust attempted to be created was invalid, for not definitely designating its objects without resort to the oral communication with reference thereto.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. §§ 51-56; Dec. Dig. § 22.*]

2. TRUSTS (§ 68*)—RESULTING TRUSTS—INVALID BEQUESTS—DISPOSITION.

The residue which a will devised for charitable purposes goes to the heirs at law by way of resulting trust, upon the charitable trust attempted to be created being declared invalid.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 94; Dec. Dig. § 68.*]

Case Reserved from Supreme Judicial Court, Bristol County.

Petition by Alexander J. Wilcox and others against the Attorney General and others, to establish a trust. Case reserved. Decree as stated.

Hugo A. Dubuque, City Sol., for the Attorney General. Arthur S. Phillips, for petitioners. Jennings, Morton & Brayton, for respondents.

BRALEY, J. The testatrix in the fourth clause of her will devised and bequeathed the residue of her estate "to Henry H. Earl * * * in trust, nevertheless, to carry out certain other purposes of mine mentioned to him and to Abbie C. Anthony * * * and relating to certain benevolent and charitable institutions and associations, to a clock tower and clock in memory of my sister Mary Amanda Borden; to the use of our old homestead estate as a memorial to my mother Eliphah Tucker Borden to be known as the 'Eliphah Tucker Borden Park Play Grounds' et cetera. And I hereby give to my said trustee full power and authority to sell other lots of land and improvements thereon and to give full deeds of conveyance and acquittance thereof in fee simple and to use the proceeds in carrying out said designated plans and purposes; also to buy any other lots or parcels of land necessary to more fully carry out said plans and purposes. I also give my said trustee full power to buy, exchange, invest and reinvest my personal estate as he may consider best for the interests of my estate and the foregoing plans and purposes referred to." It being plain that no personal bequest was intended, as the trustee was to hold and distribute the property in accordance with the wishes of the testatrix, the trust cannot be administered unless a definite charitable gift is disclosed. If the trust had been for such charitable purposes as the trustee in his discretion might select, or if the directions had been specific that he was to erect for the benefit of the public, a clock tower with a clock in memory

of her sister, and to convert the homestead into a park or playground as a memorial to her mother, the phrase relating to her previous oral instructions might be treated as merely descriptive as in *Wells v. Doane*, 3 Gray, 201, 204, and a valid charity established. *Minot v. Baker*, 147 Mass. 348, 17 N. E. 839, 9 Am. St. Rep. 718; *Gill v. Attorney General*, 197 Mass. 232, 83 N. E. 676; *Molly Varnum Chapter, D. A. R., v. Lowell*, 204 Mass. 487, 493, 90 N. E. 893, 26 L. R. A. (N. S.) 707, and cases cited; *New England Sanitarium v. Stoneham*, 205 Mass. 335, 341, 91 N. E. 885. But while a general purpose to devote the residue to charity is evident, the objects finally to be selected are not designated, and can be ascertained only upon resort to the verbal communications made to the trustee and to *Abbie O. Anthony*. If these instructions had been in writing, a reference to the instrument would have incorporated it with the will, but as a testamentary disposition of property cannot be made partly under the statute of wills, and partly by parol, the trust is so indefinite that it cannot be executed. *Minot v. Attorney General*, 189 Mass. 176, 179, 180, 75 N. E. 149; *Berry v. Dunham*, 202 Mass. 133, 139, 88 N. E. 904.

It follows that after the payment of the pecuniary legacies, and the bequest to the executor for the purposes named in clause three over which there is no dispute, the residue goes to the heirs at law of the testatrix who take by way of a resulting trust. *Nichols v. Allen*, 180 Mass. 211, 39 Am. Rep. 445; *Minot v. Attorney General*, 189 Mass. 176, 75 N. E. 149; *Bowden v. Brown*, 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419.

Decree accordingly.

(207 Mass. 365)

BASSILL v. BASSILL et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. EQUITY (§ 197*) — CROSS-BILL — WHEN MAINTAINABLE.

Where complainant filed a bill to determine the title to certain property as between him and the defendant, including the validity of a lease and the lessee's rights thereunder, a cross-bill, seeking determination of defendant's rights concerning the same matter and their enforcement as against plaintiff, was properly filed.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 455-459; Dec. Dig. § 197.*]

2. EQUITY (§ 197*)—CROSS-BILL—PROPERTY.

A cross-bill for relief is proper, where in the original suit all things in litigation touching the subject-matter cannot be brought before the court, but defendant, in order to obtain complete settlement of the controversy, is entitled to some relief, which the scope of plaintiff's suit will not afford him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 455-459; Dec. Dig. § 197.*]

3. INJUNCTION (§ 27*)—ACTION AT LAW.

Where, in a suit to determine the title to certain property, complainant asked the

court to adjudicate the very questions involved in a prior ejectment suit, from an adverse determination of which plaintiff had appealed, he thereby submitted himself to the jurisdiction of equity, and could not complain that the court enjoined him from further prosecuting such appeal.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 27.*]

Appeal from Superior Court, Suffolk County.

Bill to enforce a trust by *Fred J. Bassill* against *Phoebe H. Bassill* and others, in which defendants filed a cross-bill. From an order overruling a demurrer to the cross-bill, and from a final decree directing plaintiff's surrender of the premises in the suit and restraining him from prosecuting an appeal from the judgment against him in an ejectment suit referred to in the bill and cross-bill, he appeals. Affirmed.

W. Edwin Ulmer and *Geo. W. Reed*, for appellant. *Warren, Hoague, James & Bigelow* (*Henry James, Jr.*, of counsel), for appellees.

HAMMOND, J. The bill alleged a trust for the plaintiff's benefit in certain real estate owned, as of record, by the defendant *Phoebe M. Bassill*, the plaintiff's wife, and leased by her to the defendant *Fellows*, and called for a conveyance to the plaintiff of the legal title. A cross-bill was filed, to which was filed a demurrer, which was overruled, and the plaintiff appealed. The case went to a master who reported findings for the defendants on all points in dispute under the bill and cross-bill. No objections or exceptions to this report having been filed, the findings are conclusive. The trial court dismissed the bill, and in accordance with the prayers in the cross-bill made a final decree ordering the plaintiff to remove from and surrender the premises in dispute and to desist from further prosecuting his appeal from a judgment against him in the ejectment suit named in the bill and in the cross-bill. From this final decree the plaintiff appealed, and the case is before us upon the two appeals.

The plaintiff does not argue that upon the findings of the master the bill was not properly dismissed, but he insists that the demurrer to the cross-bill should have been sustained, and that the final decree is erroneous in so far as it gives affirmative relief to the defendants based upon the cross-bill. But neither the objections to the cross-bill nor to the final decree are tenable.

By his bill the plaintiff sought to have the court pass upon the question of title to the property as between him and the defendants, including the validity of the lease to *Fellows* and the rights of *Fellows* thereunder. The cross-bill did not seek for a determination of any other questions than those raised in the bill. Its purpose was to have established

and enforced against the plaintiff whatever rights in the questions involved the defendants might have as finally determined by the court; and it is no less within the jurisdiction of the court than is the bill itself. "It is a well-settled principle that a court of equity, after it has acquired jurisdiction of a subject-matter in controversy between parties, will, as far as possible, settle all questions in litigation touching it, and do complete justice to all parties, so that there may be an end of controversy. A cross-bill for relief is proper in cases where, in the original suit, all things in litigation touching the subject-matter cannot be brought before the court, but the defendant, in order to obtain a complete settlement of the controversy, is entitled to some relief which the scope of the plaintiff's suit will not afford him." Morton, J., in *Richards v. Todd*, 127 Mass. 167, 169. This cross-bill was well within this principle. It was the proper way to seek affirmative relief against the defendants. *Andrews v. Gilman*, 122 Mass. 471.

One of the plaintiff's objections to the decree is that it passes upon the questions involved in the ejectment suit then pending in the superior court on his appeal from the judgment rendered against him in the lower court; and in support of that objection he relies upon the general principle that the court which first takes jurisdiction of a subject-matter will hold the same to the exclusion of other courts. It is unnecessary to inquire whether the principle be here applicable, for it is plain that inasmuch as the plaintiff in his bill asked the court to consider and adjudicate the very questions thus involved he has waived whatever right he had to the application of the principle to this case, and having submitted himself to the jurisdiction of this court of equity, he cannot now complain.

It follows that the decree overruling the demurrer to the cross-bill and the final decree should both be affirmed; but so far as respects the final decree a manifestly clerical error should first be corrected. In the fifth line of the second paragraph as printed in the record before us the words "Fred. J." should be stricken out and the words "Phoebe M." inserted in place thereof.

So ordered.

(207 Mass. 189)

BLINN et al. v. DAME et al.

DAME et al. v. BLINN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 2, 1911.)

1. INSURANCE (§ 624*)—LIFE POLICIES—ACTIONS—PARTIES PLAINTIFF.

Before St. 1894, c. 225, now contained in St. 1907, c. 576, § 73, relating to life policies, action on a policy must have been brought in insured's name or in that of his personal representative, where the contract was made entire-

ly between him and the company, and the general interest in the beneficial stipulations of the policy were vested in him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1557-1561; Dec. Dig. § 624.*]

2. INSURANCE (§ 138*)—LIFE POLICIES—PROVISION FOR INSURED'S CHILDREN—VALIDITY.

Provision in a life policy that insured's children shall receive the proceeds, if he does not live until a certain date, if they survive him, and if he does not surrender the policy, is valid and enforceable, under St. 1894, c. 522, § 73 (St. 1907, c. 576, § 73), relating to life insurance.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 138.*]

3. INSURANCE (§ 239*)—LIFE POLICIES—VESTED RIGHTS.

Where an appointment or settlement is made in a life policy upon insured's children by provision for payment to them, their right, once established, is to be taken away only by the terms of the appointment itself.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. § 239.*]

4. INSURANCE (§ 239*)—LIFE POLICIES—PROVISION FOR INSURED'S CHILDREN—EFFECT.

Under a life policy payable to insured on a certain date, and to his children if he dies before them, if they survive him, and if he has not surrendered the policy, the children's right is subordinate to the father's right to surrender.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 518; Dec. Dig. § 239.*]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 97*)—CONSTRUCTION—PROPERTY ASSIGNED.

An assignment of one's property, legal or equitable, claims, etc., except property exempt from execution, excepts property exempted by Rev. Laws, c. 177, § 34, and not that exempt at common law, and conveys all rights which assignor's creditors could have reached by process, or under Rev. Laws, c. 163, § 10, relating to proceedings against judgment debtors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 320; Dec. Dig. § 97.*]

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 97*)—PROPERTY COVERED—RIGHTS UNDER LIFE POLICY.

An assignment of one's property, claims, etc., except property exempt from execution for the benefit of creditors, carried the right of assignor to receive insurance payable at a future date to him as insured, if he then be living, and the right to have it paid to his personal representatives on his prior decease, if his children do not survive him, precluding him from surrendering the policy for his own benefit, and entitling the assignees to require him to execute any written surrender essential to collect the surrender value.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 97.*]

Case Reserved from Superior Court, Suffolk County; James B. Richardson, Judge.

Bills by Charles P. Blinn, Jr., and others against Warren S. Dame and others, and by Irving L. Dame and another against Charles P. Blinn, Jr., and others. Reserved from the superior court. Decree for plaintiffs in first case. Second bill dismissed.

Two bills in equity to determine the rights of parties to the surrender value of a policy of life insurance issued by the Penn Mutual

Life Insurance Company to Warren S. Dame, who had made an assignment for the benefit of his creditors to Chas. P. Blinn, Jr., et al. The first suit was by the assignees; the second was by children of Dame, who claimed the money value of the policy. In the superior court the case was reserved for the Supreme Judicial Court.

Warren, Garfield, Whiteside & Lamson, for assignees of Warren S. Dame. Henry Wheeler, for Warren S. Dame. Harry Le Baron Sampson, for Irving L. Dame. Walter L. Van Kleeck, guardian ad litem of Mildred F. Dame. Arthur H. Brooks, for Penn Mut. Life Ins. Co.

SHELDON, J. This policy was issued by the insurance company to Warren S. Dame; the contract of insurance was made entirely between him and the company; the general interest, ownership and right of property in the beneficial stipulations of the policy were vested in him; and before the enactment of St. 1894, c. 225, now contained in St. 1907, c. 576, § 73, any action to recover the amount of the policy must have been brought in his name or in that of his personal representative. *Wright v. Vermont Life Ins. Co.*, 164 Mass. 302, 41 N. E. 303; *Robinson v. Mutual Life Ins. Co.*, 170 Mass. 369, 373, 49 N. E. 645. See *Brown v. Greenfield Life Association*, 172 Mass. 493, 53 N. E. 129; *Millard v. Brayton*, 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294; *Bailey v. Wood*, 202 Mass. 562, 89 N. E. 149.

The policy was issued however after St. 1894, c. 522, had taken effect; and under the provisions of section 73 of that act, now included in the same section of the act of 1907 already cited, the limitations made in the policy of its proceeds for the benefit of the children of the insured, who are the plaintiffs in the second suit, are valid and must be enforced in their behalf. If an appointment or settlement has been made upon them by a stipulation in the policy that the amount thereof shall be paid to them, that establishes their right, and their right, once established and brought into being as a vested right, is not to be taken away from them, except as this result shall be found to have been contemplated and provided for by the terms of the appointment itself. We must ascertain therefore the true construction of this policy as to the disposition of the amount insured; that is, the construction, considering all the terms of the policy, of the promise contained therein. By that promise the company, reciting that it insures the life of Warren S. Dame, undertakes to pay the sum of \$10,000 to him, "the insured, his executors, administrators or assigns," on the 10th day of July, 1918, or if "he should die before that time then to make said payment to Irving F. Dame and Mildred L. Dame," his children, "if they survive the insured (with power to the insured to surrender the policy to

the said company at any time), otherwise to the insured's executors, administrators or assigns." The policy was assignable by the insured; and it contained a statement of what the expected surrender value, or the amount to be paid by the company to the insured or his assigns on his surrender of the policy, would be at the end of the successive years of the proposed insurance.

It thus appears that the elder Dame, the insured, had several valuable rights in the policy; and it is difficult to see why his assignment of the policy would not carry with it all his valuable rights, unless we find some restriction in the language of the policy.

1. If he lived until July 10, 1918, he would be entitled to receive the sum of \$10,000.

2. If he died before that time, that sum would be payable to his personal representatives and would go to increase the amount of his estate unless his children survived him.

3. At any time during the term of the proposed insurance he could surrender the policy and receive for his own benefit the amount of the then existing surrender value.

The right of his children was to receive the amount of the policy if he did not live until the appointed time and if they survived him and he had not in his lifetime surrendered the policy. If this right is regarded as contingent, it would not come into existence at all if the father should at any earlier time exercise his absolute right to surrender the policy; if their right was a vested one, it would be completely divested by their father's exercise of his right. Their right, in the opinion of the majority of the court, was strictly subordinate to the prior and superior right of their father. It was so made by the very language which created it. Either it was not to arise at all if the paramount right of their father should be exercised, or it would be completely divested by the exercise of his paramount right to surrender the policy. Whether their interest was vested or contingent, they could have no part of the proceeds of the policy if their father lived until its maturity, or if they did not survive him, or if he had at any earlier time surrendered the policy. Unless these three contingencies concurred in their favor, either their right never would vest, or it would be completely divested and cut off by the very terms of the conditional limitations in their favor. We do not deem it material to determine whether their right was vested or contingent; for, as we have seen, the result would be the same in either event. There is no question here of the attempted revocation of a trust. Such cases as *Stone v. Hackett*, 12 Gray, 227, and *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89, and those cases in which an absolute interest was given to beneficiaries of life insurance policies, have no bearing. We are to construe the language of the policy and to determine what rights it gives to the children. The statute which has

been referred to protects these rights when ascertained, but it has no operation to increase or extend them.

Under this state of affairs, the elder Dame made his assignment to the predecessors of the plaintiffs in the first action, hereinafter called the plaintiffs. The language of that instrument is broad and sweeping. It passes all his "estate, property and effects, real, personal and mixed, of whatever name and nature, legal and equitable; * * * also all claims, debts, choses in action owing to him, whether now or hereafter payable, and all evidences thereof; also any and all other property, real or personal, of or belonging to him, of whatever description and wheresoever the same may be; * * * except such property as is exempt from being taken on execution by law." This exception does not cover property which could not be taken on a writ of execution at common law; it manifestly refers only to the statutory exemptions stated in Rev. Laws, c. 177, § 34. The instrument, we are satisfied, was intended to convey, and does convey, to the assignees all the property and property rights of the assignor which the creditors could have reached for the satisfaction of their demands by any process, legal, equitable, or under the provisions of Rev. Laws, c. 168, § 10.

We do not doubt that the right of the assignor under this policy to receive the amount thereof on July 10, 1918, if he shall then be living, and his right to have the same amount paid to his personal representative upon his prior decease if his children shall not survive him, would have been available to his creditors and would have passed under the assignment. *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Lord v. Harte*, 118 Mass. 271; *Brigham v. Home Ins. Co.*, 131 Mass. 319; *Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151; *Haskell v. Equitable Assurance Society*, 181 Mass. 341, 63 N. E. 899; *Alexander v. McPeck*, 189 Mass. 34, 75 N. E. 88; *Biggert v. Straub*, 193 Mass. 77, 78 N. E. 770, 118 Am. St. Rep. 449. It seems equally plain that he may not now, as against his assignees, surrender the policy and take the amount of the surrender value for his own benefit. As against the insurance company no doubt he has that right. But it is a right secured to him by his contract with the company, and is a valuable right of property available to his creditors. See the cases last above cited. It is a chose in action which was in existence at the time of the assignment and passed by its terms.

What we have said is also in our opinion decisive upon the only remaining question in the case. His right of surrender was a valuable property right, vested in him by the language of the policy. It constituted an integral part of the value to him or his es-

tate of the policy itself. That pecuniary value would be very much less either to himself or to any one to whom he might transfer his property rights if this unqualified and paramount right of surrender were not secured to him. There was here an agreement on the part of the company to pay the surrender value to him upon his surrender; this was a contract right given to him by the policy, which materially increased its value to him. This was not merely a right to surrender under the third article or the third clause of the eighth article of the provisions attached to the policy. Under the parenthetical clause contained in the promise of the company he had the right to surrender the policy at any time and to receive its surrender value. Moreover this clause was made a part of the conditional limitation or appointment in favor of his children, apparently for the very purpose of saving to him the absolute ownership and control of the policy. The children's right was made subject to his unrestricted right of surrender. This was a valuable property right incident to his general right under the policy such as would pass with an assignment of the latter. It now must be held, in the opinion of the majority of the court, that it did pass, with the policy itself, under the general language of the assignment.

We have found no case which seems to us to be quite decisive upon the point raised here, though in some cases the question decided, and in others the reasoning of the courts, approaches it more or less closely. The decisions are not uniform; but the general trend of authority is in favor of our view. See *Atlantic Mutual Life Ins. Co. v. Gannon*, 179 Mass. 291, 60 N. E. 933; *Travelers' Ins. Co. v. Healey*, 25 App. Div. 53, 49 N. Y. Supp. 29, affirmed in 164 N. Y. 607, 58 N. E. 1093; *In re Steele (D. C.)* 98 Fed. 78; *In re Diack (D. C.)* 100 Fed. 770; *In re Boardman (D. C.)* 103 Fed. 783; *In re Slingluff (D. C.)* 106 Fed. 154; *In re Wellington*, 113 Fed. 189, 51 C. C. A. 151; *In re White*, 174 Fed. 333, 98 C. C. A. 205, 28 L. R. A. (N. S.) 451; *In re Hettling*, 175 Fed. 65, 99 C. C. A. 87; *Townsend v. Townsend*, 127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 313.

It follows that under his covenant of further assurance it is the duty of Warren S. Dame now to execute in favor of the plaintiffs any written surrender that may be necessary to enable them to collect the surrender value of the policy in question, and the duty of the insurance company upon receiving proper surrender of the policy to pay such surrender value to the plaintiffs and in the first case a decree must be entered for the plaintiff substantially as prayed for. The bill in the second case must be dismissed.

So ordered.

*307 Mass. 236)

**ROWE et al. v. TOWN OF PEABODY.
TOWN OF PEABODY v. UNITED STATES
FIDELITY & GUARANTY CO.**

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 8, 1911.)

**1. APPEAL AND ERROR (§ 882*) — REVIEW —
RULINGS BY CONSENT.**

Rulings as to the effect of a contract, made at the request of exceptant and without objection by any party, must be taken as correct on review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

**2. CONTRACTS (§ 803*) — BREACH — EXCUSES —
BURDENSOMENESS OR IMPOSSIBILITY OF PER-
FORMANCE.**

That performance of a positive contract to do a thing, not in itself unlawful, has through unforeseen circumstances become burdensome or impossible, will not excuse a breach.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1416; Dec. Dig. § 803.*]

**3. CONTRACTS (§ 303*) — BREACH — EXCUSE —
BURDENSOMENESS.**

Contractors having absolutely agreed to construct a tunnel, though warned that there might be difficulties in construction on account of the character of the subsoil, cannot excuse nonperformance because the nature of the subsoil, as afterwards ascertained, made performance practically impossible or impracticable without disproportionate expense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1416; Dec. Dig. § 303.*]

**4. CONTRACTS (§ 255*) — RESCISSION — POWER
OF PARTIES — CONSIDERATION.**

The parties to a town tunnel construction contract could rescind it by mutual consent, and changed relations of the parties and proposed modifications of the work would be sufficient consideration for abandonment of the original contract and substitution of a new arrangement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1150; Dec. Dig. § 255.*]

**5. TRIAL (§ 143*) — QUESTIONS FOR JURY — CON-
FLICTING TESTIMONY.**

Conflicting testimony on a given point presents a jury question.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 342; Dec. Dig. § 143.*]

6. TOWNS (§ 37*) — OFFICERS — AUTHORITY.

An agreement by one member of a town committee, which had charge of the construction of a tunnel, for a modification of the construction contract, would not bind the town, in the absence of authority from the whole committee.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 71; Dec. Dig. § 37.*]

**7. TOWNS (§ 42*) — CONSTRUCTION CONTRACTS —
WAIVER OF OBLIGATION — EVIDENCE — SUFFI-
CIENCY.**

Evidence held insufficient to show that a town waived performance of a contract to construct a tunnel.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 77; Dec. Dig. § 42.*]

**8. CONTRACTS (§ 806*) — CONSTRUCTION CON-
TRACTS — BREACH — COMPLETION BY OTHER
PARTY — DAMAGES.**

Contractors having abandoned an agreement to construct a tunnel for a town at a fixed price, the town could hold them for the increased cost of doing the work, but was bound to

take all proper measures to diminish the quantum of damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 803.*]

**9. CONTRACTS (§ 806*) — CONSTRUCTION CON-
TRACTS — BREACH — COMPLETION BY OTHER
PARTY — DAMAGES.**

Contractors, who abandoned an agreement to construct a tunnel for a town on account of unexpected cost, and their surety, on being held for the increased cost of the work to the city, cannot complain because a larger tunnel than contracted for was built, and because different construction methods were used, where that course lessened the actual cost of the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 803.*]

**10. BONDS (§ 63*) — CONTRACTOR'S BONDS — IN-
TEREST.**

Interest is properly allowed on the penalty of a contractor's bond, where the penalty is less than the amount of the damages caused by breach of the bond.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. § 66; Dec. Dig. § 63.*]

Exceptions from Superior Court, Middlesex County; Jabez Fox, Judge.

Actions by Ransome Rowe and another against the Town of Peabody, and by the Town of Peabody against the United States Fidelity & Guaranty Company, tried together. The first was contract on an account annexed for work, labor, and materials and machinery furnished the town of Peabody in the construction of a tunnel for its waterworks. The second action was on a bond given by the Guaranty Company to secure the performance by Rowe & Perini (the plaintiffs in the first action) of a contract to construct the tunnel. The court directed a verdict for the defendant in the first case, and Rowe & Perini excepted. In the second case a verdict was returned for the plaintiff for the face of the bond and interest, and the Guaranty Company excepted. Exceptions overruled.

Johnson, Clapp & Underwood and S. H. Donnell, for Town of Peabody. C. F. Choate, Jr., and F. H. Nash, for Rowe and others and for the United States Fidelity & Guaranty Co.

SHELDON, J. The plaintiffs in the first suit, hereinafter called the contractors, made in July, 1905, an agreement with the town of Peabody for the building of a tunnel from Suntaug Lake for a distance of 1,550 feet, and for the laying of certain pipe and the performance of other specified work. The contractors were to do all the work and supply the materials, so as to furnish to the town a completed tunnel with all its equipment, and were to be paid fixed prices for the different parts of what they were to do. They gave to the town a bond with the defendant in the second suit as surety, conditioned for their faithful performance of the contract. The work was to be a timber-supported tunnel, in which was to be con-

structed a masonry conduit 30 inches in diameter. The judge instructed the jury that the contract required as essential conditions "the construction of a tunnel 30 inches in diameter by the use of timber props, roof supports and lagging. It was not a contract for constructing a suitable tunnel by whatever method should become available." He further ruled that under the contract the officers acting for the town had no power "to require the contractors without their consent to construct a tunnel by pneumatic process 48 inches in diameter. Such requirement would not be a mere variation in form and dimensions which the contractors must adopt, * * * but would be the substitution of a different contract." Both of these rulings were made at the request of the contractors and apparently without objection by any party. They must now be taken as correct. *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661.

The contractors began to construct the tunnel as required by the contract, but presently found that owing to the nature of the soil there were serious difficulties, so great, they contended, as to make the construction in that way practically impossible, and certainly so great as to make it impracticable without a very large and disproportionate expense, such as they were not able to incur. Finally, on October 27th, after some negotiations with the engineer and with the committee of the town, which so far as necessary will be referred to hereafter, the contractors sent to the committee a letter formally abandoning the contract. The town then completed the tunnel by what is called the pneumatic construction, which necessarily involved a cost of \$47,805.12 in excess of the contract price. It was also necessary under this mode of construction to make the diameter of the tunnel 48 inches instead of 30 inches. This mode of construction, as already pointed out, was essentially different from that originally contracted for; but it does not seem to have been disputed that if not the only practicable method, it was at least the cheapest, most expeditious and most economical method by which the tunnel could be constructed.

The first contention made in behalf of the contractors is that the performance of their contract was impossible, or at least that it might have been found by the jury to be impossible, and that for this reason the contract was no longer binding upon the parties. They argue that a contract to build a particular tunnel of specified dimensions by a described method of construction is like a contract to ship goods by a certain steamer, or to sell potatoes to be raised upon certain specified land, or to account for the proceeds of butter to be made in a certain factory, or to build a bridge by the caisson method—in each of which cases it has been held that the continued existence of the subject-matter of the contract or the continued practicability

of the essential details that are stipulated for is an implied condition of the continued validity of the agreement. *Krell v. Henry*, [1903] 2 K. B. 740; *Chandler v. Webster*, [1904] 1 K. B. 473; *Howell v. Coupland*, 1 Q. B. D. 258; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Buffalo & Lancaster Land Co. v. Bellevue Improvement & Land Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; *Lovering v. Buck Mountain Coal Co.*, 54 Pa. 291. This is the same principle which we recently considered in *Hawkes v. Kehoe*, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125. It has frequently been applied in the courts. See, besides the cases already cited, *Angus v. Scully*, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 818; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; *Elliott v. Crutchley*, [1903] 2 K. B. 476; *McKenna v. McNamee*, 15 Canada S. C. 811. But the question is as to the construction of the contract which the parties have made. This was recognized in most of the cases above cited. One who chooses to contract absolutely for the performance of a certain thing is not to be excused from such performance, in the absence of any other ground, merely because it either was originally or has since become impossible of execution. As was said by Blackburn, J., in the leading case of *Taylor v. Caldwell*, 8 Best & S. 826, 833, "Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible." This also has been frequently declared by the courts. *Jones v. St. John's College*, L. R. 6 Q. B. 115, 127; *Paradise v. Jane*, Aleyn, 26; *Atkinson v. Ritchie*, 10 East, 590; *Hill v. Sughrue*, 15 M. & W. 253; *Harvey v. Murray*, 186 Mass. 377; *Drake v. White*, 117 Mass. 10; *Stees v. Leonard*, 20 Minn. 494 (Gil. 448). As was said by the present Chief Justice in *Butterfield v. Byron*, 153 Mass. 517, 520, 27 N. E. 667, 668, 12 L. R. A. 571, 25 Am. St. Rep. 654, "the fundamental question is, What is the true construction of the contract?"

In the case at bar the contract expressly stated that the nature of the underground plot had not been investigated, and that the committee of the town denied any responsibility for its character. The contractors also agreed by the twenty-third article of the contract to take all responsibility for the work and to bear all losses resulting on account of its nature or character or because of the nature of the ground being different from what was estimated or expected. The difficulties which it was claimed made the prescribed mode of construction impossible arose wholly from the character of the soil beneath the surface. They were warned that there might be such difficulties, and no one could say in advance that these might

not be very great, or even insuperable. But they chose to make their agreement an absolute one, and the court cannot relieve them from the bargain which they saw fit to make. The case is well within the decisions. *Boyle v. Agawam Canal Co.*, 22 Pick. 381, 33 Am. Dec. 749; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Eastman v. St. Anthony Falls Water Power Co.*, 24 Minn. 437; *Thorn v. Mayor of London*, L. R. 9 Exch. 163; L. R. 10 Exch. 112, 1 App. Cas. 120. There are three English cases, decided respectively in the House of Lords or in the Court of Appeal, which resemble closely the case at bar. *Jackson v. Eastbourne Local Board*, 2 Hudson, Building Contracts (3d Ed.) 67; *Bottoms v. Lord Mayor of York*, Id. 220; and *McDonald v. Mayor of Workington*, Id. 240. In the first of these cases, Lord Esher said in the Court of Appeal: "When a man is asked to tender upon specifications, he must inquire whether it is possible for him to do the work which he engages to do, and if he does not then find out that it is impossible, he is not excused by reason that, from the difficulties of the work it is afterwards found impossible. He has contracted to do it, and must fulfill his contract."

We are clearly of opinion that these contractors were not excused from the performance of their agreement by reason of its alleged impossibility, but that they were bound either to accomplish what they had promised to do or to respond in damages for their failure.

But it is contended that the town did not choose to stand upon its rights but waived performance by the contractors of the unfortunate obligation into which they had entered, and that it made a new arrangement with them, under which they were to construct another and different tunnel. The original contract, it is contended, was annulled or rescinded by mutual consent, and the parties now stand as if no such contract had been made.

It was competent for the parties to do this if they chose to do so; and under the circumstances of this case, considering the changed relations of the parties and the proposed modifications of the work to be done, there would be a sufficient consideration for the abandonment of the original contract and the substitution of a new arrangement. *Munroe v. Perkins*, 9 Pick. 298, 20 Am. Dec. 475; *Rogers v. Rogers & Brother*, 139 Mass. 440, 1 N. E. 122; *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 688; *Stebbins v. Connors Brothers Construction Co.*, 202 Mass. 153, 88 N. E. 1135; *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 91 N. E. 383.

Some efforts were made by the parties towards effecting a new arrangement. In these, as in all matters respecting the construction of the tunnel, the town acted through its committee on water supply, which consisted of seven persons and of

which one Walker was chairman. Its power to bind the town was not disputed. On September 29th, after the development of the conditions which impeded further progress under the terms of the contract, Barbour, the engineer of the town, wrote a letter to Walker, in which, besides stating these difficulties and the possibility that the contractors might throw up their work, he said: "In view of this possibility the question arises as to whether it will not pay the town of Peabody to make some arrangement with Rowe & Perini so that they can proceed with the work. I am satisfied that they are as well able to do this tunnel work as any one we could obtain. The cost to the town will unquestionably be much greater than originally bid. In considering any such idea it must be clearly borne in mind that we cannot make any proposition to Rowe & Perini without making the bond company a party of the same by a written agreement, otherwise there would be great danger of nullifying the bond." In October, the contractors reached the conclusion that they could not construct the tunnel according to the plans and specifications. There was evidence that Barbour suggested to Rowe, one of the contractors, that the town should continue the work, employing Rowe as its superintendent at a salary and making certain allowances to the contractors for what they had done. There was a meeting of the committee on October 17th, and Rowe testified that on the next morning he talked over a telephone with Walker, and that in answer to Rowe's question Walker said that the committee had decided to go ahead with the work as suggested by Barbour, and added, "Go on with the work, Mr. Rowe; give us the water as soon as you can and save all the money you can for the town of Peabody;" that Rowe assented to this, and put his men at work.

At the meeting of the committee on October 17th, which has been mentioned, a vote was passed "that the chairman be authorized to make a contract with Mr. Rowe to continue the work on a cost basis, all loss on the contract at the present time to be borne by the contractors; that Mr. Rowe be allowed six dollars (\$6) per day for his salary as superintendent, that the surety company be informed of the change in the contract and it is understood that they will consent to the change. It shall be agreed to by Mr. Rowe that this supplementary contract can be annulled by the committee at any time." The arrangement which had been suggested by Barbour to Rowe, and which the contractors claimed was agreed upon between Walker and Rowe, did not conform to the terms of this vote. There was no evidence that Rowe's alleged conversation with Walker was known to any other member of the committee or that the new arrangement claimed thus to have been made was communicated to any other member, or that it ever was

assented to or ratified by any of them, either individually or at any meeting of the committee. Not only did Walker himself testify that he made no such agreement with Rowe (which testimony of course would present merely a question for the jury), but each member of the committee testified that he never authorized or heard of any such agreement; and there was no evidence to the contrary. Under these circumstances, even if the testimony of Rowe had been believed by the jury, they would not have been warranted in finding that the town was at all bound by Walker's action in attempting to make a new agreement. The authority to speak for the town was in the committee as a collective body; no such authority could be found to have existed in any one member thereof, except as it might have been given to him by his associates. *Murdough v. Revere*, 165 Mass. 109, 42 N. E. 502; *Shea v. Milford*, 145 Mass. 528, 14 N. E. 764; *Haven v. Lowell*, 5 Metc. 35. See *Damon v. Framingham*, 195 Mass. 72, 78, 80 N. E. 644. Nor is there to be found in this long bill of exceptions any evidence that such a new agreement as Walker was authorized by the vote of the committee to make was ever in fact made by him with the contractors or either of them. Under these circumstances we must regard the rights of the parties as fixed by the letter of Rowe, abandoning the contract and the reply made by the committee in their letter of November 2d. There was no evidence that the town had waived the obligations of the contractors.

We need not consider the contractors' requests for rulings in detail. They are all disposed of by what has been said. We find no error in the action of the judge.

The second suit was brought by the town against the surety upon the bond given by the contractors. Most of the questions raised in this suit have been sufficiently discussed.

The cost of the tunnel actually constructed was more than \$47,000 in excess of the contract price for what was to have been done by the contractors. Upon a careful examination of the evidence and the contentions made at the trial, as well as the very elaborate and learned arguments which were made before us, we are satisfied that all parties then conceded that the mode of construction adopted by the town was the cheapest and most advantageous one that could have been devised. This resulted in giving to the town a larger tunnel than had been contracted for or than was needed or desired by the town; but it sufficiently appears that it was of the smallest size that could have been made by the best and cheapest method of making any tunnel in this location. The town, not having received the tunnel which the contractors had agreed to furnish and which their surety had agreed that they

should furnish, was entitled to hold them for the cost of obtaining such a tunnel. *Florence Machine Co. v. Daggett*, 135 Mass. 582; *Hill v. Sughrue*, 15 M. & W. 253. But it was the duty of the town to take all proper measures to diminish this quantum of damages. *Loker v. Damon*, 17 Pick. 284, 288; *Cavanagh v. Durgin*, 156 Mass. 466, 31 N. E. 643; *Ingraham v. Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087; *Sullivan v. Old Colony St. Ry.*, 200 Mass. 303, 309, 86 N. E. 511. This it has done. It has obtained a tunnel such as it needed and in its main features such as it was entitled to under the contract, at a cost much less than would have been needed to procure the one contracted for. That in doing this it has been forced to receive a tunnel somewhat larger than was contracted for and somewhat different in its method of construction does not necessarily diminish its damages, especially where this has materially lessened the burden upon those who are answerable to it. Instead of being injured, the latter gain an advantage from the course which has been adopted, and they cannot be heard to complain thereof.

The penalty of the bond was less than the amount of the damages to which the town was entitled in equity and good conscience. For this reason, interest was rightly allowed upon that penalty. *Bank of Brighton v. Smith*, 12 Allen, 243, 251, 90 Am. Dec. 144; *Bassett v. Fidelity & Deposit Co.*, 184 Mass. 210, 216, 68 N. E. 205, 100 Am. St. Rep. 552; *Sampson Co. v. Commonwealth*, 202 Mass. 326, 339, 88 N. E. 911.

The exceptions in each case must be overruled.

So ordered.

(207 Mass. 264)

BROWN v. BROWN.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 3, 1911.)

DIVORCE (§ 156*)—DECREE—DECREE NISI.

Rev. Laws, c. 152, § 18, provides that divorce decrees shall be decrees nisi, and become absolute after six months from their entry, unless the court before such time for cause, upon application, order otherwise. Divorce rule 6, adopted by the superior court, permits any person interested before the expiration of six months from the granting of a decree nisi to file a statement of objections to an absolute divorce, and that such decree shall not become absolute until the objections have been disposed of. *Held*, that the rule was not contrary to the statute, but effectuated its purpose, so that under rule 6 a decree nisi would not become absolute by lapse of more than six months, where a statement of objections to a final decree was filed within such six months.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 518-531; Dec. Dig. § 156.*]

Exceptions from Superior Court, Essex County; Charles U. Bell, Judge.

Divorce action by Gilman W. Brown

against Anna W. Brown. Libel dismissed, and libelant excepts, and also appeals from an order denying a motion for entry of a decree of divorce absolute. Exceptions overruled, and order affirmed.

W. Scott Peters, Harry J. Cole, and Fredk. H. Tilton, for libelant. Herbert Parker and Robert Walcott, for libelee.

KNOWLTON, C. J. On September 18, 1904, the libelant in this case obtained a decree of divorce nisi on account of adultery of the libelee. On February 18, 1905, the libelee filed objections to an absolute decree, properly supported by an affidavit averring condonation of the adultery by the libelant since the entry of the decree nisi, by his cohabitation with the libelee on numerous occasions. On January 1, 1907, the libel was dismissed. The case comes before us upon exceptions, and upon an appeal from an order denying a motion, made long afterwards, for the entry of a decree absolute. We need not consider the other libels that have been brought by the libelant at different times since the entry of the first decree, nor the other motions and orders that have been made in the case. The fundamental question is whether, by force of the statute, the decree nisi became absolute at the expiration of six months, notwithstanding the filing of objections by the libelee.

Rev. Laws, c. 152, § 18, is as follows: "Decrees of divorce shall in the first instance be decrees nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court, before the expiration of said period, for sufficient cause, upon application of any party interested, otherwise orders." After the enactment of this statute the superior court adopted divorce rule 6, which is in these words: "At any time before the expiration of six months from the granting of a decree of divorce nisi, the libelee, or any other party interested, may file, in the office of the clerk for the county in which the libel is pending, a statement of objections to an absolute decree, which shall set forth specifically the facts on which it is founded and be verified by affidavit. Such decree shall not become absolute until such objections have been disposed of by the court." The action of the superior court in this case was in accordance with the rule.

The question is whether the rule is in conflict with the statute. By the application of this rule, was there an order of the superior court, properly applicable to the case, which prevented the decree from becoming

absolute after the expiration of six months from the entry thereof?

The rule in terms covers the case. It was intended to cover such cases. We have not only the action of three justices of the superior court in the present suit in accordance with it, each acting independently when the case came before him, but we have the original joint action of all the justices of that court establishing the rule, which creates a very strong presumption in favor of its validity. It first prescribes a possible method of practice for making the application referred to in the statute. This may be by a statement of objections, setting forth specifically the facts on which it is founded, verified by affidavit. This does not deprive a party of his right to make an application for an order in any other proper way, under the statute. It is in the nature of a general order, applicable to all cases in which such a statement is made, that the statement shall be a sufficient cause for a hearing before the decree shall become absolute. It is a general order, applicable to all such cases, that the decree shall not become absolute until after a hearing and disposition of the objections. Every element that enters into the rule is in exact accordance with the spirit and purpose of the statute. Its effect is perfectly to carry out the intention of the Legislature. A general order that in every case such a statement shall be a sufficient cause for a hearing, and for postponing the absolute effect of the decree until after the hearing, is unobjectionable. There is no occasion for a special hearing upon that subject and a special order to that effect in each case, as distinguished from a general order covering all such cases.

This being so, there is no reason for a special order in each case that the decree shall not become absolute until the objections are disposed of, as distinguished from a general order of that purport, applicable to all such cases.

It remains to inquire whether there is any formal or technical requirement that an order under this statute shall be a special order for each case, rather than a general order applicable to all cases of a certain class. We know of none. A general order applicable to cases of this class meets the language and object of the statute as well as a special order.

The decree nisi did not become absolute by lapse of time after the statement of objections was filed.

Exceptions overruled.

Order affirmed.

(175 Ind. 458)

WILSON v. STATE. (No. 21,677.)¹

(Supreme Court of Indiana. Jan. 11, 1911.)

1. CRIMINAL LAW (§ 662*)—EVIDENCE—EVIDENCE OF TESTIMONY OF WITNESS AT FORMER TRIAL—ADMISSIBILITY.

The reproduction of the testimony of a witness on a former trial where accused either cross-examined him or had an opportunity to do so does not contravene Bill of Rights, § 13, giving to accused the right to meet the witness face to face, where the witness has died or has become insane since the former trial, or is permanently or indefinitely absent from the state, and beyond the jurisdiction of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1542; Dec. Dig. § 662.*]

2. CRIMINAL LAW (§§ 543, 1153*)—APPEAL—DISCRETION OF COURT.

The reproduction of the testimony of an absent witness testifying on a former trial is within the sound legal discretion of the trial court, and its action will not be disturbed on appeal unless the discretion has been abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1233; Dec. Dig. §§ 543, 1153.*]

3. CRIMINAL LAW (§ 543*)—EVIDENCE—TESTIMONY OF WITNESS ON FORMER TRIAL—PRELIMINARY FOUNDATION.

Subpoenas issued for a witness testifying on a former trial were returned by the sheriff "Not found." The sheriff made various inquiries to discover the witness, but without success. He sent his bailiff into different counties of the state to find the witness, without success. The prosecuting attorney was unable, after inquiries, to locate the witness. A son of the witness testified that he did not know where the witness was, and that he had not seen him since the former trial, which occurred four months before. *Held* to authorize the court in its discretion to permit the reproduction of the testimony of the witness on the former trial on the ground that the witness could not be found within the state by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1236, 1237; Dec. Dig. § 543.*]

4. CRIMINAL LAW (§ 547*)—TESTIMONY OF WITNESS ON FORMER TRIAL—ADMISSION.

Where the court on the third trial admitted in evidence the testimony of an absent witness given at the second trial, but it did not appear that the admissibility of the testimony given on the second trial was dependent on that which he gave at the first trial, the court did not err in failing to require the introduction by the state of the testimony of the witness given at the first trial, for, if the testimony given on the first trial impeached the testimony given on the second trial, accused could offer the testimony on the first trial for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 547.*]

5. CRIMINAL LAW (§ 1087*)—BILL OF EXCEPTIONS—REVIEW.

The question of the propriety of the closing argument of the state's counsel and the ruling of the court in denying the request of accused to reply thereto are not presented when exhibited only by the original bill of exceptions containing the evidence which has been certified up without transcribing.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1087.*]

6. CRIMINAL LAW (§ 700*) — ARGUMENT OF COUNSEL—RIGHT TO REPLY.

Burns' Ann. St. 1908, § 2136, subd. 4, providing that the prosecuting attorney having the opening and closing of the argument shall dis-

close in the opening all the points relied on in the case, and where, in the closing, he refers to any new point, accused's counsel shall have the right to reply thereto, does not require the prosecuting attorney to disclose in his opening argument all the criticisms which he may urge in his closing argument against the credibility of witnesses of accused, but only contemplates that the state in the opening argument shall disclose all the points on which it relies, relating to the merits of the case as establishing the guilt of accused, and the prosecuting attorney may in his closing argument refer to the infirmity or unreasonableness of any of the testimony given by witnesses of accused without thereby referring to any new point.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 700.*]

7. CRIMINAL LAW (§ 720*) — ARGUMENT OF COUNSEL.

The state's counsel in his closing argument may point out any infirmity or unreasonableness in the testimony of any witness of accused, and, where his argument is unsupported by the evidence, the court will not assume that the jury was influenced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1670; Dec. Dig. § 720.*]

8. CRIMINAL LAW (§ 730*)—IMPROPER ARGUMENT OF STATE'S COUNSEL—CORRECTION BY COURT.

The error arising from the improper argument of the state's attorney in his closing speech to the jury that a witness for accused was insane, arising from the fact that the conclusion was not warranted by the evidence, was cured by the court directing the jury to wholly disregard the remarks of counsel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

9. CRIMINAL LAW (§ 1134*)—APPEAL—VERDICT—REVIEW.

The Supreme Court on appeal, on reviewing the sufficiency of the evidence to sustain a conviction, will consider only such testimony as is favorable to the verdict, and it will not weigh the evidence and attempt to reconcile conflicts therein, whether the evidence is direct or circumstantial, or both.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3068; Dec. Dig. § 1134.*]

10. CRIMINAL LAW (§ 745*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Where the circumstantial evidence in a criminal case justifies two conflicting inferences, one of guilt and the other of innocence, the question of which inference has been established is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1718; Dec. Dig. § 745.*]

11. HOMICIDE (§ 254*)—MURDER IN THE SECOND DEGREE—EVIDENCE.

Evidence held to justify a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-539; Dec. Dig. § 254.*]

Appeal from Circuit Court, Fayette County; George L. Gray, Judge.

John Wilson was convicted of murder in the second degree, and he appeals. Affirmed.

C. S. Roots and D. W. McKee, for appellant. Jas. Bingham, Alex. G. Cavins, Edw. M. White, Wm. H. Thompson, Allen Wiles, Raymond S. Springer, and Reuben Conner, for the State.

JORDAN, J. Appellant was charged by an indictment returned by the grand jury of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹Rehearing denied.

Fayette circuit court with murder in the first degree. The crime is alleged to have been committed in Fayette county, Ind., on March 3, 1909; the person murdered being the wife of the accused. On a trial by jury he was found guilty of murder in the second degree as charged in the indictment, and, over his motion for a new trial, was sentenced by the court to be imprisoned in the Indiana State Prison during life. The record discloses that appellant has been tried three times. On the first trial the jury failed to agree; at the second the jury found him guilty of murder in the first degree. A new trial, however, was awarded him by the trial court. The third trial resulted as hereinbefore stated.

The only error assigned is that the court erred in overruling his motion for a new trial. The suberrors or reasons assigned in the motion for a new trial, and discussed by his counsel in this appeal, are that the court erred in permitting the state to read in evidence Exhibit No. 9, which was the stenographer's longhand report of the evidence of one William Fenton, a witness in behalf of the state, as given by said witness on the second trial of this cause. The ruling of the court in permitting this evidence to go before the jury is assigned in various ways in the motion for a new trial. Finally, it is assigned therein that the court erred in overruling the motion of the defendant to strike out the evidence as embraced in Exhibit No. 9.

Other reasons assigned and relied on by appellant are, first, that the court erred in refusing to permit his counsel to answer a point made by the state's attorney in closing the argument for the state, which was that a Mrs. Vance, a witness for the defendant, was not worthy of credit because she was of unsound mind; second, insufficiency of the evidence to sustain the verdict of the jury; third, that the latter is contrary to law.

The first alleged error discussed by appellant's counsel is based upon the ruling of the trial court in permitting the state to introduce the evidence of one William Fenton as given by this witness at the second trial of this cause, at which trial, as it is shown, said Fenton was fully cross-examined by appellant. The objections urged by appellant in the trial court to the introduction of this testimony were predicated by him on the right guaranteed by section 13 of the Bill of Rights as contained in the Constitution of this state, which declares that: "In all criminal prosecutions the accused shall have the right to meet the witnesses face to face." The argument presented by counsel is that the evidence of this witness was not competent in the absence of any showing that the witness was dead or insane. It is especially claimed that sufficient diligence has not been shown by the state in its efforts to secure the attendance of the witness at the trial.

It is also urged that the evidence ought not to have been introduced unless the testimony of the said Fenton as given by him on the first trial was introduced in connection with that given on the second trial. The record discloses that appellant unsuccessfully moved the court to strike out the evidence embraced in Exhibit No. 9, being the evidence of the absent witness, unless the state should introduce the evidence of the same witness given on the first trial of the cause.

In respect to the foundation laid by the state which it claimed entitled it to the admission of the evidence in question, the record discloses that the prosecuting attorney, and other officials, were unable to ascertain the whereabouts of the witness William Fenton. It appears that upon the two previous trials this witness had been brought from Henry county, Ind., to testify in behalf of the state. In this appeal the trial below was had at the October term, 1909, of the Fayette circuit court, which commenced on October 4th of that year. On the first day of this term this cause was set for trial to commence on October 18th. Some time before the trial the prosecuting attorney made inquiries of several persons in regard to where William Fenton, the witness, could be found, and these persons informed him that the witness was at New Castle, Henry county, Ind. The prosecutor subsequently talked with other persons, and inquired of them in regard to Fenton, and they informed him that they did not know where he was unless he was at New Castle, Henry county. On the first day of the term the prosecuting attorney directed the clerk of the Fayette circuit court to issue a subpoena to the sheriff of Henry county to subpoena Fenton to be present at the trial. The prosecuting attorney testified that as soon as this cause was set for trial at Connersville, Ind., he directed the clerk to issue subpoenas for all of the state's witnesses. A subpoena for Fenton, the witness in question, was sent to the sheriff of Henry county. The sheriff was also requested to send Fenton, if found in that county, to Connersville in order that he might be present at the trial. Search appears to have been made for this witness also in Wayne county, Ind., and subpoenas issued for him to Henry county and other counties were returned by the respective sheriffs "Not found." The following evidence in addition to that set out was given by the state to the court:

M. C. Buckley testified substantially as follows: "I am 68 years old. Reside at Connersville, Indiana, where I have resided 42 years. Am acquainted with William Fenton. He is 55 to 60 years old. I have known him 20 years. He is a stone mason, and has resided in Connersville 15 to 18 years, though he is occasionally away on business in other towns. It has been some weeks since I have seen him, and I have no knowledge of his whereabouts. He has done work for me. I

have not made any search or inquiry for him. I heard he went to work at New Castle, Henry county, Indiana."

William Fenton, Jr., testified substantially as follows: "I live in Connersville, and have resided there for 28 years. Am the son of William Fenton. Do not know where he makes his home, nor where he is. Prior to the close of the former Wilson trial he made his home at Connersville for about 26 years. I have not seen him since that trial, and do not know where he went, but have heard it was New Castle. I told the sheriff that I did not know where my father is. I am his only son. We do not live together. I have not been interested in him, as we were not on very good terms."

Anson B. Miller testified substantially as follows: "I am sheriff of Fayette county. Wilson and Fenton conversed with each other frequently while in the jail. I have made efforts to find William Fenton since the beginning of this trial. We sent a subpoena, issued from the clerk to New Castle, Indiana, where Fenton was on the former trial, and he could not be found. I had a communication with the sheriff up there on Tuesday or Wednesday of this week, and instructed that if the sheriff could find Fenton to send him to Connersville. The sheriff had the subpoena and promised to notify me by telephone if he found Fenton, and telephoned me that he had not seen anything of Fenton around there for three weeks, and that Fenton had left there. The sheriff said Fenton might be in Cambridge City or Richmond, and I went to both places night before last, and took with me the sheriff and deputy of Wayne county. We searched Richmond all over as near as we could. People that knew Fenton had not seen him. Fenton frequents saloons; and we inquired at different saloons and boarding houses, but were not able to find him. I inquired for Fenton of the police of Cambridge City on my way to Richmond, and went back there from Richmond and looked for him myself, and made inquiry, but could find no trace of him. The reason the New Castle sheriff thought Fenton might have been at Cambridge City or Richmond was that there was some railroad work going on around there. At Cambridge City I went to the contractor, who had a list of names of his men. Fenton was not on the pay roll, and the contractor knew nothing of him. My riding bailiff, Roe Sanders, went into different counties out from Connersville. I made inquiry of several of Fenton's acquaintances since my return—of Duff Murphy and Will Michaels, and others whose names I do not know—and have been unable to get any trace of Fenton at all. I have not seen him since the former trial of this case. I did not inquire at Rushville. I did in Brookville; I went there last week. I had a subpoena with me when I made these visits. The first subpoena for this trial came into

my hands day before yesterday. The court asked me to find Mr. Fenton if I could."

Anna Henry testified substantially as follows: "I am official stenographer for this court, and was such and was sworn as court reporter to take down the evidence on both former trials of this case, and did so. I correctly took and transcribed into longhand the evidence of William Fenton on the second trial."

Upon the showing made by the state at this preliminary hearing, the trial court held that the testimony of William Fenton, the absent witness, given by him upon the former trial of this cause, at which time he was cross-examined by the defendant, was competent, and permitted the state, over the defendant's objection, to introduce it in evidence to the jury. The testimony in question was quite material for the state.

Counsel for appellant contend that under the provisions of section 13 of our Bill of Rights appellant had a right to demand that he be permitted to meet the witnesses of the state face to face. Certainly that is true, but it is well settled that in a criminal prosecution, under certain circumstances, the reproduction of the testimony of a witness upon a former hearing or trial of the same case, where the accused party either cross-examined such witness or was afforded an opportunity to do so, does not contravene the constitutional provision securing to the accused the right of confrontation. *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *Bass v. State*, 136 Ind. 165, 36 N. E. 124; *Wabash R. R. Co. v. Miller*, 158 Ind. 174, 61 N. E. 1005; *State v. Heffernan*, 22 S. D. 513, 118 N. W. 1027, 25 L. R. A. (N. S.) 868; *Jacobi v. State*, 133 Ala. 1, 32 South. 158; *State v. Nelson*, 68 Kan. 568, 75 Pac. 505; *Hobbs v. State*, 53 Tex. Cr. R. 71, 112 S. W. 308; 3 *Rice on Evidence* (Criminal) § 224, and authorities there cited.

Counsel for appellant insist that the preliminary evidence does not disclose that the state exercised sufficient diligence in order to discover the whereabouts of the witness Fenton. The question presented for our determination is: Did the state, by the preliminary evidence which we have herein set out, lay a sufficient foundation to authorize the introduction of the evidence of Fenton, the absent witness? The admission of such testimony is an exception to the general rule of the law which excludes what is denominated "hearsay" evidence. The origin of this exception arises out of necessity in the administration of justice, and the fact that the defendant or the accused in a criminal prosecution has already at a former trial or hearing in the same case been afforded the opportunity to confront and cross-examine the witness or witnesses whose evidence, is offered to be reproduced, is held to meet or satisfy the provision of the Constitution which guarantees to him the right to

meet the witnesses "face to face." Admission of such evidence in a criminal prosecution is not alone limited or confined to a case where the witness whose former evidence is offered has died or become insane since the trial at which it was given, but the rule extends and is applicable to the former testimony of a witness who is permanently or indefinitely absent from the state, and therefore beyond the jurisdiction or process of the court in which the case is pending. *State v. Nelson*, supra; *Hobbs v. State*, supra; *Jacobi v. State*, supra; *Encyclopedia of Evidence*, p. 904; 3 *Rice on Evidence (Criminal)* § 224, and authorities there cited.

The reproduction and admission of the evidence of Fenton, the absent witness, was, under the circumstances and facts in this case, within the sound legal discretion of the trial court, but the exercise of such discretion could not be abused by the court, and the question of its abuse is one which may be reviewed and determined by this court on appeal.

The question then presented is: Did the lower court, in view of the foundation laid by the state under the preliminary evidence given, abuse its discretion in permitting the testimony in controversy to be introduced in evidence? It is disclosed that the state, by the prosecuting attorney and the sheriff of the court, exercised reasonable diligence and made a bona fide search and effort to discover the whereabouts of Fenton, the absent witness, in order to have him present at the trial. The subpoenas issued for him were returned by the sheriffs to whom they were issued "Not found." A son of the witness testified that he did not know where his father was, that he had not seen him since the former trial, which, as it appears, was four months prior. The testimony of the sheriff of the Fayette circuit court disclosed that he had made various searches and inquiries to discover where Fenton might be found. It appears that he sent his bailiff into different counties of the state in order to find the witness. The trial court, as the sheriff stated, directed him to find Fenton if possible. The state's prosecuting attorney testified that he had been unable, after the search, inquiries, and efforts which he had made, to locate the witness. There was no direct evidence to show that Fenton, the absent witness, was at any place within the state, or, if he was, that he was in any of the counties into which the subpoenas had been sent for him or search made to discover his whereabouts. This being a criminal prosecution, the deposition of the witness could not be taken by the state and used upon the trial without appellant's consent. Under the circumstances, the state in the exercise of reasonable diligence, which the law exacted of it to find the witness if within the state, was not bound to issue subpoenas for him into each and all of the counties of the state, or to send persons throughout the state in

order to discover where the witness might be found.

Under the evidence given at the preliminary hearing, we believe that the lower court was warranted in concluding that the absent witness could not be found within the state by the exercise of reasonable diligence, and therefore was justified in inferring or finding that the witness was not within the jurisdiction of the court. *People v. Gannon*, 61 Cal. 476; *People v. Riley*, 75 Cal. 98, 16 Pac. 544. Under the circumstances, we cannot say that the court abused its discretion in admitting the evidence in question. We are further of the opinion that by the admission thereof none of appellant's substantial rights was impaired. There is no merit in the argument that the court erred in admitting the evidence of the witness Fenton given at the second trial without requiring the introduction by the state in connection therewith his evidence given at the first trial of this cause. It is in no manner disclosed that the admissibility of his testimony given upon the second trial in any manner depended upon that which he gave at the first trial. If the evidence of this witness on the first trial tended to impeach or contradict that given by him on the second trial, then, under the circumstances, appellant might have offered to introduce it for that purpose. This he did not offer to do.

On the trial, Mrs. Adeline Vance, a witness who testified on behalf of the defendant, stated that about 10:30 a. m. on March 3, 1909, that being the day of the homicide, as she was riding in a phaeton by the home of the defendant, she looked up and saw his wife looking at her from the south window of the house. On cross-examination she stated that what attracted her attention was she thought Mrs. Wilson was looking at her while she (the witness) was whipping her horse, and that caused her to look up and see Mrs. Wilson looking at her through the window. She was also cross-examined in regard to some contradictory statement which it was claimed she had made while testifying at the coroner's inquest. The bill of exceptions recited that one of the attorneys for the state in the closing argument in commenting upon the evidence of this witness Mrs. Vance, and in attempting to break the force of the same, said in his argument to the jury: "That she was probably insane; that the fact that she claimed or believed that her attention had been called to the deceased, Maud Wilson, at the time the witness claimed to have looked up to have seen the deceased looking at her through a window had been by reason of the fact that the deceased, so looking at the witness, had caused the witness to look up and see her, indicated that the said witness was insane." To this argument appellant's counsel at the time objected, and at the close of the argument by the state's attorney he moved and requested the court to grant him a short time in which to

reply to the argument of the attorney in which he had attacked the sanity of the witness Mrs. Vance. The defendant stated to the court at the time that the sanity of his said witness had not been questioned by any evidence introduced in the case, and that it had in no way been referred to in the argument by the attorneys representing the state who had previously argued said cause; and that the suggestion that the witness probably was insane was a new point not previously raised in the case. The court, however, overruled the motion and request of the defendant to be permitted to reply to the argument of the state's attorney, and refused to permit him by his counsel to reply to the same, to which ruling of the court defendant objected and excepted. Thereupon the court, on its own motion, instructed the jurors that they should wholly disregard any argument or suggestion made by counsel which questioned the sanity of the witness Mrs. Vance.

The insistence of appellant's counsel is that under the provisions of subdivision 4 of section 2136, Burns' Ann. St. 1908, appellant had the right to reply to what they term was a "new point" advanced by the state's counsel in the closing argument. By the provisions of subdivision 4 of the section mentioned, among other things, it is provided that: "The prosecuting attorney shall have the opening and closing of the argument; but he shall disclose in the opening all the points relied on in the case, and if in the closing he refers to any new point or fact not disclosed in the opening, the defendant or his counsel shall have the right to reply thereto."

The Attorney General, however, contends that the question in regard to the argument of the state's counsel and the ruling of the court in denying the request of appellant to reply thereto is not properly presented by the record for the reason that it is exhibited only by the original bill of exceptions containing the evidence, which has been certified up without transcribing. An examination of the original bill verifies the Attorney General's contention, and we might properly dismiss the question attempted to be presented without consideration. *Williams v. State*, 170 Ind. 644, 85 N. E. 849; *Curless v. State*, 172 Ind. 257, 87 N. E. 129, 88 N. E. 389. However, as this is a case involving the liberty for life of appellant, we have concluded to consider the point sought to be raised regardless of the infirmity of the record. It is certainly evident, we think, that the state in a criminal prosecution, under the provisions of section 2136, *supra*, is not required in its opening argument to disclose all the criticisms which it may urge in its closing argument against the credibility of the defendant's witnesses. What the statute in question contemplates or intends by providing that the state in the opening argument shall disclose all the points upon which it relies, refers to points or facts relating to the merits of the case; or, in other words, such

points or facts which the state may insist go to establish the guilt of the accused. It cannot in reason be held to refer to criticism made by the state's counsel in respect to the infirmity or unreasonableness of any of the evidence or testimony given by the defendant's witnesses. *Taffe v. State*, 90 Ga. 459, 16 S. E. 204. It was proper for the state's counsel to point out in his closing argument any infirmity or unreasonableness with which he considered the evidence of Mrs. Vance to be impressed. If his argument in respect thereto was unsupported by the facts or evidence in the case, it would be unreasonable to assume that the jury was influenced by his opinion or logic. If he was wrong in the inference or conclusion which he deduced from the evidence of the witness, such an error is not one which a court can correct. *Behler v. State*, 112 Ind. 140, 13 N. E. 272; *Warner v. State*, 114 Ind. 187, 16 N. E. 189; *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; *Osburn v. State*, 164 Ind. 262, 73 N. E. 601.

But again, upon another view, it appears that the court in regard to the argument or suggestion of counsel calling in question the sanity of Mrs. Vance, in positive language admonished the jurors to wholly disregard such argument. It would seem that this admonition from the trial court at least had fully as much bearing or influence upon the jury as any reply which counsel for appellant could have made in respect to the argument.

The next and final proposition argued by appellant's counsel is that the evidence is not sufficient to sustain the verdict of the jury. Under a well-settled rule, in reviewing and considering evidence in a case on appeal to this court, only such as is favorable to the verdict of the jury will be considered and regarded. *Williams v. State*, 170 Ind. 630, 85 N. E. 113; *McReynolds v. Smith*, 172 Ind. 336, 86 N. E. 1009; *Schondel v. State* (at this term) 88 N. E. 67.

The evidence upon which appellant was convicted in the main is circumstantial. We will refer to it in part: Lulu Maud Wilson, the subject of the murder, was the wife of the defendant. They were married in the year 1900 and had lived together as husband and wife until the day of the homicide, the 3d day of March, 1909. It appears that from girlhood she had been afflicted with epilepsy, and from time to time she would have "fits," which varied in degree, sometimes being of a mild character and other times they were so as to render her unconscious and wholly helpless. The house of defendant, in which it is shown that his wife was murdered, is situated on the Waterloo road immediately outside of the limits of the city of Connorsville, Fayette county, Ind. The dead body of Mrs. Wilson was found on the 3d day of March, 1909, about noon lying on a bed in the north bedroom of the house. Her skull was crushed, and her face and head were beaten and crushed. When found she was

fully dressed in her everyday garments. The occupation of defendant was that of a cement worker. He was also employed at times as a railroad section hand, and at other times in digging for contractors and plumbers. He testified in his own behalf upon the trial, and stated that on March 3, 1909, he was absent from home at work in a plumber's shop in Connersville. He testified that he left his home on that morning about 6:35 o'clock, and that he did not return until about 20 minutes past 12 o'clock at noon; that when he arrived at his home he found the door standing open; that when he entered his house something attracted his attention, and he opened the door and looked into the bedroom, and saw blood on both sides of the pillow on the bed, which was standing close to the door. He entered the room far enough to see that his wife was lying on the bed with a bed cover thrown diagonally across her. Upon discovering this, he, without making any further examination, called to a Mrs. Remmert, a neighbor who lived nearby, and said to her that some one had killed his wife. He then went over to Mrs. Reed's home, his mother-in-law, who lived not far away, and told her and Joe Hauck, his brother-in-law, that some one had murdered his wife, or that "it looked that way to him." Mrs. Reed and Hauck went with him to his house. After returning to the house he stated that from the examination he made of his wife he discovered that her forehead and upper part of her face were badly beaten and crushed. The state introduced the record of the defendant's testimony given before the grand jury whereby it was shown that he testified at the inquest that his wife had a light "fit" on the day previous to the murder about 5:30 p. m. Soon after, he, in company with Mrs. Reed and Hauck, returned to his home—the news of the murder having been circulated—the neighbors came to the house and assisted in preparing and dressing the body of the deceased. The evidence given by defendant upon the trial and that given by him before the coroner at the inquest is somewhat contradictory.

Mrs. Mary Reed testified that a short time after noon, on March 3d, the defendant came to her kitchen door and said to her, "Come over; somebody has murdered Maud." Joe Hauck testified that defendant said to him at the time, "Come over, Maud is dead; somebody has murdered her." When they reached defendant's house Hauck and defendant went into the bedroom. The deceased wife was covered over, defendant raised up the cover, and said, "There she lays; she is dead. Somebody has murdered her." Defendant testified that a pair of his rubber boots and his overcoat were missing, and that he had not seen them or been able to find them since the murder of his wife.

It appears that defendant was accused of the murder and arrested and placed in the

county jail on March 9, 1909. At that time William Fenton, who testified on the second trial, and whose former evidence was reproduced, was also a prisoner in the jail. He testified that he was acquainted with the defendant; that shortly after the imprisonment of the defendant Fenton desired to show him a newspaper containing some statements made by Joe Hauck; that the defendant replied that he did not want to see the paper; that he knew what was in it; that he was always afraid that Hauck would get "rattled," and not know what he said. On another occasion defendant, while in jail, told Fenton that he expected to go to state's prison; that if he went, when he returned, "somebody would have to pay for it."

Fenton further testified that on the same day on which the defendant was imprisoned in jail he saw him tear some bloody patches from a shirt which he was wearing and throw them into a sink in the jail. He also stated that he saw him wash a bloody pocket handkerchief and hang it out to dry. These patches were found in the jail sink, and it was shown at the trial that the blood which stained them was the blood of a human being. In a few days after Fenton saw the defendant tearing out these bloody patches from his shirt, he informed the sheriff what he had seen the defendant do.

A Mr. Bishop testified that he drove a bread wagon on the day of the murder, and had been so engaged for six months prior thereto; that Mrs. Wilson was one of his customers; that he stopped at defendant's home on March 3d about 10:20 a. m.; that he rang the doorbell, but no one came to the door or answered this call; that Mrs. Wilson had previously always come to the door when he rang the bell, and would indicate if she desired any bread by a nod of her head; that on the day of the murder when he stopped at the Wilson house it was snowing a little and the wind was blowing from the northwest. The door was standing partly open, the screen door was closed, but the snow was blowing in. He heard no noise and saw no person about the house.

A Mr. Thomas testified that he came to defendant's home a short time after noon on March 3d, soon after the arrival of Mrs. Reed; that he went away and telephoned to the coroner the information of the murder, but that he returned within a half hour; that he went onto the back porch and opened the heating stove which was sitting there, and found in it an iron rod which he took out of the stove and handed to Dr. Mountain; that the rod had blood all over it, and when the rod was taken from the stove the blood was not yet dry.

Physicians who examined the body of the deceased testified that they discovered nothing to indicate that a rape had been committed on the deceased; neither did it appear that the house had been robbed. The gold watch of deceased was upon the dresser in

the room in which she was lying. Witnesses testified that it appeared that the bedclothing had been thrown over the deceased after she had been placed upon the bed; that from the position of the bedclothes and the way the deceased was lying upon the bed when found that she had been thrown or placed on the bed by some one. There was blood on the pillow and on the bedclothes, and blood was on the dresser which was standing in the northeast corner of the room and also on the window. The blood spots appeared to have come from the direction of the bed. To the left of the door inside the bedroom and about two feet from the bed a pool of blood about 18 inches long and 10 inches wide was on the floor; that it looked like about a pint of blood had been spilled there. The physicians testified that from the examination which they made that the deceased had been dead when found from three to six hours and might have been dead longer.

Joseph Hauck also testified that on Sunday following the murder he and the defendant were walking together, and that the former said to him that the iron rod which had been found in the stove covered with blood looked like one which Hauck formerly had, and, further said, "for God's sake not to say anything about it." This witness further testified that on the Sunday before the murder he was at the defendant's home, and that the latter said to him that if anything happened to his wife he would receive the insurance; that he would receive \$194 from one insurance company, and \$45 from another. After the coroner's inquest the defendant stated to a certain person who was a witness at the trial that he wished the coroner would make his report so that he could "straighten things up."

Mrs. Mary Reed further testified that she had objected to the marriage of her daughter to the defendant on account of her physical condition, and on account of the family into which she was marrying; that the defendant and his wife had lived in a part of her house for three years and a half after they were married; that her daughter had epileptic fits or spells; that defendant and his wife frequently quarreled, and that he never allowed his wife any liberty; that he gave her scarcely any money; that she was at the home of the defendant on the evening prior to the murder; that her daughter, Mrs. Wilson, seemed very much worried and depressed, and that defendant appeared to be mad and ugly, and it appeared to her as though he and his wife had been quarreling; that the defendant at that time said to her that he was going to sell off everything which he had and place his wife in a hospital. Defendant in his testimony at the trial attempted to attribute the cause for the spots or stains on his shirt to being bitten by bed bugs.

Certain letters or notes which were proven to be the handwriting of defendant and which appeared to have been written by him while

confined in jail were introduced in evidence. One of these notes, of date August 31, 1909, addressed to and received by John Krasser, attempted to cast suspicion upon Hauck as the perpetrator of the murder of defendant's wife. This letter warned Krasser to watch his girl; that there was a man out that way who could cause the girls trouble, that he was of that character, and, in the opinion of the writer, was the party who killed Mrs. Wilson, because she "would not give up to him," and that his name, as the writer thought, was Hauck. Another one of these letters purported to be addressed to J. Wilson, and was signed "Black Hand." This letter stated that the writer knew Wilson was innocent, but that Wilson and his father knew something on the writer and could "stick him," and that if Wilson "got stuck" that "would clear the writer"; that Wilson had better not tell anything on the writer, or there would be another Wilson less in this country; that the writer would not send the letter through the mail but would put it in through the window. Other of these notes attempted to cast suspicion of the crime upon Hauck.

Mrs. Miller, the wife of the sheriff, testified that two of these letters were found by her in the jailyard under the windows of the second story of the jail, in which story defendant was confined. She testified that there was about a two-inch space around each of the windows; that defendant had a broom and could reach arm's length through the bars of the cell and thereby could push these notes or letters out through the window.

The evidence of Hauck further disclosed that before and after the murder of Mrs. Wilson he and the defendant frequently associated together; that on the Sunday after the murder Hauck said to defendant that they were both under suspicion and had "better not be seen together so much"; that defendant said to him that they ought not to quit running together all at once, and that they both would be arrested for the crime. Hauck said to him in reply that he was innocent, but the defendant did not say whether he was innocent or guilty; that after he (Hauck) and the defendant had been twice examined by the prosecuting attorney, the defendant said to him that their testimony did not correspond, and that they had better not talk about the matter any more. He further said that the defendant was nervous and could not sleep. There was evidence going to show that when persons were talking about the murder appellant became nervous and excited; that he was afraid somebody was going to harm him, and carried a revolver when he went out.

There are other circumstances which point to appellant as the guilty person and these were left unexplained by him, but we do not deem it essential to further extend this opinion by setting out any more of the evidence. It is not the province of this court to weigh

the evidence in a case on appeal and attempt to reconcile any of the conflicts therein. This rule is applicable whether the evidence is direct, circumstantial, or both. *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525.

The circumstantial evidence as it appears in the record does not impress us as of such a character that two conflicting inferences might be drawn therefrom—one tending to prove the guilt of the accused, and the other in favor of his innocence. Were it of such a character, however, it would not be within the province of this court to determine which inference should have controlled the jury. *Sanderson v. State*, supra.

The record presents no reversible error, and the judgment below should be affirmed.

Judgment affirmed.

(46 Ind. App. 697)

KELLY v. GRAND TRUNK WESTERN RY. CO. et al. (No. 6,882.)

(Appellate Court of Indiana. Jan. 12, 1911.)

1. TRIAL (§ 321*)—VERDICT—RETURN.

Acts 1831, c. 33, § 387 (Rev. St. 1831, § 544; Burns' Ann. St. 1908, § 570), providing that a verdict, when returned into court, shall be delivered by the foreman, and that either party may poll the jury, requires a verdict to be returned by the jury as a body in open court, and there delivered by the foreman.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 760-763; Dec. Dig. § 321.*]

2. TRIAL (§ 321*)—RECEPTION OF VERDICT—NATURE OF ACTS.

Presiding as judge at the return of a verdict, receiving the verdict, and discharging the jury are judicial acts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 760-763; Dec. Dig. § 321.*]

3. APPEAL AND ERROR (§ 707*)—REVIEW—RECORD.

In reviewing an assignment of error to granting judgment on answer to interrogatories notwithstanding a contrary general verdict, the Appellate Court will look only to the complaint, answer, general verdict, and answers to the interrogatories.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 707.*]

4. APPEAL AND ERROR (§ 901*)—REVIEW—PRESUMPTIONS.

Inferences may be indulged to support rulings, proceedings, and the judgment below, but not in favor of one who attacks them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3670; Dec. Dig. § 901.*]

5. APPEAL AND ERROR (§ 1032*)—REVIEW—RECORD.

Appellate courts may search the record to affirm a judgment, but will not reverse unless it affirmatively appears from the record that the rulings below were harmful to appellant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

6. APPEAL AND ERROR (§ 1032*)—HARMFUL ERROR—BURDEN OF PROOF.

The burden is one alleging harmful error to present a record clearly excluding the presumption in favor of the proceedings and judgment below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.*]

7. APPEAL AND ERROR (§ 490*)—REVIEW—JUDGMENT NOTWITHSTANDING VERDICT—INSUFFICIENT RECORD.

Failure of the record to show submission of issues to a jury or that a verdict was returned into court, or that interrogatories found in the record were submitted, or that they and the answers thereto were returned into court, would warrant disregard of an assignment of error to granting judgment on such answers notwithstanding a contrary general verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 490.*]

8. TRIAL (§ 350*)—INTERROGATORIES TO JURY—SCOPE.

Special interrogatories to a jury must relate to questions of fact within the issues, as expressly provided by Burns' Ann. St. 1908, § 572.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

9. CARRIERS (§ 315*)—DEATH OF PASSENGERS—NEGLIGENCE—PLEADING—GENERAL DENIAL.

In an action against a railway company for death of a circus employé while riding on his employer's train, a general denial put in issue every fact essential to recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

10. CARRIERS (§ 316*)—DEATH OF PASSENGERS—NEGLIGENCE—BURDEN OF PROOF.

In an action against a railway company for death of a circus employé while riding on his employer's train, the burden was on plaintiff to show all the essential elements of actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

11. TRIAL (§ 350*)—SPECIAL INTERROGATORIES—SUBJECTS.

In an action against a railway company for death of a circus employé while riding on his employer's train, it was proper to submit special interrogatories to have the jury disclose the relations between decedent and the company at and before the time of the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

12. CARRIERS (§ 315*)—DEATH OF PASSENGER—EVIDENCE.

In an action against a railway company for death of a circus employé while riding on his employer's train, the agreement between the company and the employer was admissible under the general issue to show the relations between the parties, and to show the company's duty to decedent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

13. CARRIERS (§ 307*)—CIRCUS TRAINS—EXEMPTING LIABILITY—VALIDITY.

A carrier's contract with a circus company exempting the carrier from liability for negligence in handling the circus company's cars, and making the carrier's obligation that of a private carrier only, is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1252-1259; Dec. Dig. § 307.*]

14. CARRIERS (§ 322*)—DEATH OF PASSENGER—CIRCUS TRAINS—LIABILITY OF CARRIER.

In an action against a railway company for death of a circus employé while riding on his employer's train, judgment was properly given the company notwithstanding a general verdict for plaintiff, where answers to special interrogatories disclosed that the company transported the train under an agreement with the employer exempting it from liability as a common or special carrier.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 322.*]

In Banc. Appeal from Circuit Court, Miami County; J. N. Tillett, Judge.

Action by Rose Kelly, administratrix, against the Grand Trunk Western Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

George W. Galvin, Wm. A. Reading, and Frank D. Butler, for appellant. Kretzinger & Gallagher, Rooney & Rogers, and Anderson, Parker & Crabili, for appellees.

MYERS, C. J. Appellant brought this action against the Grand Trunk Western Railway Company, which we will hereafter refer to as company, and Benjamin E. Wallace to recover damages on account of the death of John F. Kelly. The complaint was in one paragraph, answered by separate denials. Appellee Wallace had the verdict of a jury in his favor, and the court rendered judgment on the verdict. The motion of appellee company, for judgment in its favor upon the interrogatories and answers of the jury thereto notwithstanding the general verdict in favor of the appellant, was sustained, and this ruling is assigned as error. Appellant makes the point that the record does not show that the interrogatories were submitted to the jury in accordance with the provisions of the act of 1897. Acts 1897, p. 128 (section 572, Burns' Ann. St. 1908). Appellees insist that the question relied on by the appellant is not presented by the record.

The record does not show the submission of the issues to a jury, or that a verdict of a jury was returned into the court, or that the interrogatories found in the record were submitted to a jury, or that the interrogatories and answers thereto were returned into court. The record does show that on December 12, 1907, "there was filed with the clerk of the Miami circuit court the verdict of the jury in the above-entitled cause." Then follows a copy of the verdict thus filed. It also appears that on the same day there was filed with the clerk of said court "the following interrogatories, with answers by the jury thereto in the above-entitled cause." Then follows the title of the cause, and a copy of the interrogatories and answers. It is not disclosed by the record that the complaint or either of the answers thereto, or that either of the aforesaid proceedings, were given a docket number. It does appear that a motion for judgment was filed by said company in cause No. 6246 (Rose Kelly, Administratrix, v. Grand Trunk Western Ry. Co., et. al.), which motion, upon a certain day of a certain month of a certain year, and on a certain judicial day of a term of the Miami circuit court, was, by the judge of that court, acted upon and sustained, A judgment was duly rendered in favor of appellees, and against the appellant.

Our Code (Acts 1881, p. 313, § 287; Rev. St. 1881, § 544; section 570, Burns' Ann. St. 1908) provides that the verdict of a jury

"must be reduced to writing and signed by the foreman; and, when returned into court, the foreman shall deliver the verdict, and either party may poll the jury." This statute evidently means that the verdict shall be returned by the jury as a body into open court, and there delivered by their foreman. The doing of these things by the jury must be taken as a part of the judicial proceedings of the particular case. It is not and will not be insisted that the clerk of the court is authorized to do any act in this regard in its nature judicial. To take the place of the judge of the court and preside at the return of the verdict, receive it, and discharge the jury are judicial acts. Willett v. Porter, 42 Ind. 250.

In this case, without any showing that the issues or interrogatories were submitted to a jury, a copy of what purports to be a verdict of the jury, and interrogatories and answers thereto, appear in the record as having been filed with the clerk of the Miami circuit court. Who filed them, or what proceedings were had in the cause after the issues were closed, leading up to the filing with the clerk of such verdict, interrogatories, and answers, is not shown. The clerk made up the record as requested by the appellant. If we may infer from the fact that the præcipe directed the clerk to furnish appellant a transcript of certain designated proceedings had in a certain cause, wherein a judgment, regular on its face, is here challenged, that the other proceedings found in the transcript had reference to and were a part of the same proceedings, then we would perhaps be authorized to consider the question sought to be raised by the assignment of error, for in determining that question we look only to the complaint, answers, general verdict, and answers of the jury to the interrogatories. City of Jeffersonville v. Gray, 185 Ind. 26, 74 N. E. 611. So it seems that the question in this case arising upon the merits will be reached only through the channel of inferences, a mode of procedure we are compelled to condemn. It is now an elementary principle of law, that inferences may be indulged in support of the rulings, proceedings, and judgment of the trial court, but not in favor of one who attacks such action of such court. In this jurisdiction appellate courts may search the record to affirm a judgment, but they will not reverse a judgment unless it affirmatively appears from the record that the rulings of the lower court were harmful to the appellant. The burden is on the one who alleges harmful error to present a record clearly excluding the presumption in favor of the proceedings and judgment of the trial court. Shugart v. Miles, 125 Ind. 445, 450, 25 N. E. 551; Allen v. Gavin, 180 Ind. 190, 29 N. E. 363; Brown v. State, 140 Ind. 374, 39 N. E. 701; Greer-Wilkinson Lumber Co. v. Steen, 37 Ind. App. 595, 597, 77 N. E. 673; Evansville, etc., Ry. Co. v. Lavender, 1

Ind. App. 855, 34 N. E. 109, 847; *Selva v. Green*, 91 N. E. 357; *Ewbank's Manual*, § 5. While the judgment in this case might, with propriety, be affirmed on the ground of uncertainty appearing upon the face of the record before us, yet we are disposed to decide it upon its merits.

The facts in this case are developed by the answers of the jury to interrogatories. From these answers, in substance, it appears that said Wallace, in the summer of 1903, was the owner of circus property, and engaged in giving circus performances, and as a part of his outfit he owned and used 37 railroad cars to transport his property and employes from place to place over railroads; that on August 6 and 7, 1903, John F. Kelly was in Wallace's employ; that on August 8, 1903, Wallace gave an exhibition with his said circus at Charlotte, Mich., which town was on said company's line of railway, and on that evening said property and the employes of said Wallace, including appellant's decedent, were placed in said cars to be transported over said company's railroad to La Peer, Mich.; that said show cars were divided into a train of two sections of 18 cars each; that decedent was carried in the rear car of the first or forward section; that near Durand, Mich., the rear section of said train ran into the rear end of the forward section, demolishing the car in which said decedent was riding, and he was thereby killed; that said cars were delivered to said company under and by virtue of a written contract between said company and said Wallace. In said contract it was stipulated that the contract was not made with the company as carriers, either common or special, and because of the inadequate consideration of any such undertaking Wallace released said company from all liability in respect to said circus and menagerie, and from any loss or damage that might be caused to persons or property to be carried under said agreement, and agreed to indemnify and save harmless said company from all losses, charges, etc., no matter how caused, occurring or sustained by any person, etc. It was also stipulated that said company was to be held only as hirers to the contractors of motive power, and of men to operate the same, and of the right to use the roads and tracks of the company, to the extent necessary in the premises, and the conductors, engineers, and trainmen to be furnished by the company, who were to be deemed the servants of the contractors, and to be operating said motive power, cars, or trains under the orders, directions, and control of said contractors, subject to certain conditions named, and the rules, regulations, and time-tables of the company governing the movements of trains; that the company was not to be liable to the contractors, or person or persons whomsoever using said cars under said contract, for any loss, damage, injury, or harm that may happen or be caus-

ed to said property or persons. Under this contract the cars in all respects as to running gears, etc., were to be acceptable to the company, and the dimensions not to exceed the standards of the company, and to conform to the requirements of the United States laws as to the height of draw bars, and to be equipped with grabirons, vertical plane, automatic couplers and air brakes, and the company had the right to reject for transportation any cars not conforming to the above requirements. The cars were to be loaded and unloaded by the contractors, and the trains, if possible, to arrive at the place of exhibition at or before 8 o'clock a. m. on the day of exhibition. The contract contained many other provisions unnecessary here to set forth.

In the complaint the alleged acts of negligence are that on August 7, 1903, said company's servants operated said engines so carelessly and negligently that at or near the town of Durand, Mich., on the line of the said company's railroad, the said two trains and cars were negligently and carelessly suffered, permitted, and allowed to collide, and to be thrown from the track and overturned, and in such collision and the wreck incident thereto said decedent was instantly killed.

Appellant insists that the interrogatory and answer of the jury showing the contract between the company and Wallace should not be considered for the reason that it had reference to a fact not within the issues of the case. It is true interrogatories must relate to questions of fact within the issue. *Illinois Central R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; section 572, *Burns' Ann. St.* 1908. This being an action founded upon actionable negligence, the general denial put in issue every essential fact necessary for the appellant to establish before she could insist upon a verdict. The burden was on the appellant to establish all of the essential elements of actionable negligence, and as "there is no negligence without a violation of some duty, and there can be no violation of duty unless such duty exists" (*Consolidated Stone Company v. Redmon*, 23 Ind. App. 319, 327, 55 N. E. 454), it was not, therefore, unimportant to show the relations between the decedent and the company at and prior to the time of the accident, and by proper interrogatories have the jury disclose such relations. It is alleged in the complaint, and the fact is found by the jury, that appellant's decedent at the time of the accident was in the employ of Wallace, and riding in one of his show cars then being transported by the company over its line of railroad under the terms of a written agreement between the company and Wallace. This agreement or contract between the company and Wallace was admissible under the general issue as tending to establish the relations between the parties, and to show the duty owing by the company to the dec-

dent. *Blank v. Illinois Central R. Co.*, 182 Ill. 332, 336, 55 N. E. 332; *Pennsylvania Co. v. Dean*, 92 Ind. 459; *Menaugh v. Bedford Belt R. Co.*, 157 Ind. 20, 60 N. E. 694. The contract in this case appears to be one in general use throughout the country between railroad companies and show companies, where the latter have their own cars for the transportation of their property and employes from point to point on railroads. The validity of such contracts exempting the carrier from liability for negligence, and providing that the carrier's obligation should be that of a private carrier only, has been generally upheld as not being contrary to public policy. *Cleveland, etc., R. Co. v. Henry*, 170 Ind. 94, 83 N. E. 710; *Pittsburgh, etc., Ry. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; *Russell v. Pittsburgh, etc., R. Co.*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; *Louisville Ry. Co. v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 98, 58 Am. St. Rep. 348; *State ex rel. v. Cadwallader*, 172 Ind. 619, 639, 87 N. E. 644, 89 N. E. 319; *Wilson v. Atlantic Coast Line R. Co. (C. C.)* 129 Fed. 774; *Blank v. Illinois Central R. Co.*, supra; *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; *Coup v. Wabash, etc., R. Co.*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Chicago, etc., R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Hutchison on Carriers* (3d Ed.) § 83, p. 84; *Moore on Carriers*, § 38. Applying the law as announced in the cases and text-books last cited to the facts as disclosed by the answers of the jury to the interrogatories in the case at bar, we are compelled to hold that the ruling of which appellant complains was not erroneous.

Judgment affirmed.

LAIRY, HOTTELL, IBACH, ADAMS, and FELT, JJ., concur.

(83 Oh. St. 108)

BALTIMORE & O. R. CO. v. LARWILL.
(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES (§ 109*)—DISMISSAL—JURISDICTION OF STATE COURT.

Where a suit commenced in a state court has been removed on the motion of the defendant to a United States court having concurrent jurisdiction of the cause of action, and has by such court, on the application of plaintiff, been dismissed without prejudice to plaintiff's right to bring a new action, there is no merger of the cause of action, and a new suit may be brought thereon within proper time in any court of competent jurisdiction as though no previous suit had been brought. *B. & O. R. Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520, overruled.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 235; Dec. Dig. § 109.*]

(Additional Syllabus by Editorial Staff.)

2. ACTION (§ 1*)—"CAUSE OF ACTION"—"SUIT"—"RIGHT OF ACTION."

A cause of action is the fact or combination of facts which gives rise to a grant of action, the existence of which affords a party a right to judicial interference in his behalf. A suit is the pursuit in a court of justice of the remedy to which the party by reason of the existence of the supposed facts believes himself to be entitled.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, p. 7598; vol. 7, p. 6226; vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

3. COURTS (§ 256*)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL PROVISIONS—"CONTROVERSIES."

The term "controversies" in article 3 of the Constitution of the United States refers to cases in which such controversies are brought to the attention of the court, and not to quarrels, disputes, or controversies at large. So there could be no controversy of which the court could take or retain jurisdiction without a cause pending. Hence a case which has been dismissed by order of the court is not a "controversy," but merely a dispute at large.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1552-1555; vol. 8, p. 7617.]

Error to Circuit Court, Wayne County.

Action by John F. Larwill against the Baltimore & Ohio Railroad Company. From an order dismissing the action in the common pleas plaintiff appealed to the circuit court, and from a judgment of reversal defendant brings error. Affirmed.

On July 21, 1908, the defendant in error herein commenced in the court of common pleas of Wayne an action against the Baltimore & Ohio Railroad Company, plaintiff in error herein, to recover for damages alleged to have been sustained by reason of the obstruction of the channel of a stream known as Apple creek, by the erection of a bridge over and abutments in the said channel, thus obstructing the natural flow of water and causing it to back up and overflow plaintiff's adjacent and contiguous lands, to his great damage. Judgment was asked for \$1,999.

The company, appearing by motion to the jurisdiction, made it known to the court that on May 1, 1908, the plaintiff instituted an action in the same court against the company to recover \$5,000 for the obstruction of the channel of Apple creek, being for the same injuries to the same land complained of in the petition herein. Whereupon, by proper pleading and bond, the company caused said action to be removed, and by subsequently filing a complete copy of the record said cause was duly removed to the circuit court of the United States for the Northern District of Ohio, Eastern Division, which court then and thereby acquired jurisdiction of said cause; the company being a citizen and resident of the state of Maryland and the said Larwill a citizen and resident of the state of Ohio. Thereupon, within proper time, the plaintiff below dismissed said action so removed as aforesaid, and so pending in said circuit court, at his own costs, and without prejudice to a future action.

The said motion of the company in the court of common pleas to dismiss the action of the plaintiff for want of jurisdiction thereof was sustained by said court and the cause thereupon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dismissed. This judgment was reversed by the circuit court, and the company now here asks a reversal of the latter judgment and an affirmation of that of the common pleas.

Arrel, Wilson & Harrington and Taylor & Taylor, for plaintiff in error. A. D. Metz, for defendant in error.

SPEAR, J. (after stating the facts as above). It is not doubted that the court of common pleas had jurisdiction of the original action of Larwill against the company, nor that such jurisdiction was ousted by the removal of the case to the Circuit Court of the United States; so that, during the pendency of the case in the latter court, its jurisdiction was exclusive, and the state court was without power to further deal with the case. The question raised by the record, therefore, is whether or not, after the suit brought in the state court had been removed to the United States court, and had by that court at the instance of the plaintiff been dismissed without prejudice to the plaintiff's right to bring a new action, the plaintiff may begin a new action in a state court upon the same cause of action, though for a less sum than would entitle the defendant to again remove the case to the United States court.

The question has been ruled against such right by this court in *Railroad Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 285, 44 L. R. A. 520, opinion by Minshall, J., and in *Thomas v. Gawn Co.*, 68 Ohio St. 501, 70 N. E. 1133, reported without opinion. The judgment of the circuit court of Wayne county brought in review by this proceeding in error was that the right of plaintiff to bring such second action in the state court after the dismissal of the case by the federal court was not controlled adversely by the removal, and hence the judgment of the circuit court of Wayne county, reversing the judgment of the common pleas of that county, followed. This court is now to determine which of these rulings respecting the second case brought by the plaintiff in the court of common pleas is the law; and this involves the question whether now this court should follow its holding in the cases above cited or should consider the proposition anew and announce such conclusion as the court as now constituted believes to be the law, irrespective of previous holdings.

In the United States court *Fulton's* suit was dismissed by order of the court for noncompliance with a rule of the court, admittedly a disposition otherwise than on the merits, and equivalent to a dismissal without prejudice. The basic proposition of the opinion in the case as reported in 59 Ohio St., 53 N. E., 44 L. R. A., supra, was that the removal of the cause was a removal of all the rights and remedies plaintiff had therein against the defendant company. The argument of the learned judge is based upon two propositions—one relating to the reason of the statute, and the other a mat-

ter of practice. Much abbreviated, those propositions are:

(1) The United States removal statute is a remedial one, and should be liberally construed. A plaintiff in a controversy between himself and a citizen of another state may, by virtue of the statute, bring suit in a federal court, and the right of removal is given a defendant sued out of the jurisdiction of the courts of his own state. This is based upon the fact that litigation between citizens of different states will be more or less affected by local influences. Thus the spirit and policy of the statute applies as well to any renewal of the action after it has been disposed of in the federal court as to the period of its pendency, and that court must on principle and reason retain it for all purposes; and so it follows that the controversy remains subject to the jurisdiction of the federal court, and is forever excluded from that of the state court unless remanded to it.

(2) After the case has been stricken from its docket by the federal court, a state court cannot determine whether or not it should be reinstated; and, by a parity of reasoning, a state court cannot pass on the right of the plaintiff to recommence the action after it has been dismissed by the federal court. If there be any rule by which a case which has been dismissed for failure to prosecute, after the time fixed by the statute of limitations has expired, the remedy must be sought in that court, as it is properly a step in the same case. If this were not so, it would open the way to a violation of the policy of the statute, and be productive of a very inconvenient practice and much abuse. It would permit a party to dismiss his case, or permit it to be dismissed for failure to prosecute, with the purpose of recommencing it in a state court, and thus compel the defendant to be at the trouble and expense of again causing it to be removed, or submit to the jurisdiction of the state court.

And so the judge concludes, and the holding is, that the court of common pleas was without jurisdiction to entertain the new suit.

Reduced to its last analysis, the second proposition advanced in the opinion is that, because of the possible contingency of an application for reinstatement to the federal court by one who has allowed the dismissal of his case for failure to prosecute, the general rule respecting the jurisdiction of state courts, a rule which, upon all other considerations would be unquestioned, is to be overridden and destroyed, and this in view of a possibility at best exceedingly remote and improbable. It is not improper here to say that the writer did not concur in the judgment in the *Fulton* Case, although no dissent appears. It seemed at the time to be admittedly a close question. However, in the latter case, wherein the conclusion in the *Fulton* Case is followed, he did concur; this in recognition of the practice that a rule of

law once announced by the court should be followed until, by the opinion of at least a majority of the court, such rule has been or should be changed. No such majority opinion was present when the Thomas Case was disposed of. The opinion in the Fulton Case is characterized by the usual refinement of reasoning peculiar to the learned jurist who wrote it. It is perhaps as able a presentation of that side of the controversy as could be made by any one. But, while it is persuasive in some of its aspects, it is not, to our mind, convincing. It seems to us to rest upon an unwarranted assumption. It appears not to give full effect to the distinction between the term "right of action" and the term "suit." A cause of action is the fact or combination of facts which gives rise to a right of action, the existence of which affords a party a right to judicial interference in his behalf. A suit is the pursuit in a court of justice of the remedy to which the party, by reason of the existence of the supposed facts, believes himself to be entitled. In no way can a court take cognizance of a cause of action except by its presentation by way of a suit. The United States statutes relating to removals of cases from a state to a federal court are reproduced in *Insurance Co. v. Dunn*, 19 Wall. 214, 22 L. Ed. 68, and they all speak of a suit, and the matter of removal is everywhere in that case treated as a suit. It is true that the term "cause" occurs in the federal removal statute. Act July 27, 1866, c. 283, 14 Stat. 306. But there is no reason for confusing this term with the term "cause of action." That it is used as the equivalent of "suit" or "case" is too clear for serious doubt. It is true that the Constitution of the United States (article 3) referred to in Judge Minshall's opinion. In treating of the extension of judicial power, does speak of controversies between citizens of different states. But the section, as shown by the context, is dealing with cases, and it is apparent that, taking the article as a whole, the term "controversies" is applied to cases in which such controversies are brought to the attention of the court, and not to quarrels, disputes, or controversies at large. So there could be no controversy of which the court could take or retain jurisdiction without a cause pending. In order to constitute a controversy to which the Constitution can be applied or of which a court can take cognizance, there must be parties present. After the dismissal of the case in the United States court there were none present in that court. There must be pleadings. There were none. There must be process or appearance. There was neither. On the contrary, the case having been dismissed by order of the court was wholly out of the court. It became then merely a dispute at large. Nor can we assent to the proposition that "because the state court might not order a reinstatement of a case once dismissed in the federal court, therefore the state court can-

not pass upon the right of the plaintiff to recommence in that court after his case has been dismissed by the federal court." The use of the term "recommence" here indicates some confusion of thought. Strictly speaking, there is no recommending of an action. What plaintiff undertook to do was to commence a new action. To succeed, every formality of pleading, process, and service was necessary to the fullest extent and in every respect precisely as though no suit had ever been brought upon that cause of action. We cannot perceive that the matter of reinstatement is of special significance, as no one doubts that one court may not pass upon the question whether a case should be reinstated which had been dismissed by order of another court; both courts being of equal authority.

Such reinstatement would not only concern the same case, but would belong to the same court. In the instance suggested by the learned judge, the inquiry, while it concerns the same cause of action, relates to a new and independent suit. Where the original suit has been dismissed by the plaintiff without prejudice and by the order of the court, no court can have jurisdiction over that particular case except the court which dismissed it. Of course, therefore, that court alone possesses the power to reinstate it upon its docket, and to then dispose of it, but it does not follow from this that another action brought by the party is the same suit although it is predicated upon the same cause of action. Nor would special inconvenience result should a plaintiff seek reinstatement of his case after dismissal by the federal court and after the commencement of a new suit by him in a state court, for in such case a plea of a cause pending in another court of competent jurisdiction upon the same cause of action would, it would seem, prove a sufficient bar. It is difficult to see that the situation would present any different considerations than those present in the ordinary case (of which the books treat fully) of a plea of another suit pending. The jurisdiction of the federal court to consider and dispose of the case upon an application for reinstatement would not be disturbed, but that court would be left free to apply to the situation the proper rules of law and dispose of the contentions of the parties accordingly.

There is often force in the argument *ab inconvenienti*, and, where a proposed rule will manifestly be productive of a very inconvenient practice and much abuse, a court will hesitate before giving construction to a statute by which such result will be brought about. It is urged that this result would follow in the present case if the conclusion in the Fulton Case should be overruled by enabling the party to dismiss his case in the federal court with the purpose of recommencing it in the state court, thus entailing expense and trouble on the defendant by again causing the case to be removed, or sub-

mit to the jurisdiction of the state court. But it is not apparent that any really prejudicial or unfair result would follow the adoption of the construction hereinbefore indicated. It is true that the policy of the removal statute on the ground of diversity of citizenship is said to rest on the belief that litigation between citizens of different states is likely to be more or less affected by local influences; and it is urged that such a policy applies as well to any renewal of the action after it has been disposed of in the federal court as to the period of its pendency. But the expense caused a defendant by plaintiff dismissing his action and commencing again is not confined to cases that have been removed. In other cases pending in a federal court that action may be taken; and, while the trouble incident might be something less in the latter instance, the objection is only one of degree; it is not one of kind. So that the policy of the statute, whatever it may be, has its limits. Had it been intended to make such policy controlling, it would seem that the statute would have been so framed as in some way to prevent, what is now permitted in case of diverse citizenship, concurrent jurisdiction with the state courts where the amount exceeds the sum of \$2,000. The policy of the statute seems to be to compel persons, whatever their citizenship, who have small claims, to litigate them in the state courts. In one aspect the right of the plaintiff to begin anew in a state court is advantageous to the other party. It requires in many cases the plaintiff to voluntarily abandon a portion of his claim, in this instance more than half of it. There is, as it seems to us, no warrant for the proposition that it was the purpose of the Constitution or the statutes to interfere with the jurisdiction of the state courts more than is necessary to maintain the jurisdiction of the federal courts in respect to causes properly brought in those courts or removed to them; and the institution of a new suit in a state court by a plaintiff can in no manner interfere with that jurisdiction even though it be upon a cause of action involved in a cause once pending in but dismissed from the federal court. Beyond this, it should be remembered that, as stated above, over the sum of \$2,000, the jurisdiction of the two courts is concurrent. It should also be remembered that the jurisdiction of the federal court is the same whether it be invoked by the plaintiff bringing it there or by the defendant removing it to that court. If the removal clothed the federal court with exclusive jurisdiction of the subject-matter, so would the act of a nonresident plaintiff in bringing his action there. Then it would follow that where a nonresident plaintiff commenced, and then dismissed an action in a federal court, he could bring a new action only in that court. And would not the same result follow the dismissal without prejudice of any case brought in a federal court?

It can hardly be said that the taking by a defendant by removal a cause to a federal court gives to that court greater or more exclusive jurisdiction over the subject-matter than if as a plaintiff he had brought action in that court originally. From considerations of reason as well as of authority, it seems to us clear that the just rule in such case is that, when a case has been dismissed by a court of the United States without prejudice, there is no merger of the cause of action, and a new suit may be brought thereon within proper time in any court of competent jurisdiction as though no previous suit had been brought. This conclusion was intimated in *Anderson v. Realty Co.*, 79 Ohio St. 23, 86 N. E. 644, but the case not requiring a ruling upon it the point was not distinctly decided.

The decision of this court in the *Fulton Case* was thought by the reporting judge to find support in a Georgia case (*Cox v. Railroad*, 68 Ga. 446), and the opinion largely rests upon that case. Unfortunately for the potency of that case as authority, the case of *McIver v. Railroad Co.*, 110 Ga. 223, 86 N. E. 775, 85 L. R. A. 437, holds squarely to the contrary of the Ohio court, and at the same time asserts that "the Ohio court has entirely misapprehended the ruling in that case," adding that "the only point necessary to be decided in the *Cox Case* was whether the law contained in the section of the Code cited had any application to a case removed to the federal court." Holding, further, that the six months' statute of Georgia "did not prevent the bar of the statute of limitations from attaching to a cause of action removed to the federal court." The court admits that "there is some language, both in the head-note and in the opinion, which would seem to indicate that the case could not be recommenced in the state court, notwithstanding it was not barred by the statute of limitations, but such language went further than the facts of the case justified, and what is thus said is not binding as authority." We are not called upon to endeavor to reconcile the decisions of a sister state, but it would seem that there was some ground for misconception, if there were such, on the part of a usually vigilant and careful Ohio judge. However, the latter case, although two of the six judges dissented, is now the law of Georgia. It is a well-stated and well-reasoned case, the opinion supported by abundant authorities, and we here give the syllabus as the deliverance of a court of high repute, and entitled to the fullest respect: "Though the plaintiff in a suit which has been properly removed from the state to a federal court having concurrent jurisdiction of the cause of action on which the suit was founded was nonsuited, or voluntarily dismissed his case in the United States court, it was nevertheless his right to bring another on the same cause of action in the state court at any time within the statute of limitations applicable

to such an action. The above is true, notwithstanding in the second suit the damages were laid in an amount which would prevent another removal to the federal court."

We have given careful attention to the argument of the learned counsel for plaintiff in error in their brief and the authorities there cited. No one of the decisions or text-books cited appears to us to reach the point of sustaining the argument, and we find ourselves unable, for reasons hereinbefore stated, to assent to the contention of counsel. Indeed, a very full examination of cases, the result of an extended search, has failed to discover any which are now the law of the jurisdiction which do really support counsel's contention. *Hickman v. M. K. & T. Ry. Co.* (C. C.) 97 Fed. 113, appears in the opinion to do so, for the judge cites the Ohio case in 59 Ohio St., 53 N. E., 44 L. R. A., and the *Cox Case* in 68 Ga., in support of a proposition to the effect that "proceedings taken by plaintiff in the state court after the removal was effected were coram non iudice and absolutely void, for the obvious and conclusive reason that the 'controversy' between the parties was then removed into the United States court, there to remain until finally determined." It is difficult to see how the case with which the judge was dealing called for any such deliverance, provided it is to be taken as using the word "controversy" with any meaning different from "suit," and the term "finally determined" in any other sense than a determination which for the time being ended the case. The case was disposed of on a motion to remand from the United States court to the state court, and the facts stated as well as the syllabus show that when the company sought to remove the case from the state court that court overruled the petition for removal, and sought to retain the case. Proper steps were thereupon taken for removal, and the cause was removed. It was therefore pending in the United States court, and that court, finding that the grounds for removal were adequate, held that the state court was without jurisdiction to proceed and that the defendant had not by further appearing and contesting the case therein waived his right to proceed in the federal court. This ruling has been the well-settled practice of the United States courts since *Insurance Co. v. Dunn*, supra, and perhaps before, and resort to the decisions of state courts was in no manner necessary in its support.

The authorities cited and relied upon by the learned counsel for defendant in error, and which are given in the reporter's note, abundantly support the counsel's contention and the judgment of the circuit court which he asks to have affirmed. It is unnecessary to reproduce the citations above referred to further than has been done in preceding pages of the opinion, but we add additional authorities all of which, with more or less

elaboration of statement and argument, support the conclusion hereinbefore stated. *Hooper v. Railroad Co.*, 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; *Krueger v. C. & A. Ry. Co.*, 84 Mo. App. 358; *Adams Ex. Co. v. Schofield*, 111 Ky. 832, 64 S. W. 903; *De Witt v. C. & O. R. Co.*, 79 S. W. 275, 25 Ky. Law Rep. 2019; *Stevenson's Adm'r v. I. C. R. Co.*, 117 Ky. 855, 79 S. W. 767; *Nipp's Adm'r v. C. & O. Ry. Co.*, 80 S. W. 796, 25 Ky. Law Rep. 2335; *C., C. & St. L. R. Co. v. Lawler*, 94 Ill. App. 36; *Swift v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969; *Fox v. Dold P. Co.*, 96 Mo. App. 173, 70 S. W. 164; *Fleming v. Railroad*, 128 N. C. 80, 38 S. E. 253; *Railroad v. Bentz*, 108 Tenn. 670, 69 S. W. 317, 53 L. R. A. 690, 91 Am. St. Rep. 763; *T. & P. Ry. Co. v. Maddox*, 26 Tex. Civ. App. 297, 63 S. W. 134.

Since the preparation of the foregoing opinion and announcement of the decision in this case, our attention has been called to the case of *Southern Ry. Co. v. Miller*, 217 U. S. 209, 30 Sup. Ct. 450, 54 L. Ed. 732, opinion by Mr. Justice Day, in which the Supreme Court holds: "After a case properly removable and removed into the federal court has been voluntarily dismissed without action on the merits, the case is again at large, and plaintiff may begin it again in any court of competent jurisdiction, including the state court from which the first case was removed into the Circuit Court." Had we known of this decision earlier, much labor as well as space would have been saved; the decision being by the highest court of the land, and giving in effect a construction to a statute of the United States, and therefore an adjudication conclusive upon this court.

The judgment of the circuit court reversing the judgment of the court of common pleas will be affirmed.

SUMMERS, C. J., and CREW, DAVIS, SHAUCK, and PRICE, JJ., concur.

(88 Oh. St. 136)

STATE v. ROBINSON.

(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

1. INCEST (§§ 7, 16*)—HARMLESS ERROR—INSTRUCTIONS.

Under section 7019, Rev. St., making it incest for persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, to commit adultery or fornication together, the crime may be committed with or without the consent of the woman, and it is not prejudicial error for the court to charge the jury that, if they find beyond a reasonable doubt that an act of sexual intercourse took place, consent on the part of the female is presumed.

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. § 6; Dec. Dig. §§ 7, 16.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3491, 3492; vol. 8, p. 7684.]

2. CRIMINAL LAW (§ 823*)—PROSECUTION—INSTRUCTIONS.

In such case when the court has instructed the jury that the woman is an accomplice, if they find she consented to the act of sexual intercourse, and that it would be unsafe and unwise for the jury to convict the defendant upon her uncorroborated testimony, and that her testimony can be corroborated only by circumstances, or testimony from some other witness, and that a fact established beyond a reasonable doubt to be regarded as corroborative must be one which is an act of the defendant tending to show sexual intimacy probable between the defendant and the woman about the time involved, something that shows that he had undue intimacy at about that time, and circumstances in the testimony directly involving the defendant and tending to make a reasonable inference of sexual intimacy between them, it is not prejudicial error to state, in summing up, that the jury may find the testimony of the prosecuting witness corroborated if they find circumstances or testimony, independent of the testimony of the prosecuting witness, tending to suggest the probability that the defendant had sexual relations with her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902-1995; Dec. Dig. § 823.*]

Error to Circuit Court, Williams County.

John Robinson was convicted of incest, and he brings error. Reversed.

Chauncey L. Newcomer, Pros. Atty., for plaintiff in error. Bowersox & Peck, for defendant in error.

SUMMERS, C. J. The defendant, John Robinson, was convicted of the crime of incest with his sister-in-law. The circuit court reversed for error in the charge of the court. The court in charging the jury assumed that it would be the duty of the jury to acquit the defendant if the proof showed the defendant guilty of rape, and instructed the jury to the effect that, if the act of sexual intercourse was proven beyond a reasonable doubt, consent on the part of the female would be presumed, unless it was proven that such force was used as made the defendant guilty of rape. Section 7019, Rev. St., defines incest as follows: "Persons nearer of kin by consanguinity or affinity than cousins, having knowledge of their relationship, who commit adultery or fornication together, shall be imprisoned in the penitentiary not more than ten years nor less than one year."

In some states it is held that to constitute the crime of incest the consent of both parties is essential, that it is a joint offense, and that both parties must be guilty. This conclusion is based upon the use of the words "with each other," "together," or similar words in defining the crime. But in the great majority of states it is held that the consent of both parties is not essential, and that a defendant may be convicted of incest, though he use such force as makes it rape. We think the better reason is with the majority. The essence of the crimes of fornication, adultery, incest, and rape is unlawful sexual intercourse. In fornication it is

unlawful because the marriage relation does not exist between the parties; in adultery because the offender is married to another; in incest because the parties are too near of kin. The act is made criminal because of the status of the parties, or of the force used to accomplish it. The act cannot be accomplished by one person, hence the use of the words "with each other," or as in our statute "together," and the offense is committed when the act is accomplished between persons within the prescribed status by the party who knowing it participated in the act whether the other consented or not. As it is said in *People v. Stratton*, 141 Cal. 604, 75 Pac. 166: "Where both the circumstances of force and consanguinity are present, the object of the statute being to prohibit by punishment such sexual intercourse, it is not less incest because the element of rape is added." If a joint offense was intended so that the guilt of both parties is essential, then a joint conviction should be required; and in the present case, if consent on the part of the woman had been proven, she being unmarried, and the act being adultery on the part of the defendant and fornication on her part, could it not then be contended that they did not commit either adultery or fornication "together"? The question whether consent is an essential ingredient of the crime was not presented in the case of *Noble v. State of Ohio*, 22 Ohio St. 541. The cases are collected in a note in 8 Am. & Eng. Ann. Cas. 908. Consent on the part of the woman not being essential to the defendant's guilt, it is evident that the defendant was not prejudiced by the instruction of the court that consent was presumed.

The circuit court found that the trial judge also erred in his charge on the subject of corroborative evidence. The judge charged to the effect that if the jury found that the woman had not resisted to the uttermost, so that the defendant would not be guilty of the crime of rape, if they found that the act of intercourse had been accomplished, that consent on her part would be presumed, and in that event she would be an accomplice, and that it would be unsafe for the jury to convict the defendant upon her uncorroborated testimony. The court then said: "Now what is 'corroboration'? Corroboration is some fact established in the testimony found by the jury which tends to prove the truth of the testimony of the accomplice in some material degree and pointing directly to the defendant, and you will observe that corroboration must come from some other witness than the witness Nellie Peppers, and in this case to be specific, a fact established beyond a reasonable doubt in this case to be regarded as corroborative must be one which is an act of the defendant tending to show sexual intimacy probable between the defendant and the girl about the time involved, something

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that shows he had undue intimacy at about that time, and circumstances in the testimony directly involving the defendant and tending to make a reasonable inference of sexual intimacy between these persons. A corroborative fact must be something involving the defendant and also pointing to sexual intimacy at the time involved between the persons in this case." The court then gave further instructions upon other matters, and in concluding his charge said: "It is your privilege to look to all the circumstances of the case independent of the testimony of Nellie Peppers, and if you find in these circumstances some things established beyond a reasonable doubt which point to the defendant and involve him in an odor of this kind of case, tending to suggest the probability that he had sexual relations with the witness at or about the time relied upon by the state, you may consider such facts so established as corroborative of the testimony of the witness Nellie Peppers." The giving of this last instruction the circuit court found to be prejudicial error. The court does not point out in what particular the instruction was erroneous, other than to say that it is not an accurate statement of what will amount to corroborative evidence. As a matter of common law, in the absence of a statute, a jury may convict of a felony upon the uncorroborated testimony of an accomplice, but the judge in his discretion advises the jury not to do so upon the testimony of an accomplice alone without corroboration. Such has been held to be the law in this state. *Allen v. State of Ohio*, 10 Ohio St. 287. At common law the judge was not bound to give such an instruction, and his failure to do so was not reversible error. The jury might disregard his counsel and convict without corroboration; the question of the existence of corroboration and its sufficiency being for the jury. *Wigmore on Evidence*, § 2056. But in many of the states it is now provided by statute that convictions shall not be had upon the uncorroborated testimony of an accomplice, and, where there is no statute, it probably would be held reversible error to refuse so to instruct the jury. So that it becomes necessary for the trial court not only to instruct the jury not to convict upon the uncorroborated testimony of an accomplice, but also to aid them in determining whether there is corroboration. The effect of the evidence is for the jury (*Noland v. State*, 19 Ohio, 131), but whether there is any evidence direct or circumstantial is a question of law (*Commonwealth v. Larabee and Another*, 99 Mass. 413). It is not necessary that the crime charged be proven independently of the testimony of the accomplice, or that the testimony of the accomplice be corroborated in every particular in order that it may be said to be corroborated, but only that there be circumstantial evidence, or testimony of some wit-

ness other than the accomplice, tending to connect the defendant with the crime charged, and to prove some of the material facts testified to by the accomplice. In *Cunningham v. State*, 73 Ala. 51, it is held: "Under the statute making the seduction of an unmarried woman under a promise of marriage, etc., a felony, and declaring that no conviction shall be had on the 'uncorroborated testimony of the female upon which the seduction is charged,' it is not necessary that every fact testified to by the woman should also be testified to by some other witness; but all the requirements of the statute are met, when the corroboration is of some matter material to the guilt of the accused, of some matter not merely formal, indifferent or harmless in its nature, the effect of which is to convince the jury that the corroborated witness has sworn truly; and, if under this rule the jury are convinced of the defendant's guilt beyond a reasonable doubt, they are authorized and required to convict. Hence, on the trial of a defendant indicted for seduction under the statute, the prosecutrix having testified to her seduction by the defendant under a promise of marriage, and she being corroborated as to the promise of marriage, a charge, given at the request of the prosecuting attorney, when construed in reference to the evidence, is free from error, which instructs the jury that 'the corroboration mentioned in the statute does not mean that every fact testified to by the woman should be testified to by some other witness, but only that some other witness shall testify to facts and circumstances that convince you of the truth of the woman's testimony beyond reasonable doubt.'" In the present case the judge correctly charged the jury that the corroboration must come from some witness other than the prosecutrix and tend to prove the truth of the testimony of the accomplice in some material matter, and tend to connect the defendant with the crime charged. That part of the charge that the circuit court found prejudicial to the defendant was said by the judge merely by way of reference to what had been fully charged and could not have been misunderstood by the jury or be prejudicial to the defendant. The charge was to the effect that, if the defendant did not rape the prosecuting witness, she would be presumed to have consented, and that the defendant could not be convicted upon her uncorroborated testimony. This was prejudicial to the state. If the jury believed her story, she did not consent, and, so not being an accomplice, the jury might have convicted upon her uncorroborated testimony.

There was evidence tending to corroborate the prosecutrix. First, it was shown that there was opportunity for her and the defendant to have sexual intercourse together; second, that the defendant had kissed and embraced her, and so had inclination for

such intercourse with her; third, that she had had sexual intercourse with some one, for she had given birth to a child; and, fourth, the want of opportunity or the absence of a showing of opportunity to have had such intercourse with any one other than the defendant. There are many cases to the effect that evidence of that character is corroborative.

Counsel for defendant in error contend that there were other errors than those assigned by the circuit court for which the judgment of the trial court should be reversed. We have given the record careful consideration, and find no prejudicial error specifically pointed out by counsel. The judgment of the circuit court is reversed, and the judgment of the court of common pleas is affirmed.

Judgment reversed.

CREW, SPEAR, DAVIS, and SHAUCK,
JJ., concur.

(83 Oh. St. 126)

DYKEMAN v. JOHNSON.

(Supreme Court of Ohio. Nov. 22, 1910.)

(Syllabus by the Court.)

1. ACCOUNT, ACTION ON (§ 6*)—PLEADING—PETITION IN SHORT FORM.

Where, in an action on an account to recover for services rendered, the petition of plaintiff is in the short form authorized by section 5086, Revised Statutes, such petition must be construed to contain and by implication allege all those facts which it would otherwise be necessary to specifically aver in the statement of a sufficient cause of action, and every fact thus averred by implication is traversed and put in issue by the general denial.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 8-12; Dec. Dig. § 6.*]

2. ACCOUNT, ACTION ON (§ 7*)—PLEADING (§ 166*)—ANSWER.

When, by way of answer to such a petition, the defendant, in addition to pleading the general denial, further alleges that the services performed by the plaintiff were rendered and performed by him under an express contract the terms of which preclude the recovery of compensation therefor, such averments do not constitute an affirmative defense of new matter requiring a reply, and the filing of a reply thereto does not operate to change or enlarge the issues, or to shift the burden of proof. The legal effect of such an answer, taken as a whole, is merely to deny the cause of action asserted by plaintiff in his petition, and the burden of proof upon the issues thus joined rests with the plaintiff, and the court of common pleas did not err in so instructing the jury in the present case. *Sanns v. Neal*, 52 Ohio St. 56, 38 N. E. 881, distinguished.

[Ed. Note.—For other cases, see Account, Action on, Dec. Dig. § 7; Pleading, Cent. Dig. §§ 321-328; Dec. Dig. § 166.*]

Error to Circuit Court, Lorain County.

Action by Arland W. Johnson against H. A. Dykeman. A common pleas judgment for defendant was reversed, and defendant brings error. Reversed, and common pleas judgment affirmed.

Arland W. Johnson, the defendant in error, filed his petition in the court of common pleas of Lorain county, Ohio, against the plaintiff in error, H. A. Dykeman, to recover upon an account for services rendered and money expended. Said petition was in the words and figures following, to wit:

"The first full name of defendant is unknown to this plaintiff. Plaintiff is an architect located and doing business in Toledo, Ohio. There is due the plaintiff from the defendant the sum of \$1,540 upon an account of which the following is a true copy:

Mr. H. A. Dykeman, Elyria, Ohio, Dr. to Arland W. Johnson, Toledo, Ohio.

April 23rd, 1907.

To one set of plans and specifications for a theater building to be erected at Lorain, Ohio, and letting contract to Superior Construction Company for the erection of the same 8½% on \$38,000.00.....	\$1,260 00
To letting contract with the H. J. Spieker Co. for the construction of same, the Superior Construction Co. having failed to qualify	120 00
To expenses in connection with the same, including thirty trips from Toledo, Ohio, to Lorain, Ohio.....	120 00
To expenses telegraphing and telephoning..	20 00
Total	\$1,540 00

"There are no credits thereon, or offsets thereto. There is due the plaintiff from the defendant on said account the sum of \$1,540 with interest thereon from the 23d day of April, 1907, at 6 per cent. per annum, which he claims and for which he asks judgment. Wherefore plaintiff asks judgment against defendant for the sum of \$1,540 with interest thereon at the rate of 6 per cent. per annum from the 23d day of April, 1907."

To this petition the defendant, H. A. Dykeman, answered as follows: "Not denying plaintiff's business and residence as alleged in his petition, defendant denies each and every other allegation contained therein. By way of further answer to said plaintiff's petition, defendant says that in the month of April, 1907, at the solicitation of said plaintiff, said plaintiff and said defendant entered into a verbal agreement looking to the promotion and erection of a theater building at Lorain, Ohio. Said defendant, at that time, was the owner of certain booking rights, which in theatrical circles is known as a 'franchise,' for the city of Lorain, which were to expire in October, 1907, and which franchise was only valuable to said defendant in case he could procure a lease of a theater in which to commence playing shows in Lorain, prior to said date, to wit, October 1, 1907, and for which franchise said defendant had expended a considerable sum of money. Said plaintiff had full knowledge of these facts, and desiring as well a commission, which is a percentage upon the cost of the building for which his plans and specifications should be furnished and including the superintend-

ence of its erection, which commission is very greatly in excess of the actual cost of the production of such plans and specifications, entered into an agreement with the said defendant as aforesaid to furnish plans and specifications for a theater building for Lorain, as against defendant's franchise rights, and that they, together, would endeavor to secure the money by the organization of a company and sale of stock or by such other means as were feasible in order to build such theater. It was further agreed that said building should not cost, including the architect's commission, to exceed \$35,000, 'rung up,' which is to say, 'complete and ready for use.' That in the event they were successful, said plaintiff was to receive a commission of 5 per cent. upon the full cost of said building. Provided always that such commission should not raise the cost of such building above said sum of \$35,000. It was expressly agreed and understood that, in the event they were not successful in promoting and building such theater, said plaintiff should stand the cost of preparing his plans and specifications and that said defendant should stand the loss of such expenditures as he, himself, had made in the effort to promote the venture. That, notwithstanding the best efforts of both parties to the agreement, they were unsuccessful, and each took his chances with full knowledge of the circumstances. Said defendant, in the loss of the money expended for the aforesaid franchise, for an option upon certain real estate in Lorain, in connection with the aforesaid venture, and in the payment of personal expenses, including two trips to New York, sustained losses fully equal to and greater than those sustained by said plaintiff. Wherefore defendant prays that he may be adjudged to go hence with his costs."

To this answer the plaintiff filed the following reply: "Now comes the plaintiff, and for his reply to the defendant's answer herein admits that the defendant was the owner of certain booking rights, which in theatrical circles are known as a 'franchise,' for the city of Lorain, and which was valuable to said defendant in case he could procure a theater; that defendant had expended considerable sums of money in procuring said 'franchise'; that plaintiff was to receive a commission of 5 per cent. upon the full cost of the building in case plaintiff should furnish superintendence of construction, in addition to the designing, furnishing plans and specifications, and letting contracts which he was required to furnish, but plaintiff avers that he was to receive only $3\frac{1}{2}$ per cent. upon the full cost of the building in case he should furnish the designing, plans, specifications, and letting contracts, but did not furnish superintendence. Plaintiff denies all and singular the allegations in defendant's answer contained not herein expressly admitted to be true and which are not admissions of the statements in plaintiff's petition herein."

The cause was tried in the court of common pleas and resulted in a verdict and judgment in favor of the defendant H. A. Dykeman. Error was duly prosecuted to the circuit court of Lorain county, where the judgment of the court of common pleas was reversed on the sole ground that said court erred in charging the jury that the burden of proof under the pleadings was upon the plaintiff instead of upon the defendant. To obtain a reversal of this judgment of the circuit court and affirmation of the judgment of the court of common pleas, the present proceeding in error is prosecuted.

Clayton Chapman and Q. A. Gillmore, for plaintiff in error. Lewis W. Morgan, Stroup & Fauver, and King, Tracy, Chapman & Welles, for defendant in error.

CREW, J. (after stating the facts as above). The only assignment of error which we deem it important to notice in this opinion is that relating to the charge of the court touching the question of where and with whom rested the burden of proof in this case. Upon the trial of this cause in the court of common pleas, the evidence and arguments being closed, the court among other things instructed the jury that under the pleadings the burden of proof upon the issues joined was upon the plaintiff, and refused to charge, as requested by counsel for the plaintiff, "that the burden of proof was upon the defendant to establish the defense set up in his answer." The circuit court found and held that the instruction given, which imposed upon plaintiff the burden of proof, was erroneous, and for that reason and upon that ground alone reversed the judgment of the trial court. In this we think the circuit court erred. The petition of plaintiff in this case was upon an account for services rendered and was in the short form authorized by section 5086, Rev. St., which section, so far as its provisions are here material, reads as follows: "In an action * * * upon an account * * * it shall be sufficient for a party to set forth a copy of the account * * * with all credits * * * thereon and to state that there is due to him on such account * * * from the adverse party a specified sum which he claims with interest." By the enactment of this statute the Legislature obviously intended that the statements therein prescribed, when adopted by the pleader, should be held the equivalent of, and should imply and import, all that it would otherwise be necessary to specifically allege in the statement of a sufficient cause of action. Hence every fact thus averred by implication must be held to be traversed and put in issue by the general denial. In the present case the defendant, A. W. Johnson, by way of answer, in addition to pleading the general denial, further alleged that the services count-

ed upon by plaintiff in his petition were services performed by him under and pursuant to an express agreement made and entered into between plaintiff and defendant the terms of which were fully set out in said answer. After the general denial, the pleading of this contract was wholly unnecessary, for it tendered no new or separate issue and in legal effect amounted only to a denial of the averments of plaintiff's petition. It was not a plea of new matter by way of confession and avoidance; hence no reply thereto was necessary, and the reply filed was without legal effect to either change or enlarge the issues, or to shift the burden of proof. The attitude of the defendant under the pleadings in this case was purely defensive, and his answer in legal effect merely a denial of the cause of action asserted by plaintiff in his petition. The burden of proof was therefore on the plaintiff, and the court of common pleas properly so instructed the jury. *Simmons v. Green*, 35 Ohio St. 104; *Mehurin v. Stone*, 37 Ohio St. 49; *Koppitz-Melchers Brewing Co. v. Schultz*, 68 Ohio St. 407, 67 N. E. 719; *List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N. E. 120; *Ginn v. Dolan*, 81 Ohio St. 121, 90 N. E. 141; 9 Cyc. 735.

It would seem from the opinion of the circuit court in this case—which opinion we now have before us—that, notwithstanding that court entertained the view that the rule as herein above announced is the correct rule, it nevertheless felt constrained to enter the judgment it did, because of the interpretation placed by it upon a former decision of this Supreme Court. The circuit court in its opinion says: "If the matter were one of first impression with us, we should approve this rule (that the burden of proof was on the plaintiff); but we feel bound by the rule of *Sanns et al. v. Neal*, 52 Ohio St. 56 [38 N. E. 881], which we cannot distinguish in its application to the facts of that case from its equal application to the facts of this case. * * * Though logic would seem to require the plaintiff to prove, as in other cases in its entirety, the contract on which his account is based, we bow reluctantly to authority and reverse the judgment for error in charging upon the burden of proof and in refusing to charge as requested." In thus yielding deference to the supposed controlling effect of the decision in *Sanns v. Neal*, supra, we think the learned circuit court misconceived and incorrectly interpreted the scope of that decision. While certain of the language found in the majority opinion in that case is seemingly perhaps, at first glance, opposed to the conclusion reached by us in this case, yet, when the facts of that case are fully considered, we very much doubt if the court thereby intended to decide anything which we are called upon to overrule or reverse in the present case.

In that case, which was also an action on account for services rendered, the defendants in their answer, after pleading the general denial, by way of further and particular defense alleged that all of the services performed by plaintiff were performed by him under a special contract, and that full payment therefor according to the terms of said contract had been made to the plaintiff, and, while the rendition of the services sued for was put in issue by the general denial, performance of such services by the plaintiff and that he was entitled to compensation therefor was not in dispute, but on the trial was admitted by the evidence of defendants themselves. The performance of the services being admitted, this averment of special contract and plea of payment under and purgant thereto was more than a mere denial; it was in legal effect the assertion of an affirmative defense, the burden of maintaining which was on the defendants. These facts we think so far differentiate and distinguish that case from the case at bar as to leave it without controlling effect in the determination of the present case.

The judgment of the circuit court reversed, and the judgment of the court of common pleas affirmed.

SUMMERS, C. J., and SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(307 Mass. 333)

NEAL v. SCHERBER et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. EXCEPTIONS BILL OF (§ 26*)—CONSTRUCTION—"APPEARED FROM THE EVIDENCE."

The statement of the bill of exceptions that certain facts "appeared from the evidence" is to be construed as meaning that they were undisputed or admitted.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 33; Dec. Dig. § 26.*]

2. BILLS AND NOTES (§ 379*)—ACCOMMODATION PARTIES—LIABILITY—CONSIDERATION—"HOLDER FOR VALUE."

Where a note to a bank, made by S. and indorsed by W. for the accommodation of C., was used by C. with which to take up his note to the bank, indorsed by W., the bank is a holder thereof for value, within Rev. Laws, c. 73, § 46, declaring an accommodation party to a note liable thereon to a "holder for value," notwithstanding such holder, at the time of taking it, knew him to be only an accommodation party.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 965; Dec. Dig. § 379.*]

For other definitions, see Words and Phrases, vol. 4, p. 3320.]

3. COSTS (§ 260*)—PENALTIES FOR FRIVOLOUS EXCEPTIONS.

Exceptions, being frivolous, will be overruled, with double costs and 12 per cent. interest.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002; Dec. Dig. § 260.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by William E. Neal, receiver of the American National Bank of Boston, against John F. Scherber and Mary White, on a note made payable to said bank, and executed by said Scherber as maker, and indorsed by said White and William A. Carrie; Scherber being an accommodation maker and White an accommodation indorser for said Carrie. The note was delivered to the bank by Carrie, the last indorser on it, in exchange for another note made and indorsed by the same parties, and then due, which other note had been given in exchange for a note made by Carrie and indorsed by White. Verdict was directed for plaintiff, and defendants bring exceptions. Overruled.

David T. Montague, Wade Keyes, and Malcolm B. Sturtevant, for plaintiff. Charles F. Spear, for defendants.

SHELDON, J. All the facts necessary to make out the plaintiff's prima facie case were conceded at the trial. We must construe the statement of the bill of exceptions that these facts "appeared from the evidence" to mean that they were undisputed, or in other words that they were admitted. That the defendants became parties to the note for the accommodation of Carrie and that this was known to the bank would not affect its right to hold them. As between them and the bank there was ample consideration for their agreement, whatever may have been the case as between them and Carrie. Rev. Laws, c. 73, § 46; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1.

The verdict for the plaintiff was rightly ordered. The exceptions are frivolous and must be overruled, with double costs and 12 per cent. interest.

So ordered.

(207 Mass. 312)

SACO BRICK CO. v. J. P. EUSTIS MFG. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1911.)

1. JUDGMENT (§ 744*)—RES JUDICATA—QUESTIONS CONCLUDED.

A decision of the Supreme Judicial Court that a contract for the sale of machinery was a contract between plaintiff and defendant, and not between plaintiff and a third person, rendered in a suit in equity by defendant to reform the contract, so as to make it a contract between plaintiff and a third person, settles the question that the contract is between plaintiff and defendant; and the latter, when sued for breach of contract, cannot relitigate the question that the contract is between plaintiff and a third person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.*]

2. SALES (§ 411*)—CONTRACTS—ACTION FOR BREACH—DECLARATION—SUFFICIENCY.

A declaration in an action for breach of contract of sale, which alleges that the parties

entered into a contract of sale, a copy of which is annexed, whereby defendant agreed to sell to plaintiff a gas engine, and plaintiff agreed to pay a specified sum, that defendant delivered an engine to plaintiff, who paid the price, and that defendant failed to comply with the contract in specified particulars, resulting in damages to plaintiff, sets forth the facts necessary to state a cause of action, and is sufficient, within Rev. Laws, c. 173, § 6, cl. 2, providing that a declaration shall state the facts necessary to constitute a cause of action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1161-1164; Dec. Dig. § 411.*]

3. PLEADING (§ 204*)—DEMURRER—TO SEPARATE COUNTS OF DECLARATION.

Since, under Rev. Laws, c. 173, § 6, cl. 4, providing that any number of breaches may be assigned in each count of the declaration, a plaintiff in an action for breach of contract of sale is not confined to one form of statement in regard to any particular breach alleged, but may state it in the alternative in different ways, where, according to the true construction of the contract, breaches are improperly assigned, they may be demurred to specifically, without demurring to the declaration as a whole.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 490; Dec. Dig. § 204.*]

4. ELECTION OF REMEDIES (§ 2*)—CONCURRENT REMEDIES—EFFECT OF ELECTION.

The remedy of an equitable defense in an action at law for breach of contract, based on the ground that the contract is one between plaintiff and a third person, and not between plaintiff and defendant, and the remedy in equity by defendant to reform the contract, so as to make it show that it is between plaintiff and the third person, are concurrent, and where defendant elects to sue in equity, he is bound by his election.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. JUDGMENT (§ 645*)—CONCLUSIVENESS—ACTION AT LAW AND SUIT IN EQUITY—TIME OF COMMENCEMENT OF ACTION.

The decree in the suit in equity, denying relief, is conclusive in the action at law, though the latter action was first commenced.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1158; Dec. Dig. § 645.*]

6. PLEADING (§ 170*)—CONTRACTS—ACTIONS FOR BREACH.

Under Rev. Laws, c. 173, § 33, providing that a replication may allege facts occurring after the commencement of the action, a plaintiff, suing at law for damages for a breach of contract of sale, may, by way of replication to the answer, setting up an equitable defense based on the claim that the contract is between plaintiff and a third person alone, plead the judgment in a suit by defendant to reform the contract, brought subsequent to the commencement of the action, and resulting in the denial of relief.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 332; Dec. Dig. § 170.*]

7. PLEADING (§ 412*)—REPLICATION—WAIVER OF OBJECTION.

Where, pending an action at law, a decree in a suit in equity is rendered, which is determinative of certain issues in the law action in favor of plaintiff, and such judgment is received in evidence without objection, defendant cannot complain that such judgment was not pleaded by way of reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. SALES (§ 72*)—CONTRACTS—CONSTRUCTION.

A contract for the sale of a gas engine, which provides that the seller shall furnish and deliver one 55 horse power gas engine, same arranged for gasoline fuel, that the engine shall be tested at the seller's works and develop 55 actual brake horse power, and that the seller guarantees the engine to operate a 10 per cent. overload, is a contract for the sale of a gas engine that will develop 55 horse power and an overload of 10 per cent. with gasoline for fuel; the evidence showing that the engine was designed for use with natural gas as a fuel, or, if arranged for, with gasoline fuel.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 197-202; Dec. Dig. § 72.*]

9. SALES (§ 85*)—CONTRACTS—CONSTRUCTION.

A contract for the sale of a gas engine, which contemplates that the foundation thereof shall be built by the buyer according to plans, does not make the building of a foundation according to the plans a condition precedent to the seller's undertaking that the engine, when placed on the foundation and properly connected shall develop, with gasoline fuel, a stipulated horse power; and, where the engine does not develop the power called for, the seller may show that the failure so to do is due, in whole or in part, to the manner in which the foundation has been constructed; and, in the absence of any claim that the buyer did not act in good faith in building the foundation as he did, a charge that, if he did not build such a foundation as the contract called for, he could not recover for the seller's failure to deliver an engine which would develop the stipulated horse power, was properly refused.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 236-238; Dec. Dig. § 85.*]

Exceptions from Superior Court, Suffolk County; John A. Aiken, Judge.

Action by the Saco Brick Company against the J. P. Eustis Manufacturing Company. There was a verdict for plaintiff, on a trial after the overruling of a demurrer to the declaration, and defendant appeals from the ruling on the demurrer, and brings exceptions to rulings and refusal to rule at the trial on the merits. Order overruling demurrer affirmed, and exceptions overruled.

Fred L. Norton, for plaintiff. G. C. Abbott, for defendant.

MORTON, J. This is an action to recover for certain alleged breaches of a written contract entered into between the defendant and the plaintiff for the sale and purchase of a gas engine. The defendant demurred to the declaration. The demurrer was overruled and the defendant appealed. The case came on for trial upon the merits and there was a verdict for the plaintiff. The case is here on the appeal from the order overruling the demurrer and on exceptions by the defendant to certain rulings and refusals to rule by the presiding justice at the trial on the merits.

1. We think that the demurrer was rightly overruled. The grounds of demurrer relied on are that the declaration does not state concisely and with substantial certainty the substantive facts necessary to consti-

tute the cause of action as required by Rev. Laws, c. 173, § 6, cl. 2, and that the contract contained in the written agreement was a contract not with the defendant company but with the Bruce-Merriam-Abbott Company, for which the defendant company was acting as agent. As to the second ground relied on it is disposed of, we think, by the case between the same parties, the defendant here being plaintiff there, reported in 198 Mass. 212, 84 N. E. 449, and 201 Mass. 391, 87 N. E. 596. It was expressly held in the first case that the Eustis Manufacturing Company was liable as a party to the contract, and when the case was before this court again in 201 Mass. 391, 87 N. E. 596, it was pointed out that there were provisions in the contract inconsistent with liability on the part of the Bruce-Merriam-Abbott Company, and it was held that the decree dismissing the bill was well warranted on that and other grounds. The contention of the Eustis Manufacturing Company that the contract was with the Bruce-Merriam-Abbott Company and not with it must therefore be regarded as having been settled against it. In regard to the other ground of demurrer it is to be observed that the statute does not require that in an action upon a written contract all the details contained in the contract shall be set out, but only that the substantive facts necessary to constitute the cause of action shall be stated, and that those shall be stated concisely and with substantial certainty. In the present case the declaration alleges that the plaintiff and defendant entered into a written contract, of which a copy is annexed, whereby the defendant agreed to sell to the plaintiff a gas engine, and the plaintiff agreed to pay therefor \$1,750; that the defendant delivered a certain engine to the plaintiff and the plaintiff paid the defendant therefor the sum of \$1,750, but that the defendant "failed to comply with the contract in the following particulars." Then follow allegations as to the breaches complained of, and the declaration concludes with averments in regard to the damages sustained by the plaintiff. The cause of action is clearly stated and the breaches relied on are distinctly set forth. According to the express terms of the statute the plaintiff could include any number of breaches in the same count (Rev. Laws, c. 173, § 6, cl. 4), and it was not confined to one form of statement in regard to any particular breach alleged, but could state it in the alternative in different ways. If, according to the true construction of the contract, breaches were improperly assigned, they could be demurred to specifically without demurring to the declaration as a whole. *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502. No such ground of demurrer was, however, alleged.

2. In its answer the defendant set up by

way of equitable defense that it was intended and understood by and between the plaintiff and defendant that the contract should be and was between the plaintiff and the Bruce-Merriam-Abbott Company and that the contract ought not in equity to be enforced against the defendant. The first exception taken by the defendant at the trial was to a ruling made by the presiding justice at the request of the plaintiff that "the equitable defense was *res adjudicata*; and that it was not open to the defendant in this action, and that no evidence could be introduced in support of it." We think that the ruling was right. The ground now set up by way of equitable defense to the present action was that on which equitable relief was sought by the defendant in the suit already referred to and the decree in that case which was against the defendant must be regarded as disposing once for all of the contention whether made the ground of affirmative or defensive relief or advanced at law or in equity. The remedy was concurrent at law and in equity, but having elected to pursue the remedy in equity the defendant is bound by its election. *New York, New Haven & Hartford R. R. v. Martin*, 158 Mass. 313, 315, 33 N. E. 578; *Nash v. D'Arcy*, 183 Mass. 30, 31, 66 N. E. 606. The fact that this action was begun before the action reported in 188 Mass. 212, 84 N. E. 449, and 201 Mass. 391, 87 N. E. 596, did not prevent the plaintiff from setting up the judgment in that case as a bar to the equitable defense which the defendant sought to introduce in this case. The judgment could have been pleaded by the plaintiff by way of replication to so much of the defendant's answer as sets up the equitable defense. *Rev. Laws, c. 173, § 33*. See *Goodrich v. Bodurtha*, 6 Gray, 323. No objection was taken because it was not so pleaded, and it must be regarded therefore as having been properly before the court for the court to rule upon.

The next exception was to a ruling of the court that "the contract requires the engine to be of the capacity of 55 horse power with an overload of 10 per cent. when operated by gasoline." We think that this ruling also was right. The contract provided that the defendant should "furnish and deliver f. o. b. cars Cleveland * * * one 55 H. P. twin cylinder vertical gas engine, * * * same arranged for gasoline fuel and to have air-starting outfit." It also provided that "the engine shall be tested at our works and develop 55 actual brake H. P." The contract also contained the following guaranties on the part of the defendant, namely: "We will guarantee the engine to develop a 10 per cent. overload. Also guarantee the engine to operate between no load and full load without more than 2 per cent. variation in speed." And there was on the back of the blueprint that was furnished by the defendant to the plaintiff the indorsement "55 H. P. gasoline." "There was evidence tending to show that

the engine with a gasoline attachment was manufactured in Cleveland, * * * and was shipped from there to and received by the plaintiff at Saco; * * * that it was designed for use with natural gas as a fuel, or, if arranged for, as it was, with gasoline fuel." It appeared "that an engine which would develop 55 H. P. and a 10 per cent. overload with natural or illuminating gas would develop much less power with gasoline." "The only fuel contemplated by the parties to be used by the plaintiff," as the exceptions recite, "in the operation of the engine was gasoline." It is plain, we think, not only from the contract itself, but also when interpreted in the light of the conduct of the parties, that what the parties were contracting for was an engine which should develop 55 horse power and an overload of 10 per cent. when operated with gasoline as a fuel. The contract expressly provides that the engine shall be "arranged for gasoline fuel." That is the only fuel referred to in the contract, and the natural construction and meaning is that the engine was intended to develop the specified horse power and overload with that fuel. There is nothing to show that the power for which it was to be tested was anything except power which would be created by the use of gasoline as a fuel. The fact which was testified to without objection that the only fuel contemplated by the parties was gasoline also tends to show that the construction which we have given to the contract is the correct one. The contract was not for a gas engine of 55 horse power warranted to develop an overload of 10 per cent., but for a gas engine that would develop 55 horse power and an overload of 10 per cent. with gasoline for fuel.

The third and last exception was to the refusal of the court to rule as requested by the defendant that "the fact that the plaintiff did not build such a foundation as the contract calls for prevents any recovery in this action." Instead of the ruling thus requested the court instructed the jury that "If the foundation furnished by the brick company" (the plaintiff) "was just as good as that specified in the blueprint, the failure of the foundation to accord with the specifications is not a defense in this action. If, however, the failure to build the foundation in the manner the blueprint specified * * * was the reason why the engine did not furnish the horse power stipulated in the contract, the brick company" (the plaintiff) "cannot recover damages in this case." We think that these instructions were sufficiently favorable to the defendant. We assume in favor of the defendant that the blueprint and foundation plan constituted a part of the contract, and that it was intended and expected by the defendant that the foundation should be built by the plaintiff as therein specified. But the building of the foundation specified in the blueprint by the plaintiff was not a condition precedent to the de-

defendant's undertaking that the engine when placed upon it and properly connected should develop with gasoline fuel the stipulated horse power. If the engine did not develop the power called for, the defendant had a right to show, if it could, that the failure was due in whole or in part to the manner in which the foundation had been constructed, and to have the case decided accordingly. But there being nothing to show and no claim being made that the plaintiff did not act in entire good faith in building the foundation as it did, it would have been error to instruct the jury as requested that if the plaintiff did not build the foundation as specified it could not recover. Under the instructions of the court the jury could find for the plaintiff only in case they found that the foundation built by the plaintiff was "just as good as that specified in the blueprint." As already observed, this was to say the least sufficiently favorable to the defendant.

Order overruling demurrer affirmed.
Exceptions overruled.

(207 Mass. 542)

KILEY v. BOSTON ELEVATED RY. CO.
(two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. STREET RAILROADS (§ 95*)—INJURIES AT CROSSINGS.

In an action against a street car company for injuries to a boy sliding down hill, where evidence showed that the motorman had his car under control, and stopped to let another boy go safely in front of the car, it was not negligence on the motorman's part that he failed to see and prevent plaintiff from running under the rear wheels and being injured.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 95.*]

2. STREET RAILROADS (§ 93*)—INJURIES AT CROSSINGS.

In an action against a street car company for injuries at a crossing, where it did not appear that the motorman saw, or in the exercise of reasonable care ought to have seen, the plaintiff, the road cannot be charged with negligence.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 93.*]

3. STREET RAILROADS (§ 93*)—INJURIES AT CROSSINGS.

While it is the duty of a motorman to keep his car under control, and to be alert at intersecting streets to avoid collisions, he is not bound to look out for travelers who may run into the rear of his car.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 93.*]

Report from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Actions by Raymond Kiley and by Henry F. Kiley against the Boston Elevated Railway Company. From the granting of a motion by defendant for a directed verdict in each case, plaintiff excepted. Heard on report of justice of the superior court. Judgment entered on the verdict in each case.

J. R. Murphy and W. A. Bule, for plaintiffs. W. G. Thompson and H. W. Durant, for defendant.

RUGG, J. Raymond Kiley, hereafter referred to as the plaintiff, was at the time of his injuries, which are the subject of this action, a bright boy almost eight years old. At about 10 o'clock in the forenoon of a day in December he was coasting on a single sled, riding on his stomach, on Lexington street, in the Charlestown District. At a place where it was steep Lexington street crossed at a right angle Bunker Hill street, in which were double tracks of the defendant. Just before the plaintiff reached the junction of the two streets another boy on a sled came down the hill and, turning to the right as he crossed Bunker Hill street, avoided collision with an eight-wheeled car of the defendant proceeding from the left to the right side of Lexington street on the track nearer the top of the hill. The motorman brought his car either to a stop or nearly so in order to avoid striking this boy when the front of his car was close to or a little past the middle of the street, and then immediately started forward. The plaintiff was coming down the hill about in the middle of the street. He described what occurred as follows: "Because I saw this car and I saw the other boy, I slew to the right * * * I thought I would get around the stern of the car so I wouldn't get hurt and I slewed against the car and the minute I struck the car, the car started up." From other evidence it appeared that it was the rear wheel of the car which ran over the plaintiff's hand. Two men standing on the forward vestibule of the car as the car had started forward after avoiding the boy who slid in front of it, saw the plaintiff coming down the hill and hastened unavailingly to prevent injury to him. There was testimony from one other witness, who was in a store, that as the car began crossing the foot of Lexington street the plaintiff was 25 or 30 feet back from the crosswalk and that he did not see the other boy go in front of the car, and that the car seemed to him to slow down until it stopped after the injury. But in view of the testimony of the plaintiff and his other witnesses, it must be held that the other boy did go in front of the car, which slowed or stopped to let him pass and then started forward. There were buildings covering all the land at the street corners, so that the view up the hill by the motorman was to that extent cut off.

There is nothing in these facts to show any negligence of the motorman. He must necessarily keep the street in front of his moving car constantly within his view. He must also be alert at all intersecting streets to avoid collision with travelers who may

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be likely to come therefrom upon his tracks. But ordinarily he is not bound to be looking out for travelers, who may run into the rear of his car. The establishment of such a standard of duty would prevent to a large extent the reasonably rapid carriage of passengers for which street railway corporations are chartered. This motorman had his car under control. That he stopped it to let one boy slide without injury directly in front of it shows this. He was then across the street down which there was coasting. It was his duty to move his car out of the way as quickly as possible, or it might become a menace to other travelers. Even if he had seen the plaintiff in the position, where he must have been the instant the boy, who went in front of the car, was out of danger slewing his sled so as to get around the rear of the car, it would be difficult to say that to drive the car forward was not the most careful thing to do in the light of all the conditions then surrounding him, including the observation that the plaintiff was trying to go behind the car. But for the stopping to avert collision with the boy in front, the course for the plaintiff would probably have been clear. It might well have been regarded as perilous to permit the car to remain still in the face of coasters coming down the hill with the possibilities of serious injury to them from running into a stationary car. It does not appear, however, that the motorman saw or in the exercise of reasonable care ought to have seen the plaintiff, and hence he cannot be charged with any default of duty. *Hamilton v. West End St. Ry. Co.*, 163 Mass. 199, 39 N. E. 1010; *Black v. Boston Elevated Ry. Co.*, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799. It is hardly necessary to add that these facts are wholly different from those in cases where a car is driven among coasters in plain sight without any reasonable effort to avoid running them down, of which *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543, 50 N. W. 690, relied on by the plaintiff, is an example.

Judgment on the verdict in each case.

(207 Mass. 545)

HALEY v. LOMBARD et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. MASTER AND SERVANT (§ 289*)—ACCIDENT TO TEAMSTER—UNSAFE APPLIANCES—CONTRIBUTORY NEGLIGENCE—JURY QUESTIONS.

Whether a teamster, killed by falling under a passing wagon, caused by the breaking of a defective strap with which he was binding his load, was guilty of contributory negligence in bracing one foot upon his wagon, and whether the use made of the strap was within the line of his duty, held under the evidence, jury questions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1094, 1119, 1120; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 288*)—ACCIDENT TO TEAMSTER—UNSAFE APPLIANCES—ASSUMPTION OF RISK—JURY QUESTION.

Whether a teamster, killed by falling under a passing wagon, caused by the breaking of a defective strap with which he was binding his load, assumed the risk by voluntarily exposing himself to danger after full knowledge of the facts, held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1071; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§§ 101, 102*)—TEAMSTERS—DUTY OF EMPLOYER.

An employer must furnish his teamsters reasonably safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 178; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 286*)—ACCIDENT TO TEAMSTER—UNSAFE APPLIANCES—NEGLECT—JURY QUESTIONS.

In an action for the death of a teamster, killed by a passing wagon, caused by the breaking of a defective strap with which he was binding his load, whether defendant's employers were negligent respecting the strap held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1018; Dec. Dig. § 286.*]

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by Julia T. Haley, administratrix, against Samuel Lombard and others. Directed verdict for defendants, and plaintiff brings exceptions. Exceptions sustained.

R. W. Frost and M. B. Breath, for plaintiff. R. W. Nason, T. W. Proctor, and W. H. Vincent, for defendants.

RUGG, J. The plaintiff's intestate was an experienced teamster in the employ of the defendants. There was evidence from which it might have been found that about a week before his injury the plaintiff's intestate showed to a superintendent of the defendants a strap used for binding a load, calling attention to its weakness. The latter, after examination of the strap, said: "That will hold all the load you will ever put on your wagon." About a week later, while the plaintiff's intestate was pulling hard to tighten the strap around his load, it broke, he fell into the street between the wheels of a passing wagon, and received fatal injuries. The street was adjacent to the great market in Boston, and was lined with teams on each side, leaving space enough between so that there was no blockade.

1. It is urged that the plaintiff's intestate was not in the exercise of due care, for the reason that he braced one foot upon the wheel of his wagon in order the better to tighten the strap around some barrels, knowing its weakened condition, and pulled upon it hard in such a position that he must have foreseen that if it gave way he would be likely to fall under the heavy wagon which he saw approaching. He had spoken of deterioration in the strap to his superior, who had given emphatic assurance of its strength. It does

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not appear that he dissented from this view or further discussed the subject, but there was testimony that after the accident he said that he supposed the superintendent knew better about it than he did, and he let it go at that. It could not have been ruled, as matter of law, in view of this testimony and his subsequent conduct, that he did not rely on this statement, and it might have been inferred that he surrendered his own opinion to that thus expressed by the representative of his employer. It was said in *Carriere v. Merrick Lumber Co.*, 203 Mass. 322, at page 326, 89 N. E. 544, 545, that "an assurance of safety by a superintendent has usually been held to be such a consideration as to render the due care of a workman relying upon it a question of fact." While there may be exceptions to this rule, no considerations appear which take the present case out of its operation. If the deceased relied upon the assurance as to the strap given by the superintendent, then the fact that he was in such position when pulling upon it that in case it broke he might fall under passing vehicles was of slight significance. It does not appear that he could have stood in any other position and efficiently performed his work. The street was a busy one, and whether he could have waited for the heavy wagon by which he was injured to pass without encountering other dangers was one of the circumstances to be weighed by the jury.

2. Whether the deceased assumed the risk by voluntarily exposing himself to danger, after knowing the facts and having a full appreciation of their bearing upon his safety, was a question of fact. *McKinnon v. Riter-Conley Mfg. Co.*, 186 Mass. 155, 71 N. E. 296; *Frost v. McCarthy*, 200 Mass. 445, 86 N. E. 918; *O'Toole v. Pruyn*, 201 Mass. 126, 87 N. E. 608. This aspect of the case is so interwoven with the inquiry as to due care in view of the assurance given by the defendants' representative touching the strength of the strap as to stand upon the same ground. The defendant strongly relies upon *Davis v. Forbes*, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170. Without impairing the authority of that case, it is distinguishable on the ground that the plaintiff there relied upon an experiment performed in his presence to determine the soundness of the appliance, and not primarily upon the assurance given by the defendant. In *Levesque v. Janson*, 165 Mass. 16, 42 N. E. 335, there was apparently opportunity for selection by the plaintiff of a safe harness, and he chose to use the rotten one. Hence this case affords no support to the defendants. Cases like *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 47 N. E. 117, where the risk from permanent conditions was held to have been assumed by the contract of employment, have no bearing, because there was no evidence to show the condition of the strap at the beginning of the

employment of the plaintiff's intestate, and because it might have been inferred that this worn condition did not manifest itself until about the time when notice was given to the defendants' superintendent.

3. It was the duty of the defendants to furnish reasonably safe appliances. The fact that this strap broke, coupled with evidence that its worn condition had been especially called to the attention of the representative of the defendants, was sufficient to make improper a ruling as matter of law that the defendants were not negligent. *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Shannon v. Willard*, 201 Mass. 377, 87 N. E. 610. Whether the use being made of the strap at the time it gave way was within the line of duty of the deceased was for the jury. Hard pulling in order to tighten the binding of a load of barrels might have been found to be necessary.

Exceptions sustained.

(207 Mass. 416)

MILTON v. PUFFER et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1911.)

1. ADJOINING LANDOWNERS (§ 9*)—CONTINUING TRESPASS.

Projecting the stones of the foundation of a building into the land of an adjoining owner, without right or license from such owner, is a wrongful act; and maintenance of them in such position is a continuing trespass or nuisance.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

2. ADJOINING LANDOWNERS (§ 9*)—CONTINUING TRESPASS—RIGHT OF ACTION.

While plaintiff, having, only after the act, become owner and acquired possession of the lot adjoining defendant's, into which defendant, when building on his lot, projected the stones of the foundation, without right or license from the owner, cannot sue for the original trespass, yet, as the maintenance of the stones there constitutes successive or continuing trespasses or nuisances, she can sue for any injury therefrom.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

3. ADJOINING LANDOWNERS (§ 9*)—CONTINUING TRESPASS—LICENSE—BURDEN OF PROOF.

Defendant, sued for maintaining in plaintiff's adjoining land projections of his foundation stones, where he placed them prior to plaintiff's acquisition of title, if relying on a right or license acquired from the former owner, has the burden of showing he had such right or license.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 67-73; Dec. Dig. § 9.*]

Exceptions from Superior Court, Suffolk County; Jabez Fox, Judge.

Action by Mary Milton against Luther W. Puffer and others, administrators of Alvin D. Puffer, deceased. Verdict was directed for defendants, and plaintiff brings exceptions. Sustained.

Charles F. Smith, for plaintiff. I. R. Clark and G. F. Ordway, for defendants.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

MORTON, J. The plaintiff and the defendants' intestate, whom we shall speak of as the defendant, owned adjoining estates on Irving street, Boston. On the premises of the defendant was a brick building which he had erected after he acquired title in 1898, the face of the southerly wall of which coincided with the dividing line between the two estates. The plaintiff acquired title in 1905 and immediately began the erection of a brick building according to plans which contemplated that the northerly foundation and wall should be up to and flush with the northerly line of her land and the dividing line between the two estates. In excavating for the foundations the plaintiff found that all along the dividing line the foundation stones of the defendant's building projected irregularly into her land from 10 to 12 inches and interfered materially with the construction of her building. Thereupon she complained to the defendant, and after a delay which inflicted upon her, as the plaintiff contended, a substantial loss, the defendant caused the stones to be cut off up to the dividing line except for a distance of 12 or 14 feet near the front of the two estates, where the building inspector of the city of Boston refused to allow it to be done on the ground that owing to the peculiar nature of the foundation of the defendant's building at that point it would tend, if done, to weaken the wall of the defendant's building. In consequence thereof the plaintiff was subjected, as she alleges, to additional expense in the erection of her building, which she seeks to recover in this action with other expenses and damages, alleged to have been caused by the projection of the stones into her land and the maintenance of them there. At the conclusion of the plaintiff's evidence the presiding justice ruled that the plaintiff was not entitled to recover, and directed the jury to return a verdict for the defendant. The case is here upon exceptions by the plaintiff to this ruling and direction. We think that the ruling and direction were wrong.

Projecting the stones into the adjoining land without a right or license from the owner to do so was a wrongful act on the part of the defendant, and the maintenance of them in the position in which they were so placed constituted a continuing trespass or nuisance. *Smith v. Smith*, 110 Mass. 302, 304.

The plaintiff cannot maintain an action against the defendant for the original trespass since she was not in possession at the time that it was committed. The plaintiff, however, does not seek to recover for that. But the maintenance of the stones in the places where they were originally put constituted successive or continuing trespasses or nuisances and any one injured thereby

could maintain an action therefor. *Pren-tiss v. Wood*, 132 Mass. 486, 488; *Curtis Manuf. Co. v. Spencer Wire Co.*, 206 Mass. 448, 452, 89 N. E. 534, 153 Am. St. Rep. 307. That is the cause of the action set out in the declaration. If the defendant relied on a right or license obtained from the former owner of the premises belonging to the plaintiff, the burden was on him to show that he had such right or license. *McLeod v. Jones*, 105 Mass. 403, 407, 7 Am. Rep. 589; *Collier v. Jenks*, 19 R. I. 493, 34 Atl. 998.

Exceptions sustained.

(207 Mass. 401)

VERMILYNE v. WESTERN UNION TELEGRAPH CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 35*)— OPERATION—ACCEPTANCE OF MESSAGES— CONFORMITY TO COMPANY'S RULES.

A rule of a telegraph company, requiring each message for transmission to be written upon a form provided by the company, or to be attached thereto by the sender, so as to leave the printed heading in full view above the message, which was in a tariff book open to the public in the telegraph company's office, would not affect the sender of a message, who had no knowledge thereof, so as to justify the company's refusal to accept for transmission a message having pasted on the blank form a printed notice of the nature of the message, even if the rule prohibited a message in that form.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 25; Dec. Dig. § 35.*]

2. TELEGRAPHS AND TELEPHONES (§ 35*)— OPERATION—ACCEPTANCE OF MESSAGE—EX- CUSSES FOR NONACCEPTANCE.

Defendant telegraph company's rules required each message for transmission to be written upon the form provided by the company, or to be attached thereto by the sender, so as to leave the printed heading in full view above the message. Plaintiff stuck on the message form, opposite the name of the addressee, a piece of paper, about three-fourths of an inch wide and two inches long, on which was printed a notice that the message was a business message, and that failure to deliver it promptly and correctly would likely cause financial loss to the sender, and that further particulars could be obtained from the address named; but the pasting on of such notice did not tend to confuse the operator in sending the message, or increase the probability of error, and did not exclude the printed heading above the message. *Held*, that the presence of the notice on the message did not justify the company's refusal to transmit it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 25; Dec. Dig. § 35.*]

3. APPEAL AND ERROR (§ 179*)—PRESENTA- TION BELOW—SUFFICIENCY.

Defendant telegraph company's request for a ruling, in an action against it for damages for refusal to receive and transmit a message, that it could not be held liable under a certain statute for refusal to receive and transmit under the circumstances under which the message was presented, was sufficient to raise on appeal the question of the constitutionality of the statute.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

4. COMMERCE (§ 59*) — "INTERSTATE COMMERCE"—REGULATION OF TELEGRAPH COMPANIES.

While all telegraph lines extending through different states are instruments of commerce, so that messages passing over them from one state to another constitute "interstate commerce," within the meaning of the provisions of the federal Constitution relating thereto, in absence of the enactment by Congress of statutes upon the same subject, a statute such as Rev. Laws, c. 122, § 9, requiring a telegraph company to receive dispatches from any person and transmit them impartially on payment of the usual charges, is not a regulation of interstate commerce, within the meaning of such constitutional provision, being a proper police regulation, which only incidentally affects interstate commerce.

[Ed. Note.—For other cases, see Commerce Cent. Dig. § 87; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

Exceptions from Superior Court, Suffolk County; William Schofield, Judge.

Action by William M. Vermilye against the Western Union Telegraph Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

The sticker which plaintiff pasted on the telegram sheet was about three-fourths of an inch wide and two inches long, on which was printed in small type a notice to the effect that the message was a business message, and that failure to deliver it promptly and correctly would likely cause the sender financial loss, and stating that further particulars would be furnished, if desired, on application to the sender at a certain address.

Olcott O. Partridge, for plaintiff. Arthur Lord and Arthur P. Hardy, for defendant.

KNOWLTON, C. J. This action was brought by the same plaintiff and tried at about the same time as *Vermilye v. Postal Telegraph Cable Co.*, reported in 205 Mass. 598, 91 N. E. 904, and it is almost identical with that case in its facts, and in the findings and rulings of the superior court. The only questions raised by the defendant's exceptions in this case that are not covered by our decision in the other are two: One as to the effect of a certain rule of the defendant, and the other as to the constitutionality of Rev. Laws, c. 122, §§ 9, 10, in their application to a telegraph company that transmits messages in connection with interstate commerce.

The rule relied on by the defendant is as follows: "Messages to be on message forms. Each message for transmission will be written upon the form provided by the company for that purpose, or will be attached to such form by the sender, or by the person presenting the message as the sender's agent, so as to leave the printed heading in full view above the message." The plaintiff had no knowledge of this rule when he presented the message. It was in a tariff book which was open to the public in the defendant's of-

fice, but the company did nothing to call the attention of the public to the book, beyond leaving copies of it in its office. The defendant contended that the rule forbade the sender of messages to put anything upon the face of the blank but the message, the date, and the name and address of the person to whom it is to be sent, and that the "sticker" and notice attached to the plaintiff's telegram were in violation of this rule. Witnesses for the defendant were in court ready to testify that the defendant and its agents had always put this construction upon the rule.

The court ruled that the construction put upon it by the defendant and its agents was of no force to bind the plaintiff. This was plainly right. The question for the court was, what was the true meaning of the rule. Not only had the plaintiff done nothing in his dealings with the defendant that would affect him by the defendant's construction of the rule, but he did not even know of the existence of the rule.

The court found as a fact that the rule did not have the meaning for which the defendant contended. Inspection of the tariff book showed that this was a rule of the receiving department, and that this and other rules under the same and similar headings in the tariff book were intended for the use and guidance of the company's agents, and not for the public.

The language of the rule shows that the judge was right in his construction of it. While it requires that messages shall be written upon the form provided for the purpose, it does not forbid the writing of any other unobjectionable matter upon the same paper, in such a way as not to mislead the agents or cause them inconvenience in the performance of their duties. It was put upon the paper by the plaintiff in the form of a sticker or a notice which it was proper for him to give to the company, orally or in writing, in any reasonable way. The judge found that its presence on the blank had no tendency to confuse the defendant's operator, or to increase the probability of error or delay in transmitting the message, and that it did not obscure the printed heading above the message. The judge was right in holding that this rule was not a justification for the defendant's absolute refusal to transmit the message.

The only other question is whether the statute under which the plaintiff was permitted to recover is unconstitutional as a regulation of interstate commerce. Seemingly this question was not brought to the attention of the court or the plaintiff's attorney at the trial, and perhaps it was not thought of then by anybody. But, against the plaintiff's contention, we treat it as open under the defendant's fifth request for a ruling, namely, that "the defendant cannot be held liable under Rev. Laws, c. 122, § 9, for re-

fusal to receive and transmit the message in question under the circumstances under which it was presented."

It is settled that telegraph lines extending through different states, to be used in an ordinary way, are instruments of commerce, and that messages passing over them from one state to another in the transaction of business are a part of interstate commerce that is entitled to the protection of the Constitution of the United States. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 98 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 847, 7 Sup. Ct. 1126, 30 L. Ed. 1187. It is also as well settled by the highest authority that such a statute as that in question, so long as Congress passes no law upon the same subject, is not a regulation of interstate commerce, within the meaning of the constitutional provision, but is a proper police regulation for the enforcement of the rules and policy of the common law, which affects interstate commerce only incidentally. *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Missouri, K. & T. Railway Co. v. Haber*, 169 U. S. 613-634, 18 Sup. Ct. 488, 42 L. Ed. 878; *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612-622, 29 Sup. Ct. 214, 53 L. Ed. 352; *Western Union Tel. Co. v. Willson*, 213 U. S. 52-55, 29 Sup. Ct. 403, 53 L. Ed. 693; *W. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088. The defendant's counsel has given us no reason and has referred us to no decision that should call for a different conclusion. There is no constitutional objection to the plaintiff's recovery under the findings of the Judge.

Exceptions overruled.

(307 Mass. 419)

MASON v. MASSACHUSETTS GENERAL HOSPITAL et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 5, 1911.)

1. WILLS (§ 493*)—CONSTRUCTION—DESIGNATION OF BENEFICIARY.

The court, in determining whom testator intended to designate as a beneficiary in his will, may consider the circumstances at the time of its execution; and where, in the light of such circumstances, it is plain what institution was intended, that institution must take, regardless of the fact that there may be another institution which will better carry out testator's purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1077; Dec. Dig. § 493.*]

2. WILLS (§ 515*)—CONSTRUCTION—DESIGNATION OF BENEFICIARY.

Testator gave his residuary estate to "the Massachusetts Hospital for diseased and wounded soldiers." At the time of the execution of the will, and for many years prior thereto, the Massachusetts General Hospital, incorporated many years before, had been commonly called the "Massachusetts Hospital." At the time of the execution of the will an institution had

made provision for the care of diseased and wounded soldiers, and the Legislature had made appropriations for its support. Testator was a man of intelligence, and had the knowledge of men moving about the city ordinarily. Held, that the Massachusetts General Hospital was the legatee intended, and it must receive the residuary estate and administer it for the purpose named in the will; the words "for diseased and wounded soldiers" not being descriptive of the institution which should take, but of the purpose to which the gift was to be devoted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1110; Dec. Dig. § 515.*]

Case Reserved from Supreme Judicial Court, Middlesex County.

Petition by Edward H. Mason against the Massachusetts General Hospital and others for the construction of the will of John Ashton, deceased. There was a decree of the probate court construing the will, and the Massachusetts General Hospital appealed, and a single justice, at the request of the parties, reserved the case on facts found. Decree ordered in favor of the Massachusetts General Hospital.

B. B. Jones, N. N. Jones, and C. T. Smith, for Trustees of Soldiers' Home in Massachusetts. Alfred Hemenway and John Abbott, for Massachusetts General Hospital.

MORTON, J. This is a petition by the surviving trustee under the will of one John Ashton for instructions as to the construction of the following residuary clause in said will: "7th. All the residue and remainder of my property shall be given to the Massachusetts Hospital for diseased and wounded soldiers." The petitioner has upwards of \$20,000 in his hands to be disposed of under the clause in question. Various parties were made respondents. The Massachusetts General Hospital, the Massachusetts Homeopathic Hospital, the Trustees of the Soldiers' Home in Massachusetts, Mary G. Rustemeyer and the Attorney General appeared in the probate court. The others were all defaulted. The probate court ordered and decreed that the petitioner "pay over said residue and remainder * * * to the Trustees of the Soldiers' Home in Massachusetts aforesaid, to receive and expend for the benefit of diseased and wounded soldiers in Massachusetts." The Massachusetts General Hospital appealed. The single justice was of opinion upon the facts found by him that the Massachusetts General Hospital was the legatee intended by the testator, but at the request of the parties reserved the case upon the facts found by him for the full court. The heir at law did not appear at the hearing in this court and it is not contended by her, or any one else, that the contingency upon which the residuary clause was to become operative has not occurred.

The single justice found that the Trustees of the Soldiers' Home in Massachusetts was not in existence when the will was made, and that the Massachusetts Homeopathic Hospital was incorporated in 1851, and its first hospital was not established until 1871; and he found that neither of these institutions was intended by the testator. Counsel for the Trustees of the Soldiers' Home do not contend that it was the institution intended by the testator. Their contention is that the institution intended by the testator was an association on Springfield street in the city of Boston, known as the Discharged Soldiers' Home, which had been established a short time before the will was made, for the purpose of providing a home for sick and wounded soldiers who had been honorably discharged from the army of the United States. That association or institution has admittedly ceased to exist; but it is contended by the Trustees of the Soldiers' Home in Massachusetts that the gift constitutes a charitable trust, that the case is one for the application of the *cy pres* doctrine, and that the fund should be handed over to them to administer.

We interpret the words "for diseased and wounded soldiers" in the clause in question, not as descriptive of the institution which is to take, but of the purpose to which the gift is to be devoted. That, it seems to us, is the natural construction of the language used. The question then is, What institution or corporation did the testator mean by the words "Massachusetts Hospital"?

In the effort to ascertain whom the testator meant it is proper to consider the circumstances existing at the time when the will was made. And if in the light of those it is plain what corporation or institution was intended, then such corporation or institution is to take regardless of the fact that there may be another institution or corporation which would better carry out the testator's purpose. See *Tucker v. Seaman's Aid Society*, 7 Metc. 188.

The single justice found that the Massachusetts General Hospital was incorporated in 1810, and that "at the time this will was made [it] was, and for some years had been, known and called as well the Massachusetts Hospital as the Massachusetts General Hospital." He further found that at the time the will was made "provision had been made there for the care of diseased and wounded soldiers—not as a home for discharged soldiers, but as a place where wounded and dis-

eased soldiers should be treated, and that was generally known." He found that the testator was a hairdresser doing business on Spring Lane in Boston; that he was 63 years of age when the will was made; that he was a man of intelligence and "had the knowledge of men of that age moving about the city ordinarily." But there was nothing in the case, he says, upon which he could find that the testator had had his attention called one way or another to either the Massachusetts General Hospital or the Discharged Soldiers' Home on Springfield street "or that he knew anything about them, except what may be presumed to be known by a man who lived and worked here as he did."

It is apparent from the findings of the single justice that the principal if not the sole purpose of the institution on Springfield street was to care for sick and wounded soldiers differing in that respect from the Massachusetts General Hospital and it may well have appealed for sympathy and support to the patriotic feelings which so profoundly stirred all classes in this and other communities at the North at the time when the will was made. The Legislature for several years made appropriations for its support and maintenance, at first with the condition that an equal amount should be raised by private subscription, and later without that condition. It is possible, of course, that the testator knew of the existence of that institution. But it is hardly conceivable that if he had intended to make that institution the object of his bounty he would not have described it by some fitting name. The only institution to which the name which he has chosen naturally applies is the Massachusetts General Hospital. It is expressly found that that corporation was as well known by the name of the Massachusetts Hospital as by its corporate name at the time when the will was made. It had existed for a long time, and it is not unreasonable to suppose that the testator knew of it. Indeed it would seem that he must have known or heard of it. The name which he has used to describe the legatee describes that institution and no other; and we think the conclusion to which the single justice came that the Massachusetts General Hospital was the legatee intended was correct, and that a decree should be entered ordering the fund to be paid to it, to be held and administered by it for the purposes named in the will.

So ordered.

(207 Mass. 407)

CUSHMAN v. BOSTON STORAGE WAREHOUSE CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1911.)

1. REPLEVIN (§ 5*)—RIGHT OF ACTION—GOODS IN LEGAL CUSTODY.

Rev. Laws, c. 190, § 8, provides that if goods exceeding \$20 in value have been attached on mesne process or taken on execution, and are claimed by a person other than the defendant in the action, the owner may have them replevined. The goods sought to be replevined were deposited with defendant warehouse company in plaintiff's name, and on the day they were deposited defendant was summoned as trustee of the goods in a suit against plaintiff, and before the return day of the writ plaintiff demanded the goods of defendant, which defendant refused, because of the pendency of the trustee writ. *Held*, that plaintiff was not entitled to replevin the goods, they being in effect in the custody of the law; plaintiff's remedy, if any, being in part against the officer and attaching creditors.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 27-37; Dec. Dig. § 5.*]

2. WAREHOUSEMEN (§ 25*)—REFUSAL TO DELIVER GOODS—CLAIM BY THIRD PERSONS—TRUSTEE PROCESS.

St. 1907, c. 582, § 19, providing that if some other than the depositor claims title or possession of the goods deposited, and the warehouseman has information of such claim, he shall be excused from liability for refusing to deliver the goods to the depositor until he has a reasonable time to ascertain the validity of the adverse claim, or to sue to compel claimants to interplead, does not apply where the warehouseman has been summoned as trustee of the depositor.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 47; Dec. Dig. § 25.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Ada M. Cushman against the Boston Storage Warehouse Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

F. S. Hesseltine and W. D. Gray, for plaintiff. A. E. Burr, for defendant.

MORTON, J. The property which is the subject of this suit consists of household goods deposited with the defendant in the name of the plaintiff. On the day on which they were deposited the defendant was summoned as trustee in a suit brought against the plaintiff and her husband and returnable to the municipal court in Boston. Before the return day of the writ the plaintiff made a demand on the defendant for the goods which the defendant refused because of the pendency of the trustee writ. Thereupon two or three days after the demand and refusal the plaintiff brought this action of replevin and the goods were taken out of the defendant's possession.

The trustee writ was duly entered in the municipal court and the defendant appeared and answered that it had in its possession

at the date of the service of the writ certain household goods stored in the name of the plaintiff, whose value was unknown to it. Subsequently the trustee was charged upon its answer and the plaintiff, who had been admitted as claimant, appealed. In the superior court the claimant's claim was allowed and the trustee was discharged without costs. No appeal from or exceptions to this finding appear to have been taken. The case now before us was tried by the court without a jury and the court found in favor of the defendant. It is here on exceptions by the plaintiff to the finding so made and to the refusal of the presiding justice to make certain rulings requested by her. The presiding justice ruled and found as requested by the plaintiff that the goods were necessary household goods within \$300 in value and were exempt from attachment, but refused to rule, and we think rightly, as requested by the plaintiff that the plaintiff's right to possession of the goods was not affected by the pendency of the proceedings in the trustee suit. The effect of the trustee process was to attach the goods in the hands of the defendant as the plaintiff's goods, and until it was discharged as trustee the defendant was bound to hold them subject to any judgment which might be obtained and any execution which might be issued against the principal defendants. The trustee was not bound to decide at its peril whether they were or were not exempt from attachment. Although not in the hands of an officer the goods were in effect in the custody of the law, and the plaintiff, under our statute in regard to replevin, could not replevy them. Rev. Laws, c. 190, § 8; *Ilsey v. Stubbs*, 5 Mass. 280; *Baker v. Fales*, 16 Mass. 147, 150; *Allen v. Staples*, 6 Gray, 491, 493. The remedy of the plaintiff, if any, was in tort against the officer and the attaching creditor. *Bean v. Hubbard*, 4 Cush. 85; *Davlin v. Stone*, 4 Cush. 359. The peculiar language of our statute in regard to replevin which provides that if goods exceeding \$20 in value "have been attached on mesne process or taken on execution, are claimed by a person other than the defendant in the action in which they have been so attached or taken, the owner * * * may cause them to be replevined," renders the cases cited by the plaintiff from other states inapplicable.

The presiding justice was asked to rule and should have ruled that St. 1907, c. 582, § 19, relating to warehouse receipts, did not apply to this case and constituted no justification for the defendant's refusal to deliver the goods to the plaintiff. But in view of the other findings and rulings the error did not and could not have operated prejudicially to the plaintiff.

Exceptions overruled.

(307 Mass. 322)

HALL et al. v. BOSTON PLATE & WINDOW GLASS CO.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)**1. ASSIGNMENTS (§ 41*)—FUTURE WAGES—STATUTES—COMPLIANCE.**

Under St. 1906, c. 390, providing that no assignment of future wages shall be valid, unless a copy is delivered to the assignor by the assignee at the time of the execution of the assignment, and that it shall not be binding on the employer of the assignor until a copy of it and an account conforming to specified requirements shall have been delivered to the employer, an assignment of future wages is not binding on the employer, unless the requirements of the act have been complied with; and an assignment not conforming to the statute is invalid, as against a subsequent assignment observing the statutory requirements.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 41.*]

2. ASSIGNMENTS (§ 73*)—FUTURE WAGES—STATUTES—COMPLIANCE—EFFECT.

An assignment of future wages, executed in accordance with St. 1906, c. 390, operates to transfer to the assignee, the wages of the employee while in the employ of the employer during the time covered by the instrument.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 73.*]

3. ASSIGNMENTS (§ 71*)—FUTURE WAGES—STATUTES—COMPLIANCE.

An assignment of future wages, executed in accordance with St. 1906, c. 390, fixes the rights of the parties at the time of its execution; and a subsequent attempt to have a former assignment, not executed in accordance with the statute, conform thereto, does not affect the rights of the parties.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 71.*]

4. ASSIGNMENTS (§ 110*)—FUTURE WAGES—STATUTES—COMPLIANCE.

Where a servant assigns his future wages in the manner prescribed by St. 1906, c. 390, the master need not see to the appropriation of the wages paid by him to the assignee, but is justified in paying the wages to the assignee.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 110.*]

Appeal from Superior Court, Suffolk County; Frederick Lawton, Judge.

Action by Harry D. Hall and another against the Boston Plate & Window Glass Company. There was a judgment for defendant, rendered on agreed facts with power to draw inferences, and plaintiffs appeal. Affirmed.

L. A. Charlton, for appellants. G. E. Hills, for appellee.

MORTON, J. This case was heard upon agreed facts with power to draw inferences. The court found for the defendant and the plaintiffs appealed.

It appeared that one Does who was in the employ of the defendant made an assignment of his wages on August 17, 1908, to the plaintiffs for two years, to secure a debt of \$217.50 due from him to them. No notice of the assignment was given by the

plaintiffs to the defendant, as required by St. 1906, c. 390, until June 25, 1909, and the assignment was not recorded until August 2, 1909. On January 9, 1909, Does, who was still in the employ of the defendant, made another assignment of his wages, also for two years, to one Hills to secure a loan of \$844 with interest at 5 per cent. per annum. Hills had no notice of the prior assignment. He was informed by Does that there was no outstanding prior assignment, and upon inquiry of the defendant was told that they had no notice of any. He also examined the records of the town of Winthrop, where Does lived, and found no assignment on record. Thereupon he made the loan and took the assignment aforesaid and caused it to be recorded in the town clerk's office of Winthrop on January 11, 1909, and on January 13, 1909, he gave notice of it to the defendant and did all the things required by St. 1906, c. 390, to make it binding on them. The defendant paid Hills each week, beginning on January 16th, the wages due to Does until he left their employment August 14, 1909. On June 25, 1909, the day on which the plaintiffs gave notice to the defendant of their assignment, Does owed the plaintiffs \$131.76, and that is the amount which they seek to recover of the defendant in this action. On September 9, 1909, they duly demanded of the defendant payment of the same. The plaintiffs make no claim to any of the wages of said Does accruing prior to June 25th. On said June 25th, and also at the date of the agreed facts, the amount owed by Does to Hills largely exceeded the amount of the plaintiffs' claim. The wages of Does were \$34.61 a week and were more than sufficient in amount, as stated in the plaintiffs' brief, to have paid the sum lent by Hills to Does to secure the payment of which the assignment was given by Does to Hills.

St. 1906, c. 390, is entitled "An act relative to the assignment of wages," and by section 6, "all acts and parts of acts inconsistent herewith are hereby repealed." Section 1 provides that no assignment of future wages shall be valid for a period exceeding two years from the date thereof, nor unless certain specified requirements are complied with. Section 2 provides that no such assignment shall be valid unless a copy is delivered to the assignor by the assignee at the time of the execution of the assignment, and that it shall not be binding on the employer of the assignor until a copy of it and an account conforming to the requirements thereafter stated shall have been delivered to the employer. The plain implication of what is required to be done in order to make the assignment binding on the employer is that if that is done the assignment shall be binding on the employer according to its

terms. This is borne out by the provisions in section 5 that "An assignment of wages made in accordance with the provisions of this act shall bind all wages earned by the assignor within the period named in such assignment." The effect of the statute is, therefore, to render invalid as against a subsequent assignment where the requirements of the statute have been observed, a prior assignment where the requirements of the statute have not been observed. The matter being one of statutory regulation, cases like *Thayer v. Daniels*, 113 Mass. 129, on which the plaintiffs rely, which deal with conflicting assignments at common law, do not apply. It follows from the construction which we have given to the statute that the defendant was justified in paying over the wages to Hills after it received notice from the plaintiffs of their assignment. Upon its execution in accordance with the requirements of the statute the assignment to Hills operated to transfer to him the wages earned by Does, while in the employ of the defendant, during the time covered by the instrument. See *Citizens' Loan Association v. Boston & Maine Railroad*, 196 Mass. 528, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584. And so long as it continued in force the rights and obligations of the parties could not be affected by an invalid assignment previously made. Nor could validity be given to such invalid assignment as against one subsequently properly made, by attempting to comply later with the requirements of the statute. The rights of the parties were fixed once for all, so far as these proceedings are concerned, by the execution of a valid assignment to Hills. The defendant was not bound to see to the appropriation of the wages paid to Hills by them. The only question is whether they were justified in paying them to Hills, and, as we have already said, we think that they were. Whether the plaintiffs have any remedy by means of a trustee process summoning Hills as trustee or otherwise to compel an accounting as between Hills and Does, it is not necessary now to consider.

Judgment affirmed.

(207 Mass. 207)

FAY v. HASKELL.

PERKINS v. SAME.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 3, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 415*)—
ALLOWANCE OF CLAIMS—PROCEDURE.

The procedure for enforcement of claims against estates differs as to solvent and insolvent estates, the creditor of a solvent estate being entitled to proceed at law, while a creditor of an insolvent estate cannot; and a creditor of a solvent estate is barred unless he brings suit within 2 years from the appointment of the administrator, while the creditor of an insolvent

estate is barred unless he presents his claim to the probate court or commissioner within the time prescribed by the court, which cannot exceed 18 months; the provision as to time being in the nature of a statute of limitation, with a contingency under which the bar may be removed, such contingency in the case of insolvent estates being the reception by the administrator of new assets after expiration of the time of his appointment, as expressly provided by Rev. Laws, c. 141, § 11, and in the case of solvent estates the coming into the administrator's hands after the decree of distribution of further assets, as expressly provided by chapter 142, § 10.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 415.*]

2. EXECUTORS AND ADMINISTRATORS (§ 415*)—
ALLOWANCE OF CLAIMS—INSOLVENT ESTATE
—CONSTRUCTION OF STATUTE—"FURTHER
ASSETS"—"NEW ASSETS."

Rev. Laws, c. 142, § 10, relating to insolvent estates, provides that a creditor who does not present his claim for allowance to the commissioners, or to the court where no commissioners are appointed, within the time prescribed by that court, shall be barred, but that, if "further assets" come into the hands of executor or administrator after the decree of distribution, the claim may be proved and paid. *Held*, that the term "further assets" is substantially the same as "new assets," which belated creditors are permitted to reach under chapter 141, § 11, relating to solvent estates, and in general does not include property for which the administrator has been charged, or the property into which such property, or any part thereof, has been changed, or the natural increment of such property; and where an administrator did not include in the inventory, nor in his first nor second and final account, certain land, or the proceeds of the sale thereof, if he knew that the land belonged to his intestate long before the decree of distribution, and had it in his control well within the two-year period from his appointment, neither the land nor the proceeds of its sale would be "further assets," but, if his knowledge of intestate's interest in such tract did not come to him until after two years from his appointment, the proceeds of their sale would be "further assets."

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 415.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4784.]

Exceptions from Superior Court, Essex County; Chas. U. Bell, Judge.

Proceedings by Frank H. Haskell, as administrator, for settlement of the estate of one Blanchard. From an order disallowing claims of William A. Fay and Fred L. Perkins, they appealed to the superior court. Judgment for claimants, and the administrator brings exceptions. Exceptions overruled.

Samuel H. Hollis, for petitioner Fay. Augustus B. Tolman, for petitioner Perkins. James C. Batchelder, for defendant.

HAMMOND, J. These are two appeals to the superior court from the disallowance by the probate court of claims presented against the insolvent estate of one Blanchard, deceased, under Rev. Laws, c. 142, § 10. Neither appellant presented his claim within the time prescribed by the probate

court, but contended that he was entitled to share in certain funds in the hands of the administrator, upon the ground that these funds were "further assets" which had come to the administrator's hands after the decree of distribution within the meaning of that section. At the trial in the superior court without a jury in each case the court, at the request of the appellee, ruled that "the appellant was not entitled to prove his claim * * * unless 'further assets' came to the hands of the administrator," and having so ruled, found for the appellant. Under the ruling the general finding necessarily implies that the court found there were such further assets; and the only question is whether upon the evidence such a finding was warranted.

The section relates to the proof of claims against the estate of a deceased person which has been duly represented to be insolvent, and reads as follows: "A creditor who does not present his claim for allowance in the manner herein provided [that is to the commissioners appointed by the probate court, or to the court, if no commissioners are appointed, within the time prescribed by that court] shall be barred from recovering the same; but if further assets of the deceased come to the hands of the executor or administrator after the decree of distribution, the claim may be proved, allowed and paid as provided in this chapter for contingent claims."

What is meant by the term "further assets" as used in this section? For more than two centuries and a quarter there has been in this jurisdiction a similar provision as to the right of a creditor of the insolvent estate of a deceased person to present his claim after the time prescribed by the court. Such a creditor was debarred under the colonial laws "unless he could find some other estate of the deceased not found out before and put into the inventory." Mass. Col. Laws (Whitmore's Ed.) p. 250. Under the provincial laws, unless he could find "some further estate of the deceased not before discovered and put into the inventory." Prov. Sts. 1692-93, c. 16; 1696, c. 8 (1 Prov. Laws, pp. 48, 251). And under the laws of the commonwealth, unless he should "find some other estate of the deceased not inventoried or accounted for by the executor or administrator before distribution." St. 1784, c. 2. In Rev. St. 1836, c. 68, § 20, the phrase is "unless further assets of the deceased shall come to the hands of the executor or administrator after the decree of distribution"; and such has been the form ever since. Gen. St. 1860, c. 99, § 21; Pub. St. c. 137, § 10; Rev. Laws, c. 142, § 10.

It is argued by the appellee that the term "further assets" as used in the section under consideration means in substance the same as "new assets" in Rev. Laws, c. 141, § 11, and that under the law interpreting the latter term none of the assets shown by the evi-

dence were further assets. It is argued by the appellants that by the Revised Statutes a change was made in the law and that now "further assets" mean and can only mean any money available for dividends which comes to the hands of the administrator after the decree of distribution." The contention is thus stated in their brief: "In other words, prior to the Revised Statutes 'further assets' were limited to such further assets as should be found by the creditor himself, and which had not been inventoried or accounted for, but since the Revised Statutes the Legislature by cutting off the qualifying words 'not inventoried or accounted for' showed clearly that thenceforth 'further assets' meant simply any additional assets from which the administrator could pay a dividend." Accordingly, as they claim, cash coming to the hands of the administrator after the decree of distribution, even although it be the proceeds of land or other property named in the inventory but sold after the decree, may be regarded as further assets.

Rev. St. 1836, c. 68, § 20, was enacted in the precise form drafted by the commissioners, and while they made upon that section a note of considerable length, there is nothing to indicate that by the verbal changes in the description of the kind of assets which would let in a belated creditor there was any intention to change in that respect the law as it had previously existed under St. 1784, c. 2.

With respect to our procedure for the enforcement of claims against the estate of a deceased person, there is a marked difference, depending upon whether the estate is solvent or insolvent. In the former case the creditor whose right of action has accrued may proceed at common law; in the latter he cannot. In the former he is barred unless the suit be brought within 2 years from the appointment of the administrator; in the latter he is barred unless he present his claim to the probate court or commissioner within the time prescribed by the court, which time cannot exceed 18 months. In each case the provision as to time is in the nature of a statute of limitations. But in either case there is a contingency under which the bar may be removed to a certain extent. Where the estate is solvent, the contingency is that new assets have been received by the administrator after the expiration of the time of his appointment (Rev. Laws, c. 141, § 11), and, where the estate is insolvent, it is that further assets have come into the administrator's hands after the decree of distribution (Rev. Laws, c. 142, § 10). In each case the bar, unless thus removed, is absolute at law. The remedy in equity provided for in Rev. Laws, c. 141, § 10, is not material to this discussion. More briefly stated, the general framework of our procedure for the enforcement of claims against the estate of a de-

ceased person, whether the estate be solvent or insolvent, is that a creditor whose right of action has accrued shall within a certain specified time take legal steps to enforce his claim; and that if he fails so to do he shall be forever barred unless, in the case of a solvent estate, "new assets," or, in that of an insolvent estate, "further assets" have come to the hands of the administrator. Where in either case the belated creditor is barred, the surplus property does not go to the administrator as his own, but, where the estate is solvent, to the heirs at law; and when it is insolvent, to the creditors who have proved their claims within the time specified. There is no reason why there should be any distinction as to the respective rights of belated creditors in these two kinds of estate. Substantial rights ought not to depend upon the statutory course of procedure. In view of these considerations we are of opinion that the kind of assets which a belated creditor may reach under Rev. Laws, c. 141, § 11, is the same as that which such a creditor may reach under Rev. Laws, c. 142, § 10. "New assets" and "further assets" are substantially the same. Such an interpretation of these terms works uniformity in the principles upon which the rights of creditors of the estates of deceased persons depend and does equal justice to both classes of creditors.

The cases in which this court has considered the statutory provision on this matter so far as respects insolvent estates are very few, and they throw little if any light upon the precise question before us. In *Johnson v. Libby*, 15 Mass. 140, it was said by Parker, C. J., that "we can hardly think that the fact of a judgment, recently recovered by the heirs of the intestate, for land to which he had lost his right of entry, can be considered as the discovery of estate not inventoried or accounted for by the administratrix." In *Ostrom v. Curtis*, 1 Cush. 461, it was said by Shaw, C. J., that the question whether further assets have come to the hands of the administrator "may be a very difficult question to decide."

The phrase "new assets" occurring in statutes relating to solvent estates has received much more attention. Property recovered by an administrator which was fraudulently conveyed by the intestate has been regarded as new assets. *Holland v. Cruft*, 20 Pick. 321; *Welsh v. Welsh*, 105 Mass. 229. And so a reversionary interest in property conveyed to trustees for the benefit of creditors, which at the time of the debtor's death and long afterwards was supposed to be of no value, and although known to the administrator is not included in the inventory of the estate, but which after 11 years turns out to be more than sufficient to pay the debtor's claim. *Quincy v. Quincy*, 167 Mass. 536, 46 N. E. 108. In this case *Holmes, J.*, says that the section

of the Public Statutes (then Pub. St. c. 136, § 11, now Rev. Laws, c. 141, § 11) "is a difficult one to construe. It cannot be taken to extend to all cases where tangible property first is received by the executor or administrator after two years, even if not included in the inventory. * * * But, on the other hand, the section must be given a serious meaning, and it would be made almost illusory if construed not to apply to any case where the right was vested at the debtor's death." See, also, *Copeland v. Field*, 180 Mass. 223, 62 N. E. 249.

On the other hand it is held that a mere change in the form of the property does not make "new assets." This principle was applied in *Sturtevant v. Sturtevant*, 4 Allen, 122, where the administrator sold out the interest of his intestate in a partnership which had been inventoried, and took in payment notes which were collected more than two years after his appointment; in *Chenery v. Webster*, 8 Allen, 76, and in *Alden v. Stebbins*, 99 Mass. 616, where land which had been inventoried was sold by the administrator after two years from the time of his appointment under a license of the probate court to pay debts; and in *Bradford v. Forbes*, 9 Allen, 365, where after two years the executor recovered judgment upon a suit begun by his testator. Striking illustrations of the application of this principle may be found in *Veazie v. Marrett*, 6 Allen, 372; *Robinson v. Hodge*, 117 Mass. 222, and *Gould v. Camp*, 157 Mass. 358, 32 N. E. 225. In *Veazie v. Marrett*, which was a suit by a belated creditor against an administrator *de bonis non*, it was held that money received by the defendant from a surety upon the bond of the original administrator was not new assets. The ground of the decision was stated by Hoar, J., in the following language: "The original administrator included in the inventory all the estate of the intestate which has ever been discovered. For a part of the estate so inventoried he failed to account, and a suit was brought upon his bond. The property now in the hands of the defendant was received by him from a surety on the bond, in satisfaction of that suit. It is therefore merely the proceeds of the estate embraced in the first inventory, and belongs to the creditors or persons entitled to distribution when the plaintiff's claim was barred." In *Robinson v. Hodge*, 117 Mass. 222, certain patent rights were inventoried; and it was held that money received by an administratrix after two years from that time from the patent rights, whether as royalties or as proceeds of the sales of rights, was not "new assets." *Wells, J.*, in giving the opinion said: "We infer from the report, and it was so assumed by the argument on both sides, that this money arose from sales or contracts made by the administratrix, or, at least, that it accrued after the decease of the intestate, and that it arose from the inventions mentioned in the inventory. It

was the product of the property included in the inventory; and in the same sense as are the income of stocks and the increase of live animals, it was embraced as a potentiality in the valuation of the patent for the invention. The new form which the property assumed or was converted into did not make it 'new assets' in the sense of the statute. *Sturtevant v. Sturtevant*, 4 Allen, 122." In *Gould v. Camp*, 157 Mass. 358, 32 N. E. 225, the facts are somewhat complicated and will not here be stated. Holmes, J., said: "It is impossible * * * to lay down the universal principle that everything omitted from the inventory by accident or any cause no matter what is 'new assets.' * * * Notes and choses in action generally are assets. * * * The chance of getting the proceeds would be 'embraced as a potentiality in the valuation. *Robinson v. Hodge*, 117 Mass. 222, 225."

It is impossible to give in advance a general definition of these terms which shall in terms embrace all the cases properly within it and exclude all others; and the cases must be settled as they arise. Generally, however, it may be said that neither term includes property for which the administrator has been charged in his inventory or otherwise, or the property into which the same or any part thereof has been changed, or the natural increment of such property in the way of interest or otherwise.

Applying these principles to the case before us, it is plain that neither the balance of the former account, nor the proceeds of the judgment recovered against the Lynn Institution for Savings, nor the sum received for tools, nor the money received as interest on the deposit in the Manufacturers' National Bank were further assets. As to the \$49.40 recovered against Wilson, there is more doubt. We understand that this was recovered as damages for the breach of a contract to purchase the note and mortgage of the Lynn & Boston Steamboat Company, which note and mortgage were inventoried as worthless. Had the contract for the sale been carried out the proceeds thereof would not have been new assets, and we think that notwithstanding some technical difficulties the sum received for breach of the contract may be regarded as in substance a change so far as it goes in the original asset and was not further assets.

As to the sum received in May, 1909, from the sale of an interest in the land on Bloomfield street and the sum received June 10, 1909, from the sale of an interest in land on Reed street, there is considerable difficulty. It does not appear at what precise time the sales were made. In the absence of anything to the contrary it is fair to assume that each sale was made at or about the time the proceeds thereof were received. The "second and final account" of the ad-

ministrator was filed April 8, 1909, and allowed May 8, 1909, nearly four years after his appointment. In neither of these accounts were either of these parcels of land or the proceeds from the sale of them included. The administrator testified that he knew that said parcels belonged to his intestate as early as in the fall of 1905, some two or three months after filing the inventory, and for a long time before the decree of distribution he had been endeavoring to negotiate a sale of the same to prospective purchasers. If this statement of the administrator is correct, then, although the interest in these lands was not inventoried, yet well within the two years he had them in his control and neither they nor the proceeds of the sale of them were "further assets." But the court may not have given credit to this testimony of the administrator, and from all the evidence he may have concluded that knowledge of the interest in these two parcels of land did not come to the administrator until long after the expiration of the two years from the time of his appointment. Under such a finding the sums were "further assets."

It follows that neither the first nor second requests should have been given. And so of the third. It assumes as true the testimony of the administrator.

Exceptions overruled.

(207 Mass. 225)

PAGE v. INHABITANTS OF WEYMOUTH.

(Supreme Judicial Court of Massachusetts.

Suffolk. Jan. 5, 1911.)

MUNICIPAL CORPORATIONS (§ 821*)—TORTS—QUESTION FOR JURY.

The fact that plaintiff, who was injured by falling into a hole in sidewalk, had passed over the hole before and knew of its existence, does not as a matter of law preclude her from recovering, as it was a question for the jury, under the evidence, whether at the time of the accident plaintiff was using due care.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1755; Dec. Dig. § 821.*]

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by Sarah F. Page against the Inhabitants of Weymouth. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

H. S. MacPherson, W. H. Foster, and J. B. Mahar, for plaintiff. A. P. Worthen, for defendant.

KNOWLTON, C. J. There is nothing in this case that calls for the consideration of any but very familiar rules of law, and the facts are simple. The jury properly might find that there was a defect in the earth sidewalk on a much-traveled street, which was in the form of a hole or gutter, caused by a flow of water across the walk; that this

defect had existed there for a long time; and, that the authorities of the town knew it, or would have known it if they had exercised due care.

It was a question for the jury whether the plaintiff, at the time of the accident, was using due care. The fact that she had passed over the hole before and knew of its existence does not, as a matter of law, preclude her from recovering. *Winship v. Boston*, 201 Mass. 273, 87 N. E. 600; *Campbell v. Boston*, 189 Mass. 7, 75 N. E. 96; *George v. Haverhill*, 110 Mass. 506.

Exceptions overruled.

(307 Mass. 409)

DOWNS v. PERKIN.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 5, 1911.)

1. FRAUDS, STATUTE OF (§ 13*)—APPLICABILITY—PROMISE TO ANSWER FOR ANOTHER'S DEBT.

The New York statute of frauds (Consol. Laws N. Y. c. 41, § 31), making void a promise to answer for another's debt unless it, or some memorandum thereof, be in writing, applies to collateral, and not to original, promises.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 13; Dec. Dig. § 13.*]

2. FRAUDS, STATUTE OF (§ 159*)—PROMISE TO PAY ANOTHER'S DEBT—NATURE—JURY QUESTION.

When the facts were in dispute, the question whether defendant's promise to pay for services rendered her brother by plaintiff was a collateral or original obligation, within the New York statute of frauds (Consol. Laws N. Y. c. 41, § 31), was for the jury.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 398; Dec. Dig. § 159.*]

Exceptions from Superior Court, Middlesex County; Robt. B. Bishop, Judge.

Action by Mary L. Downs against Emily A. Perkin. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

P. B. Kiernan, for plaintiff. Geo. M. Poland and Loring P. Jordan, for defendant.

MORTON, J. This is an action of contract to recover for board and lodging furnished by the plaintiff to one William H. Mellins, the brother of the defendant, upon an alleged original undertaking by the defendant to pay for the same. The declaration was in two counts, the first being upon an account annexed, and the second for the sum found due upon an alleged accounting together. The presiding justice ruled that the evidence did not support the second count and the case was submitted to the jury on the first count alone. At the time of the making of the alleged promise the parties were all residents of the state of New York and the plaintiff still resides there. The presiding justice ruled that the case was governed by the law of New York. The defense was that the promise was a promise to pay the debt of another and not in writing and void under the statute of frauds of New

York. The defendant introduced in evidence so much of the statute of frauds of New York as was applicable, and the following decisions by the courts of that state: *Larson v. Wyman*, 14 Wend. 246; *Payne v. Baldwin*, 14 Barb. 570; *Halsted v. Pelletreau*, 101 App. Div. 125, 91 N. Y. Supp. 927, and *Dixon v. Frazee*, 1 E. D. Smith, 32. At the close of the evidence the defendant asked the court to rule and instruct the jury that the plaintiff was not entitled to recover on the first count, that the charges on the plaintiff's books, and the accepting by her of payments from the brother were conclusive against her right to recover and that by the law of New York the plaintiff was not entitled to recover. The presiding justice refused to rule as thus requested and submitted the case to the jury under instructions not otherwise objected to.

The jury returned a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding justice to give the rulings and instructions requested. It was admitted that the defendant was able to pay.

We think that the rulings requested were rightly refused. The statute of frauds of New York so far as introduced in evidence is as follows, namely: "Every agreement, promise or undertaking is void unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or his agent, if such agreement, promise or undertaking: * * * (2) Is a promise to answer for the debts, default or miscarriage of another person." (Consol. Laws N. Y. c. 41, § 31.) This is substantially the same as similar provisions in our own statute (Rev. Laws, c. 74, § 1), and it has been construed by the courts of New York as the cases introduced in evidence by the defendant show as applying like our own statute to collateral and not to original promises and undertakings. The question then is whether according to the law of New York the defendant's alleged promise or undertaking should be regarded as an original or collateral promise or undertaking. And that, so far as the plaintiff's right to recover is concerned, depends, according to our understanding of the New York cases, on whether taking the testimony as a whole there is or is not any evidence which would warrant a finding that the undertaking was an original undertaking. We think it plain that there was such evidence. The plaintiff testified, amongst other things, that in the course of a conversation about her brother the defendant said to her: "If you will take care of William I will pay you when I can." This was said, according to the plaintiff's testimony, before the board and lodging or any part of it was furnished. It was denied by the defendant, but it could have been found that the circumstances under which it was claimed to have been said and the situation

of the brother corroborated the plaintiff. The plaintiff also testified to subsequent conversations with the defendant of a confirmatory nature. On the other hand there was evidence tending to show that the account which the plaintiff kept was charged to the brother and that it was entirely separate from an account which was charged to the defendant for board and lodging furnished to her during the first part of the time covered by the account against the brother. There was also other evidence, such as payments on account by the brother and a conversation which he had with the plaintiff's husband who was her agent, and a conversation between the plaintiff's bookkeeper and the defendant which the defendant contended showed that her undertaking was collateral and not original in its nature. The case was not one where there was practically no dispute as to the material facts and the question became therefore one of law, but the facts were themselves in dispute and the case was therefore rightly left to the jury. No exceptions were taken to the instructions except so far as they were inconsistent with the rulings requested, and the instructions must therefore be deemed to have been correct and such as the case called for.

Exceptions overruled.

(207 Mass. 337)

FLINT et al. v. WESTCHESTER FIRE INS. CO. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 4, 1911.)

1. INSURANCE (§ 311*)—FIRE INSURANCE—FORFEITURE OF POLICY—INTEREST OF MORTGAGEE.

A fire policy, stipulating that it should be void if, without the assent of insurer, the property of insured should be sold, and that any loss should be paid to the mortgagee as its interests might appear, and that no act of any other person than the mortgagee should affect its right to recover in the event of a loss, is invalidated by a sale by insured without the consent of insurer, except as to the mortgagee, and after a sale the amount necessary to protect the mortgagee remains in force, subject to the terms of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 706, 707, 762-781, 827, 841, 874, 890, 903; Dec. Dig. § 311.*]

2. INSURANCE (§ 684*)—FIRE INSURANCE—FORFEITURE OF POLICY.

Where a fire policy, stipulating that it should be void if, without the assent of insurer, the property of insured should be sold, was invalidated by a sale by insured without the assent of insurer, the rights of insured and his purchaser under the policy were unaffected by a subsequent contract, whereby an insurance company agreed to reinsure the outstanding liabilities of insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 684.*]

3. INSURANCE (§ 679*)—CONTRACT OF REINSURANCE—RIGHTS AND LIABILITIES.

An insurance company, contracting to reinsure the outstanding risks of an insurer liable under a policy covering mortgaged property, and stipulating that the loss, if any, should be

payable to the mortgagee as its interests might appear, and providing that, on insurer electing to pay the mortgagee the amount secured on the mortgage, the mortgagee should assign to insurer the mortgage with the debt thereby secured, stands in the place of insurer, and, on paying to the mortgagee the amount secured by the mortgage in the event of a loss, it may elect to take an assignment to a third person in trust for it.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 679.*]

Report from Superior Court, Suffolk County; William Cushing Wait, Judge.

Suit by Alice L. Flint and another against the Westchester Fire Insurance Company and another. The cause was heard on the merits on an agreed statement of facts, and was reported to the full court. Bill dismissed.

Edward H. Warren procured from the United States Fire Insurance Company a fire policy on his property incumbered by a mortgage in favor of the County Savings Bank of Chelsea. The policy stipulated that it should be void if without the assent in writing of insurer the property was sold, and that a loss, if any, should be payable to the mortgagee as its rights might appear. Insured conveyed the property to plaintiff Alice L. Flint without the consent of the company. Subsequently the Westchester Fire Insurance Company agreed to reinsure the risks of the United States Fire Insurance Company on the same terms.

Noble, Davis & Stone, for plaintiffs. F. W. Brown and W. L. Came, for respondents.

HAMMOND, J. This seems to be a very plain case. The insurance policy issued by the United States Fire Insurance Company contained a provision that the policy should be void if without the assent in writing or in print of the company the property insured "shall be sold or this policy assigned." By the subsequent sale to Flint without such consent this condition was violated, and except as to the mortgagee which was protected by another clause hereinafter mentioned, the policy was void. Neither Warren, and much less Flint, had any interest in the policy as owner of the property.

Nor was the situation changed by the contract of reinsurance between the insurer and the defendant, the Westchester Fire Insurance Company. The contract could not enlarge the rights of Warren or the plaintiff under the policy, or renew rights already lost. The only party as to whom the contract still existed as one of insurance was the mortgagee, the County Savings Bank; and this was by virtue of a clause in the policy which so far as material to the question before us reads as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him,

shall affect such mortgagee's right to recover in case of loss on such real estate: provided that * * * whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

The defendant company stood in the place of the original insurer. It elected to take an assignment under this clause in the policy. The fact that at its request the assignment was made to Foster in trust for the company rather than to the company itself is of no consequence. The assignment to him was in effect an assignment to the company. The policy in the case of *Graves v. Hampden Fire Ins. Co.*, 10 Allen, 281, cited by the plaintiff, does not appear to have contained a clause for an assignment like the clause in this policy. That case therefore is clearly distinguishable from this.

It is also immaterial whether the original amount of insurance exceeds the amount of the mortgage. No matter what was the original amount of the insurance, after the sale only the amount necessary for the protection of the mortgagee still stood, and even that stood subject to the provision for an assignment.

In accordance with the terms of the report the order is:

Bill dismissed.

(207 Mass. 200)

CARNEY v. A. B. CLARK CO.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 3, 1911.)

1. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—STATUTES—CONSTRUCTION—GIVING EFFECT TO ENTIRE STATUTE.

A statute should, if practicable, be construed so as to give effect to all parts of it. Therefore, where the act (St. 1887, c. 270, § 1, cl. 2) making a master liable to servants for injuries by negligent fellow servants imposed liability for negligence of employes whose sole and principal duty was that of superintendence was amended by St. 1894, c. 499, § 1, adding thereto "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer" (Rev. Laws, c. 106, § 71), the two clauses must be construed together, and as the first clause applied only to a master who had a vice principal, and limited his liability to injuries caused by that servant's negligence, the latter clause must necessarily be construed as applying only in the case of a master who has a servant whose principal duty is that of superintendence and who is temporarily absent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 371; Dec. Dig. § 182.*]

2. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS—STATUTE—DUTY OF SERVANT.

For a servant to recover, under Rev. Laws, c. 106, § 71, which imposes liability on a master for the negligence of a superintendent, whose chief duty is superintending, or for a servant acting as such in the superintendent's absence and with the master's consent, negligence in a superintendent "whose chief duty is superintending" must be shown, but in case of a substitute his chief duty need not be superintending.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 371; Dec. Dig. § 182.*]

Exceptions from Superior Court, Essex County; Wm. B. Stevens, Judge.

Action by William Carney against the A. B. Clark Company. Verdict was directed for defendant, and plaintiff excepted. Exceptions sustained.

William B. Sullivan, Wm. H. Fay, and Jas. J. Gaffney, for plaintiff. Knox & Walsh, for defendant.

HAMMOND, J. The plaintiff, with Cleveland and Machury, all being employes of the defendant, were laying "parold" paper on the roof of one of the defendant's buildings. The building, which was 200 feet long, had a pitched roof, and its eaves were 50 feet above the ground. The work was begun at the ridge pole, parallel with which the paper was laid in strips 3 feet wide. While the men were standing upon a bracket staging a few feet below the eaves, engaged in laying the lower strip, a gust of wind tore the paper from the hands of the other two men stationed one at each end, wrapped the paper around the plaintiff, who was stationed between the two, and hurled him to the ground.

The due care of the plaintiff is admitted. There was evidence that Cleveland ordered that this last strip of paper should not be temporarily tacked to the roof, as it was unrolled, and that he had authority to give such an order. In view of the evidence as to the giving of this order, as to the velocity of the wind, the size, weight and texture of the paper, the length of the strip unrolled, the distance of the staging from the ground and the consequent seriousness of the injury likely to result to a person through a fall therefrom, the questions whether the order was given, whether, if given, it was a negligent order, and whether the injury to the plaintiff was caused thereby, were for the jury.

The only remaining question is whether the relations of the defendant to Cleveland and to the plaintiff were such as to make the defendant answerable for this negligence, or in other words whether the order of Cleveland was in law the order of the defendant.

The plaintiff relies upon Rev. Laws, c. 106, § 71, cl. 2, which holds an employer responsible to a careful employe for (1) "the

negligence of a person in the service of the employer who was entrusted with and was exercising superintendence, or (2) in the absence of such superintendent of a person acting as superintendent with the authority or consent of such employer." It is plain that the plaintiff cannot stand upon the first part of the clause. There was no evidence which would justify a finding that Cleveland was a person whose sole or principal duty was that of superintendence. It certainly was not his sole duty, and even upon the plaintiff's own testimony it was not his principal duty. In this respect the case must be regarded as one of the class of which *O'Neil v. O'Leary*, 164 Mass. 387, 41 N. E. 662, is a type.

Can the plaintiff stand upon the second part of that clause? This leads to an inquiry as to the meaning of that part. By a series of decisions beginning with *Farwell v. Boston & Worcester Railroad*, 4 Metc. 49, 38 Am. Dec. 339, it has been constantly held by this court that by the common law of this state an employer who uses due diligence in the selection of competent and trustworthy employes and in the furnishing of proper tools and appliances is not answerable to one employe for the carelessness of another when both are engaged in the same service, or, more tersely stated, that the master is not responsible to one servant for the carelessness of a fellow servant. And this is so even although the negligent employe is a superintendent, or foreman acting within his sphere as such. *Albro v. Agawam Canal*, 6 Cush. 75; *O'Connor v. Roberts*, 120 Mass. 227. St. 1887, c. 270, however, changed in many important respects the common law upon this subject. The first section of that statute provided that an employer should be answerable to a careful employe for injury caused to him (1) "by reason of any defect in the condition of the ways, works or machinery * * * used in the business, * * * which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition," or (2) "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," and (3) "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine or train upon a railroad." It will be noted that in the two particulars named in the first and third clauses respectively the person for whose negligence the employer is answerable need not be a person whose chief duty is that of superintendence, or even (in the first clause) that of caring for the proper condition of the ways, etc., or (in the third clause) that of having charge and control of the switch, etc. It is sufficient if a part, and

even a small part, of his duty is the care of the ways, or of the switch, etc. But, when the subject of the liability of the employer for negligence of his employes in other respects than those thus particularly specified is reached, the provision is that the negligent employe must be a person whose sole or principal duty is that of superintendence. Briefly stated, the employer was to be held liable in any event for the act of his employe in the two respects particularly specified, whether or not the negligent employe was chiefly employed in other duties, but his liability for negligence of an employe in other respects, that is, his general liability for such negligence, was confined to the cases where superintendence was the sole or principal duty of the negligent employe. It is manifest that, while the first and third clause might be held applicable to every employer, whether or not he had a superintendent whose sole or principal duty was that of superintendence, the second clause had no such broad application. With respect to the liability created by this clause employers were really divided into two classes, of which the first was composed of such as had superintendents of the kind named in the clause, and the second of those who did not. As to the first class the common law was modified, while as to the second it stood as before. Such is the plain reading of the clause and such always has been the judicial construction of it. *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *O'Neil v. O'Leary*, 164 Mass. 387, 41 N. E. 662, and cases cited; *Gardner v. New England Telephone & Telegraph Co.*, 170 Mass. 156, 48 N. E. 937.

Thus stood the law for seven years, at the expiration of which time this second clause was amended by adding thereto these words: "Or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." St. 1894, c. 499. And the second clause as thus amended has ever since stood. Rev. Laws, c. 106, § 71, cl. 2; St. 1909, c. 514, § 127, cl. 2.

What is the effect of this amendment? It may be suggested that its effect is to hold every employer liable, provided that with his authority or consent the negligent employe be acting as superintendent, entirely irrespective of the question whether or not superintendence be his sole or principal duty. If this be the meaning of the amendment, there was no necessity for retaining the first part of the clause; and the plain and obvious course would have been to strike out the second clause as it originally stood and substitute in its place the words constituting the amendment. It may also be suggested that its effect was to hold the employer liable for the negligence of a person acting as a temporary substitute for a superintendent whose sole or principal duty was that of superintendence, but only in cases where the substitute himself is a person whose sole

or principal duty is that of superintendence. If this be its meaning, then the amendment was useless because it made no change. Neither one of these interpretations therefore seems satisfactory. The statute as amended should, if it be reasonably practicable so to do, be so construed as to give effect to every part of it, as well that part which was allowed to stand as that part which was added.

There is no difficulty in placing such an interpretation upon it. As the clause was originally drawn, the negligent employé must have been a person whose sole or principal duty was that of superintendence; and unless an employer had such a superintendent he was not affected by the statute. But it is obvious that at times this superintendent might be temporarily absent and some person for a time might act as his substitute by the authority or consent of the employer, and yet not be a person whose sole or principal duty was superintendence. We are of opinion that this amendment applies only to such a case. Since the amendment, as before, the only employers affected by the clause are those who have a superintendent whose sole or principal duty is that of superintendence. The only effect of the amendment is to extend their liability so as to cover the case of the negligence of a temporary substitute of such a superintendent. The employer who has such a superintendent is answerable for the negligence of any substitute acting by the authority or consent of the employer; and that is so, entirely irrespective of the qualifications or general duties of the substitute. Such an interpretation gives due effect to the clause as originally written and still retained, and proper scope for the action of the amendment. It perfects the liability of the employers originally affected by the clause, and in the general direction originally indicated. It is suggested by the natural meaning of the words "in the absence of such superintendent." The word "absent," as applied to persons, primarily implies the existence of the person who for the time being is not present. And with the possible exception of a case to be hereinafter mentioned such seems to have been the interpretation placed upon the effect of the amendment, both by the bar and the courts. Cases have been brought upon the first part of the second clause, and the question whether it was material to show that the superintendent was one whose sole or principal duty was that of superintendence has been discussed by this court as though material. See *Baldwin v. American Writing Paper Co.*, 196 Mass. 402, 82 N. E. 1; *Fitzgerald v. Worcester & Southbridge St. Ry.*, 200 Mass. 105, 85 N. E. 911, 19 L. R. A. (N. S.) 239; *Robertson v. Hersey*, 198 Mass. 528, 84 N. E. 843. In this last case it was said by Rugg, J., that the chief question was "whether there was sufficient evidence that McArthur, by the direction of whom the compound pry was used,

was a superintendent 'whose * * * principal duty was that of superintendence,' within the meaning of these words as used in * * * Rev. Laws, c. 106, § 71." Perhaps the case which contains the best illustration of the true interpretation of the clause as amended is *Knight v. Overman Wheel Co.*, 174 Mass. 455, 460, 461, 54 N. E. 890, 892. That was an action brought under St. 1887, c. 270, § 1, cl. 2, as amended by St. 1894, c. 499, for injuries suffered by the plaintiff's intestate, who at the time of the injury was an employé of the defendant. It went to the jury only on the third and fourth counts. The negligence set out in the third count was that of "some person in the service of the defendant intrusted with and exercising superintendence whose sole or principal duty was that of superintendence"; and the negligence set out in the fourth count was that of "some person in the service of the defendant who at the time was acting as superintendent with the authority and consent of the defendant in the absence of the defendant's superintendent." The negligence proven was that of one Freeman. The defendant asked for a ruling that the plaintiff could not recover on either count—on the third because there was no evidence that Freeman was a superintendent whose sole and principal duty was that of superintendence, and on the fourth because there was no evidence that Freeman was acting as superintendent with the authority and consent of the defendant and in the absence of the defendant's superintendent. The requests were refused and in this court the refusal was upheld. Lathrop, J., in giving the opinion of the court said: "As to whether Freeman was a superintendent, there was no doubt that he was a foreman in charge of a gang, of which the plaintiff's intestate was a member; but this fact alone does not determine the question whether his principal duty was that of superintendence. On this point the evidence was conflicting." And he finally says in substance that this question is for the jury. As to the fourth count he says: "There was evidence in the case that Freeman was intrusted with the duty of superintending the work of lowering the shafting [by the sudden fall of which the plaintiff's intestate was injured] by the general superintendent of the defendant company, and that the superintendent took no charge of the work, and was not present. This brought Freeman within the purview of St. 1894, c. 499."

In this opinion the true construction, although not explicitly stated in full, is still clearly indicated. In an action under this clause it is necessary to show negligence of a superintendent whose sole or principal duty is that of superintendence, or of a person acting temporarily as his substitute in his absence by authority and consent of the employer, but the substitute need not be shown to be a person whose sole or principal duty is that of superintendence. When by the

consent of the employer the substitute puts on the uniform of the original superintendent, the condition is the same as though the original and not the substitute were the wearer of the uniform. So far as McCabe v. Shields, 175 Mass. 438, 56 N. E. 699, contains anything inconsistent with this view it cannot stand.

In the case before us the defendant cannot be held upon the ground that Cleveland's principal duty was that of superintendence. O'Neil v. O'Leary, 164 Mass. 387, 41 N. E. 662, and cases cited. But we think there was evidence that the work of papering the roof was under the general superintendence of Clark, and that his sole or principal duty was that of superintendence and that by the authority and consent of the defendant acting through Clark, its chief executive officer, Cleveland was acting as the foreman or superintendent of this work in the absence of the general superintendent. Under these findings the case comes within the last half of the clause in question (Knight v. Overman Wheel Co., 174 Mass. 455, 54 N. E. 890), and should have been submitted to the jury.

Exceptions sustained.

(207 Mass. 219)

RICHARDSON SHOE MACHINERY CO. v. ESSEX MACH. CO.

(Supreme Judicial Court of Massachusetts. Essex. Jan. 3, 1911.)

1. PATENTS (§ 215*)—CONTRACTS—CONSTRUCTION.

Plaintiff and defendant in 1908, being interested in a machine then being devised by defendant's inventor, agreed that plaintiff and defendant should each pay one-half of all expenses incurred in making an experimental machine, and for further machines as they should mutually agree on, together with the cost of obtaining patents, that each should own an undivided half interest in the machines, patents, etc., and that neither company should sell, lease, or grant licenses to use or otherwise dispose of or make use of his interest without the written consent of the other company. *Held*, that such a contract contemplated that the title to the invention, as well as any patents that might be obtained thereon, should be vested by proper instruments of assignment or otherwise in both parties, and that, except as limited by the terms of the agreement, each party should have power to deal with his own interest as he saw fit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.*]

2. PATENTS (§ 183*)—RIGHTS OF INVENTOR BEFORE PATENT—ASSIGNMENT.

An inventor or his assignee has, before the issuance or allowance of a patent, an inchoate right of property in his invention and in a pending application for a patent, which he may assign, or with which he may deal, as an article of property.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 259-262; Dec. Dig. § 183.*]

3. PATENTS (§ 215*)—CONTRACTS—CONSTRUCTION—OWNERSHIP.

Plaintiff and defendant, being interested in an invention, agreed that each should pay half the expenses of making an experimental ma-

chine, and any further machines required, that they should bear equally the cost of obtaining patents, and that each should own an undivided one-half in the machines, patents, etc., and that neither could sell, lease, or grant licenses to use or otherwise dispose of his half interest without the written consent of the other company. *Held*, that since the assignments or licenses which might have been made by the parties under such agreement could have been made before as well as after the final issuance of the patent, or even before the filing of the application therefor, the agreement should be construed to cover and establish the rights of the parties to the invention itself and to the application for a patent, as well as to the patent when obtained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.*]

4. PATENTS (§ 215*)—CONTRACTS—CONSTRUCTION—RIGHT.

Where plaintiff and defendant, interested in certain shoe-making manufacturing machinery, agreed that each should bear one-half of all the expenses incurred in making an experimental machine, and any further machines which they should mutually agree on, and also share equally the cost of obtaining patents, and each should own an undivided half interest in the machines, patents, etc., the agreement could not be regarded as a mere license, nor was it limited to the experimental machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 328; Dec. Dig. § 215.*]

5. SPECIFIC PERFORMANCE (§ 121*)—OWNERSHIP OF INVENTION—CONTRACT—RESCISSION—EVIDENCE.

In a suit for specific performance of a contract for the mutual ownership of an experimental shoe machine, and other machines to be manufactured, and any patents to be issued thereon, etc., evidence *held* insufficient to warrant a finding that the agreement had been abrogated or rescinded.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 121.*]

6. SPECIFIC PERFORMANCE (§ 8*)—RIGHT—JUDICIAL DISCRETION.

An application for specific performance is addressed to the judicial discretion of the court, to be exercised on equitable considerations, in view of all the circumstances of the particular case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 7, 8; Dec. Dig. § 8.*]

7. SPECIFIC PERFORMANCE (§ 14*)—CONTRACTS—RIGHT TO RELIEF—ALTERED CIRCUMSTANCES.

Complainant and defendant, being in competition in the sale of shoe machinery with another company which controlled at least 98 per cent. of all the shoe machines in the United States, and having developed a cutting press for dieing uppers for boots and shoes, contracted that each should pay one-half of the expenses incurred in making an experimental machine, and any other machines which they should mutually agree on, and the cost of obtaining patents, and that each should own an undivided half interest in the machines, patents, etc., and that neither could dispose of or make use of his half interest without the written consent of the other company. Defendant, having obtained an assignment of the patent on the machine in question from the inventor, refused to assign a half interest therein to complainant, after the company with which both were in previous competition had acquired a controlling interest in complainant's stock. *Held*, that complainant could not, under such circumstances, enforce specific performance of the

contract, as the change in the control of complainant would cause the agreement to operate in a manner different from what was present in the minds of the parties when it was made.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 38; Dec. Dig. § 14.*]

8. SPECIFIC PERFORMANCE (§ 133*)—NATURE OF REMEDY—DAMAGES.

Where complainant is not entitled to specific performance, but is entitled to recover damages, the appellate court will order the bill dismissed without prejudice to an action at law, unless complainant requests and obtains leave from the superior court to retain the bill for an assessment of damages.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 133.*]

Case Reserved from Superior Court, Essex County; Franklin G. Fessenden, Judge.

Bill by the Richardson Shoe Machinery Company against the Essex Machine Company to enforce a written agreement relating to the handling and sale of shoe machinery. Case reserved and reported to the full court. Bill dismissed, without prejudice to an action at law, unless plaintiff shall request the superior court to retain the bill for assessment of damages, and that court shall see fit to grant plaintiff's request.

On April 27, 1908, complainant and defendant, being jointly interested in developing and exploiting a cutting press for dieing uppers of boots and shoes and the invention embodied therein, entered into a written agreement reciting: "Whereas, the Essex Machine Company and the Richardson Shoe Machinery Company, both of Lynn, Massachusetts, are engaged in producing a cutting press for dieing uppers of boots and shoes, it is hereby agreed as follows: Each of the aforesaid companies is to pay one-half of all expenses incurred in the making of the experimental machine, and any further machines which they may mutually agree upon, and the cost of obtaining patents, etc., and each is to own an undivided half interest in the machines, patents, etc., and neither company is to sell, lease, grant licenses to use, or otherwise dispose of or make use of its half interest without the written consent of the other company."

In accordance with the terms of this agreement, the machine or machines embodying the invention above referred to was built at the machine shop of the defendant company at the joint expense of plaintiff and defendant, and a large amount of experimental work at the joint expense of both done thereon, with a view to obtaining a machine which would be commercially valuable and operative. At the request of complainant and defendant, and at their joint expense, application for a patent on the invention and improvements embodied in and relating to said machine was filed by one Reed, the inventor, on May 27, 1908. At the same time Reed executed an assignment of his entire right, title and interest in and

to the invention. This assignment requested the Commissioner of Patents to issue any letters patent which might be granted on said invention to the Essex Machine Company as assignee, and was duly recorded in the United States Patent Office. The application for a patent was prosecuted at the joint expense of plaintiff and defendant, and the application was subsequently allowed on condition that the final fee be paid on or before December 5, 1908. The defendant, though requested to assign to complainant its share of the patent, has repudiated the agreement and all obligations imposed on it thereunder, and has refused to execute any assignment to secure complainant's one-half interest in the invention, wherefore complainant prays specific performance.

W. B. Farr and N. B. Todd, for complainant. W. Quinby, for defendant.

SHELDON, J. It is undisputed that the agreement now sought to be enforced was made concerning the machine then in process of construction and embodying the invention and improvements of Reed, which is mentioned in the plaintiff's bill. The plaintiff claims that by the correct construction of this agreement it is now entitled to a decree declaring that it is jointly interested with the defendant in the said invention and improvements, and ordering the defendant to assign to it one-half interest therein and in the application for letters patent now pending in the name of the defendant as assignee of Reed. The defendant rests its claim that no such decree should be entered, upon its contentions that the agreement was not to be carried out and cannot be enforced until letters patent upon the invention shall have been actually issued, that there is no agreement to assign anything, that the alleged agreement is only a license and has as yet no other subject-matter than an experimental machine, which is of no value; and that before the assignment made by Reed to the plaintiff the agreement was rescinded and abrogated by the parties and is no longer in existence. It is also suggested that the agreement, if otherwise valid and enforceable, yet ought not to be specifically enforced in equity, for the reason that since it was made the United Shoe Machinery Company has become the owner of the entire capital stock of the plaintiff corporation and all the tangible property of the latter except this agreement has been transferred to that company (hereinafter called the United Company), the plaintiff company having been theretofore a competitor in business of the United Company; that this suit is now prosecuted at the instance and really for the benefit of the United Company, and that the result of its success would be and is intended to be to prevent the defendant from putting upon the market the new machines in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

competition with those of the United Company, or at least materially to hamper the efforts of the defendant in that direction, whereas the main object of both the plaintiff and the defendant in making the agreement was to enable them, the one as the manufacturer and the other as the seller of the projected machines, to compete better and more advantageously with the United Company.

1. In our opinion, the agreement in question was designed to make the parties the equal owners of both the invention and of any letters patent that might be issued thereon. Each of them was to pay one-half of the cost of constructing the experimental machine and of any other machines that might be agreed upon. They were to contribute equally to the cost of obtaining patents. Each was to own an undivided half interest in the machines and the patents. It was clearly contemplated that the title to the invention itself as well as to the patent that might be obtained thereon should be vested by proper instruments of assignment or otherwise in both parties, and that, except as limited by the terms of the agreement itself, each one should have the power to deal with its own interests; for there was an express stipulation that neither party should sell or lease its half interest or grant any licenses thereunder or make any other use or disposition thereof without the written consent of the other party.

The inventor or his assignee has before the issuance or allowance of a patent an inchoate right of property in his invention and in a pending application for a patent, which he may assign or with which he may deal as an article of property. *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Currier v. Hallowell*, 158 Mass. 254, 255, 33 N. E. 497; *Lamson v. Martin*, 159 Mass. 557, 562, 35 N. E. 78; *Burton v. Burton Stock Car Co.*, 171 Mass. 437, 50 N. E. 1029; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Runstetler v. Atkinson*, 4 MacArthur & M. (D. C.) 382. The assignments or licenses which might have been made by the parties under this agreement could have been made before as well as after the actual issuance of the patent or even the filing of the application therefor. It seems plain to us that the agreement must be construed to cover and establish the rights of the parties to the invention itself and to the application for a patent as well as to the patent when that should have been obtained.

2. For the same reasons the subject-matter of the agreement is not limited to the experimental machine therein mentioned; and it would not be material to determine the value of that machine. Nor can the agreement be regarded as merely a license.

3. Upon the evidence it does not satisfactorily appear that the agreement has been

abrogated or rescinded. The defendant relies mainly upon the fact that when the application was about to be made Richardson, who represented the plaintiff, caused two assignments to be drawn, each transferring one-half interest in the invention, the application, and the patent to be issued thereon, and running respectively to the plaintiff and the defendant. The agreement now in suit was shown to Reed the inventor, and he was requested by Richardson to execute the assignments in order to carry out the intent of the agreement. Reed however refused to do so, and declared that he would not assign his invention to any one while that agreement remained in force. Richardson said that he desired only the agency to sell the proposed machines, or as one witness put it, that he merely "wanted the selling end." Reed also said that he would not assign to the Richardson Company at all, and that he would assign to the defendant only if that agreement was done away with. Richardson made no reply to this, and thereupon Reed made the assignment to the defendant. It does not appear that Reed was under any obligation to assign his rights to either of the parties; indeed, there are in the evidence some intimations to the contrary; and it cannot be presumed that there was such an obligation. *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 201, 84 N. E. 133, 126 Am. St. Rep. 409.

The question presented is very different from what it would be if this suit were against Reed. In that event it might forcibly be contended that Reed's action had been induced by the silence and apparent acquiescence of the plaintiff acting through Richardson, and that the plaintiff could not now claim against Reed that the agreement remained in force. But Reed is not a party to this suit; he has not sought to intervene and no present rights of his are shown to be involved in it. He has parted absolutely with his right to control the invention and the patent that may be obtained thereon, and is not concerned with any future disposition that may be made thereof. The only question is between the plaintiff and the defendant; and the claim that they have abrogated the agreement can be established only by proof that the minds of both of them have met in an assent to that proposition, or that the plaintiff is estopped as to the defendant to deny that there has been such an assent. *Banewur v. Levenson*, 171 Mass. 1, 12, 50 N. E. 10; *Rollins v. Marsh*, 128 Mass. 116, 120. Undoubtedly we must consider what took place, as already stated, just before the assignment to the defendant was made; but this is only one item of evidence. After the defendant had taken its assignment, and after the alleged rescission of the agreement, both parties treated it as still in force. Various items of expense incurred in prosecuting the application for a patent or for labor and materials upon the machine or models

thereof were paid by one party and contributed to by the other, as was called for by the agreement. Neither of them acted in any respect as if the agreement had been done away with. No such claim was made by the defendant until the fall of 1909, shortly before the filing of the bill. This ground of defense must fail.

4. At and before the time of making this agreement the plaintiff was engaged in selling a sewing machine for the manufacture of shoes, and these machines were made for it by the defendant. The plaintiff had also the American agency for selling an English machine used in that manufacture, called a "clicking press"; and Reed's invention was for an improved clicking press. It appears from the evidence that the object of the parties to the agreement was to obtain a new clicking press, which should be manufactured by the defendant and sold by the plaintiff to the profit of both parties, and to make it certain that this new machine should be used only by themselves and should not be available to their competitors in business, the principal one of those competitors being the United Company. In other words, one of the leading motives of both parties in making the agreement was to enable them, in their respective domains of seller and manufacturer, to compete more successfully with the United Company. But plainly the carrying out of this purpose under the agreement will be materially impeded and probably wholly prevented by the fact that the United Company has now not only become the owner of all the property of the plaintiff except this agreement, but also has acquired and now holds all the capital stock of the plaintiff company, and so wholly dominates and controls its future action. It is true that the plaintiff's corporate identity remains unchanged, and that the plaintiff offers to do all that is required of it by the terms of the agreement. But it still remains true that the object which was in the minds of the parties, the object which it was their main purpose to achieve in making the agreement, will no longer be attained, will probably be made incapable of attainment, if the agreement is specifically enforced. Under such circumstances specific performance ought not to be decreed.

It is settled that an application for the specific performance of any agreement is addressed to the judicial discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the particular case. *Curran v. Holyoke Water Power Co.*, 116 Mass. 90; *Thaxter v. Sprague*, 159 Mass. 397, 34 N. E. 541. The fact that an agreement would now operate in a manner different from what was present in the minds of both parties when it was made is of itself a sufficient reason for refusing specific performance. *Western Railroad v. Bab-*

cock, 6 Metc. (Mass.) 346, 352; *Lee v. Kirby*, 104 Mass. 420, 427. This is the underlying doctrine of such cases as *Cawley v. Jean*, 189 Mass. 220, 225, 75 N. E. 614; *Lamson v. Martin*, 159 Mass. 557, 562, 35 N. E. 78; and *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550. This case is not one in which the purpose of only one party unknown to the other will be frustrated, as in *Morley v. Claverling*, 29 Beav. 84, *Adams v. Wear*, 1 Bro. Ch. 567, and *Hickson v. Clarke*, 25 Grant Ch. 173. Here the common purpose of both parties has been destroyed by the act of the plaintiff after the agreement was made. That this is a sufficient reason for refusing specific performance is manifest. *Stone v. Pratt*, 25 Ill. 25; *Gothelf v. Stranahan*, 183 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455; *Bradford, Eldred & Cuba R. R. v. New York, Lake Erie & Western R. R.*, 123 N. Y. 316, 326, 25 N. E. 499, 11 L. R. A. 116; *Wadick v. Mace*, 191 N. Y. 1, 83 N. E. 571; *Waters v. Howard*, 8 Gill (Md.) 262, 281; *Pingle v. Conner*, 66 Mich. 187, 193, 33 N. W. 385.

The bill must be dismissed without prejudice to an action at law, unless the plaintiff shall request the superior court to retain the bill for an assessment of damages, and that court shall see fit to grant its request. *Banaghan v. Malaney*, 200 Mass. 46, 85 N. E. 839, 128 Am. St. Rep. 378.

So ordered.

(207 Mass. 478)

HILLMAN v. BOSTON ELEVATED RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 6, 1911.)

STREET RAILROADS (§ 82*)—LICENSEES—WHO ARE.

At a transfer station of surface and elevated lines, the surface lines connected with opposite sides of the platform, which was intersected by the elevated track, which was depressed; the car platforms being at the level of the platform. The company provided a subway under this track for surface car patrons, and signs directed them; but many people crossed on the elevated car platforms, and they were not interfered with. Although servants of the company were instructed not to permit this, it appeared they could not distinguish between these and regular elevated passengers, and the order was not enforced. *Held*, that these people were not invited to cross; passive acquiescence not being an invitation, and it being impracticable to prevent such passage without interference with defendant's business in the use of the premises.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 178; Dec. Dig. § 82.*]

Exceptions from Superior Court, Middlesex County; *Loranus E. Hitchcock*, Judge.

Actions by *Mary J. Hillman* and by *John J. Hillman* against the Boston Elevated Railway Company. Verdict in each case for defendant, and plaintiffs except. Exceptions overruled.

Stover & Sweetser, for plaintiffs. *Walter Shuebruk*, for defendant.

LORING, J. The only question in this case is whether the evidence warranted the jury in finding that the plaintiff in the first action was invited by the defendant to go from one to the other platform in its Sullivan Square station by crossing over an elevated train which was standing between the two platforms to discharge and receive passengers.

Sullivan Square station is primarily a transfer station. Through the center of it runs the single track of the defendant's elevated railway. This track runs north and south and is in a pit about four feet below the station platforms. The station platforms are on a level with the platforms of the cars of the elevated trains. Surface cars from and to Somerville and beyond run up an incline onto five tracks with dead ends, which are reached from the platform on the west of this pit through which the elevated trains run. Similarly surface cars from and to Everett and Malden run up an incline onto four tracks on the east side of the pit. Passengers who have taken a surface car at Somerville for a point reached by a surface car running to Everett or Malden have to pass from the west to the east platform, which (as we have said) are separated by this pit four feet deep, extending the whole length of the platforms. A subway had been constructed by the defendant for this purpose at the south end of the station, which led down under the pit and up to the platform on the other side. There was a turnstile and ticket office at each entrance to the subway, and a ticket was given to each passenger on his entering it. There was a sign on the west platform (the platform on which the plaintiffs disembarked) near the entrance to the subway, on which was printed in large letters, "Subway to East Platform," with an "index hand" pointing to it; and on the ticket office at the entrance another sign, in smaller letters, on which was printed "Transfer to surface cars and East Platform."

On the morning in question the plaintiff in the first action and her husband (the plaintiff in the second action) left their home in West Somerville to visit their son who lived in Malden. The plaintiff was a woman 68 years of age and her husband (as she testified) was aged, feeble and just recovering from a paralytic shock. When the plaintiff and her husband disembarked in the Sullivan Square station there was an elevated train standing between the two platforms, with the gates on its car platforms open. The plaintiff assisted and guided her husband onto the platform of one of the cars of this train and was about to follow him when another woman crowded in between them. The husband reached the east platform in safety, but as the plaintiff was stepping from the car platform to the east platform of the station the starting gong sounded and the brakeman closed the gate. The plaintiff at once felt that her dress was caught, turned

round and tried to free it by pushing on the gate. A guard on the station platform called "Open the gate," but before the brakeman who was then looking into the car did so the plaintiff was thrown down and dragged some distance along the platform of the station. The plaintiff testified that she knew the subway was there for the purpose of enabling passengers to go from one platform to the other, but that she did not want to take her husband up and down the two flights of steps; "that she feared the exertion would be bad for him," and took the way across the elevated train "for her own convenience."

The plaintiff contends that there was evidence in the case which warranted the jury in finding that the defendant had invited her to use the elevated train as she did use it. The evidence on which this contention is based consists of the plaintiff's testimony that "she had frequently seen other people use trains as a bridge in crossing from one platform to the other," and "she had never seen any signs or notices displayed in the terminal forbidding such crossing by means of the trains, and she had never seen any attempts made by the guards or trainmen to prevent it." There was testimony from two other witnesses that "it was a general practice for passengers going from one platform to the other to walk across the platform of the elevated cars standing in the station or through the cars," meaning through the doors in the middle of the sides of the cars; that "there were no notices posted by the defendant forbidding people to cross from one platform to the other by means of the trains standing there, and he had never seen any employé of the defendant forbidding any person to use the trains for this purpose or attempting to prevent any one from so using them." The defendant's station master testified that "he had seen people use the elevated trains to cross the tracks; that they had done so every day." Several of the defendant's employes testified "that they had been instructed not to allow people to cross by the trains, and when people asked them how to cross to the further platform they always directed them to use the subway; that passengers used the trains as a means to cross; and that witnesses did not and could not attempt to stop them, because when a person stepped onto the platform of an elevated car it was impossible to tell whether they intended to cross to the other platform or to go inside the car to ride."

It was said by Chief Justice Bigelow in *Sweeny v. Old Colony Railroad*, 10 Allen, 368, 374, 87 Am. Dec. 644, that "a mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability." In *Wheelwright v. Boston & Albany Railroad*, 135 Mass. 225, 229, it was said by Colburn, J.: "The most that can be contended, on the evidence, is, that the defendant had tolerated a practice, which the plaintiff and others had adopted, of

crossing where she was attempting to cross, without taking any active measures to prevent it. This is far different from an inducement or invitation from the defendant to cross there." And in *Galligan v. Metacomet Manuf. Co.*, 143 Mass. 527, 528, 10 N. E. 171, the law was stated by C. Allen, J., in these words: "Merely abstaining from driving the children off is not an invitation which would impose any duty or responsibility for the condition of the lot." A number of cases have been since decided on the rule of law thus clearly stated. See *Redigan v. Boston & Maine Railroad*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 81 Am. St. Rep. 520; *Shea v. Gurney*, 163 Mass. 184, 39 N. E. 996, 47 Am. St. Rep. 446; *Moffatt v. Kenny*, 174 Mass. 311, 54 N. E. 850; *Legge v. New York, New Haven & Hartford R. R.*, 197 Mass. 88, 83 N. E. 367, 23 L. R. A. (N. S.) 633; *Bowler v. Pacific Mills*, 200 Mass. 364, 86 N. E. 767, 21 L. R. A. (N. S.) 976, 128 Am. St. Rep. 432; *Boden v. Boston Elevated Railway*, 205 Mass. 504, 91 N. E. 879. The portion of the opinion of Chief Justice Bigelow in *Sweeny v. Old Colony R. R.*, *ubi supra*, quoted above was adopted by Kennedy, L. J., as a correct statement of the law in the recent case of *Lowery v. Walker*, [1900] 1 K. B. 173, 198, as a correct statement of the law.

The case at bar comes within this well-established principle. In addition there is in this case a point which was relied upon in the decision of the recent case of *Bowler v. Pacific Mills*, *ubi supra*, at page 365, of 200 Mass., 86 N. E. 767, 21 L. R. A. (N. S.) 976, 128 Am. St. Rep. 432, namely, that it would have been impracticable if not impossible to prevent persons from using the defendant's premises as they were used by the plaintiff without interfering with the defendant's business in the use of its premises in question. The cases of *Sweeny v. Old Colony Railroad*, 10 Allen, 368, 87 Am. Dec. 644, and *Murphy v. Boston & Albany Railroad*, 133 Mass. 121, relied on by the plaintiff, were cases depending upon special circumstances which have been fully explained in previous cases. See *Bowler v. Pacific Mills*, 200 Mass. 364, 366, 86 N. E. 767, 21 L. R. A. (N. S.) 976, 128 Am. St. Rep. 432, where the distinction is pointed out and these previous cases are collected.

Exceptions overruled.

(207 Mass. 486)

DOW v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—FELLOW SERVANT—"ELEVATED TRAIN."

Surface cars belonging to an elevated railway, which run up an incline to a junction platform, used to discharge passengers from the elevated trains to the surface cars and vice versa, are not elevated trains, within St. 1908, c. 420, which provides that an employé shall, for

the negligence of a servant in charge of an "elevated train," have the same rights as if he were not an employé; therefore a conductor of such a surface car, who was injured by the negligence of the motorman of another such car, cannot recover against the company.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 180.*]

Report from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Timothy J. Dow against the Boston Elevated Railway Company for personal injuries caused by negligence of defendant's motorman while plaintiff was in defendant's employ. On report from superior court. Judgment for defendant.

John S. Richardson, for plaintiff. Russell A. Sears and Charles S. French, for defendant.

LORING, J. The plaintiff was a conductor of a surface car running from a point in Somerville to the Sullivan Square station of the defendant in Charlestown, where it delivered passengers to and received them from the trains of the defendant running on the tracks of the elevated railway.¹ This surface car ran up on an incline to a dead end in the station, separate and some 15 feet distant from the track of the defendant's elevated railway. On the day in question the surface car of which the plaintiff was the conductor had reached the end of its run in the Sullivan Square station, and the plaintiff was in the act of pulling out and fastening the fender for the return trip, when he was run into by the negligence of the motorman of another surface car, who ran in for the same purpose on the same track behind the plaintiff's car. The judge ruled that Rev. Laws, c. 106, § 71, as amended by St. 1908, c. 420, applied to such a car, found that the motorman was negligent, that the plaintiff's damages amounted to \$500, and reported the case to this court.

Unless this surface car was an "elevated train" within St. 1908, c. 420, the plaintiff's sole remedy is against the motorman whose negligence caused the injury to him. *Fallon v. West End St. Ry.*, 171 Mass. 249, 50 N. E. 536; *McGilveray v. Boston Elev. Ry.*, 200 Mass. 551, 86 N. E. 893.

The judge found that the car was not defective. For that reason the question whether the provision of St. 1908, c. 420 (that "an elevated car which is in use by or which is in possession of an elevated railway shall be considered as a part of the ways, works and machinery"), applies to this surface car, does not arise.

In our opinion a surface car does not become an "elevated train" by being run up an incline to discharge and receive passengers

¹ Note by Reporter.—It appears from the report in *Hillman v. Boston Elevated Railway*, 93 N. E. 653, that the Sullivan Square station was also used for the transfer of passengers from surface lines ending at and starting from that station.

transferred to it from trains running on the defendant's elevated railway.

Judgment for the defendant.

(207 Mass. 445)

HODGDON v. MOULTON et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1911.)

MUNICIPAL CORPORATIONS (§ 744*)—OFFICERS—LIABILITY IN TORT.

The members of the municipal council of a city, authorized under St. 1908, c. 574, §§ 3, 20-33, to conduct the affairs of the city, are not liable in tort to an individual aggrieved by the action of the council in denying without hearing his petitions for the restoration of water rates, for the removal of a police officer for an unprovoked assault on him, and for placing on file without notice certain petitions presented by him, though the members acted towards him with ill will; they being answerable to the public alone.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. § 744.*]

Appeal from Superior Court, Essex County.

Action by Walter S. Hodgdon against Edwin H. Moulton and others. From a judgment for defendants, rendered on sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Walter S. Hodgdon, pro se. G. M. G. Nichols, for appellees.

LORING, J. This action is entitled an action of tort. It is brought against the members of the municipal council of the city of Haverhill. As to which see St. 1908, c. 574, §§ 3, 20-33. The members filed a demurrer, the demurrer was sustained and judgment was entered in favor of the defendants. The case is here on the plaintiff's appeal from that judgment. The case stated by the plaintiff is entirely without foundation and under ordinary circumstances could be properly disposed of without more on stating that fact. But it is manifest that the plaintiff feels that he has been aggrieved by the defendants and that these grievances of his did not receive due consideration in the superior court. We have thought it wise under all the circumstances to add some words of explanation although they are so obvious that under ordinary circumstances they should be omitted.

The grievance alleged by the plaintiff is that the defendants having promised under oath to faithfully perform their duties as members of the municipal council, "regardless of their said oaths, and on account of political maleficence, * * * have substituted partiality [partiality], collusion and anarchy, and abridged plaintiff's constitutional privileges and immunities" in eight particulars, to wit:

(1) He filed a petition with the defendants for the restoration of the old rates for street watering and it was denied without giving him a hearing; (2) he filed a petition for the removal of a police officer because (so the plaintiff stated) he had committed an unprovoked assault upon him and offered him an unprovoked insult; and this petition was denied without giving him a hearing; (3) he filed a petition for abatement of a street watering tax in excess of the old rates and this was put on file "and he was not legally notified"; (4) the defendants allowed the friends of one Greul to stamp their feet and clap their hands at a hearing on a petition brought by Greul; (5) an ordinance was "filed" by the plaintiff dealing with charges to be made by "plumbers et alii" and this petition was put on file "and the plaintiff was not legally notified"; (6) on petition of one Ballard for an increase in hack fares the defendants voted "to grant the prayer after the city solicitor should change the ordinance"; (7) the plaintiff demanded a hearing on his petition as to "plumbers et alii" and this demand was put on file; and (8) the plaintiff "says that he never seeks trouble but is liable to defend his rights; that on account of political malice the defendants have held his rights in contempt; that their examples have caused him to be insulted on the streets by persons whose names were unknown, and without any provocation; and his property has been despoiled."

The substance of these alleged grievances is that in conducting the affairs of the city which have been committed into their charge by the voters of Haverhill the defendants in the first place refused to adopt the views put forward in petitions filed with them by the plaintiff, and have done so without giving him a hearing; and in the second place in acting as they did on the plaintiff's petitions not only have they not acted impartially but they have acted from ill will toward him, as is shown by the way in which they have treated Greul and Ballard. But the difficulty in the way of the plaintiff's recovering damages from the defendants for acting in these matters with ill will toward him is that the matters in which they were acting were the affairs of the public and the plaintiff had no right to have his views in those affairs adopted by the defendants. If the defendants in conducting those affairs acted out of ill will to the plaintiff in place of acting from a due regard to the interests of the public, they are answerable to the public but not to the plaintiff.

The entry must be:

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(175 Ind. 496)

WILLAN et al. v. HENSLEY SCHOOL TP. OF JOHNSON COUNTY. (No. 21,712).¹

(Supreme Court of Indiana. Jan. 26, 1911.)

1. EMINENT DOMAIN (§ 191*)—PUBLIC SCHOOLS—CONDEMNATION OF LAND—SUFFICIENCY OF PETITION.

The petition in a proceeding by a school township to condemn land on which to erect a schoolhouse need not allege that the township intends in good faith to erect a schoolhouse on the land to be taken; good faith being presumed until the contrary is shown.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

2. EMINENT DOMAIN (§ 191*) — PUBLIC SCHOOLS—PROCEEDINGS TO CONDEMN LAND—SUFFICIENCY OF PETITION.

The petition in proceedings by a school township to condemn land on which to erect a schoolhouse need not allege that steps have been taken by the township trustee to build a schoolhouse upon the land to be appropriated, or that the trustee has been authorized by the township advisory board to incur indebtedness for its construction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 509-518; Dec. Dig. § 191.*]

3. EMINENT DOMAIN (§ 262*)—APPEAL—CONDEMNATION OF LAND—SUFFICIENCY OF PETITION.

A petition by the trustee of a school township to condemn land for the purpose of erecting a schoolhouse thereon, alleged that the school township was a school corporation and described the land to be taken, the number of acres, its location, and the purpose for which it was to be used, and further alleged that in the trustee's opinion it was necessary to purchase the land upon which to erect a schoolhouse and that petitioner has been unable to agree with the owner for the purchase thereof, and that before filing the petition he tendered to him a certain sum as the purchase price, which was refused, and prayed that the court appoint appraisers to value the land. *Held*, that the petition must be held sufficient when assailed for the first time on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 681; Dec. Dig. § 262.*]

4. APPEAL AND ERROR (§ 854*)—REASONS FOR RULINGS—RULINGS ON PLEADINGS.

Where an answer was properly rejected, the reasons upon which the court based its ruling become immaterial on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8411; Dec. Dig. § 854.*]

5. EMINENT DOMAIN (§ 171*) — PUBLIC SCHOOLS—PROCEEDINGS TO CONDEMN LAND—DEFENSES.

In proceedings by the trustee of a school township to condemn land to erect a schoolhouse thereon, defendant landowners sought to file an answer, alleging that before the present suit was commenced proceedings were instituted by the patrons of the school district of the township before the superintendent of schools to relocate the site of a schoolhouse upon the land sought to be taken herein; that the petition in such proceedings by the school patrons was not signed by the township trustee nor the required number of patrons, and that to relocate the schoolhouse upon the realty sought to be taken herein would necessarily result in a change of the site of the existing schoolhouse, and that it was the purpose of the present suit to secure a new building in lieu of the school-

house on the old site, to be erected upon the land sought to be condemned, so as to cause the abandonment of the present schoolhouse and site. *Held*, that the facts alleged in the answer did not constitute a defense.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 468, 469; Dec. Dig. § 171.*]

6. EMINENT DOMAIN (§ 262*)—HARMLESS ERROR—RULINGS ON PLEADING—REJECTION OF ANSWER.

Where an answer sought to be filed in proceedings by a school township to condemn land for the erection of a schoolhouse thereon was irrelevant, so that it could have been stricken had it been filed, defendant landowners could not have been harmed by a ruling rejecting such answer.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

7. EMINENT DOMAIN (§ 262*)—APPEAL—PRESUMPTIONS.

It must be presumed on appeal, in proceedings by a school township to condemn land for the erection of a schoolhouse thereon, that the trial court, before it ordered a conveyance of the land to the school township, found that the money had been paid to the clerk of the court as required by statute, in order to authorize the court to direct a conveyance.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 683; Dec. Dig. § 262.*]

8. EMINENT DOMAIN (§ 262*) — PUBLIC SCHOOLS—PROCEEDINGS TO CONDEMN LAND—APPEAL—HARMLESS ERROR.

If the money awarded for land sought to be condemned by a school township for the purpose of erecting a schoolhouse thereon was paid to the clerk of the court for the use of the landowners as required by statute, the fact that the order requiring the conveyance of the land to the township was made upon an application which was not signed by the school township, nor its attorneys, cannot avail the landowners on appeal from the judgment of award, since they should have moved to strike the application if they considered it insufficient because not signed by the school township or its attorneys.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681, 686; Dec. Dig. § 262.*]

Appeal from Circuit Court, Johnson County; William E. Deupree, Judge.

Proceedings by the Hensley School Township of Johnson County, Ind., against Robert Day Willan and others. Judgment for defendants, and they appeal. Affirmed.

Miller & Barnett and L. Ert Slack, for appellants. Fremont Miller, Henry E. White, Geo. I. White, and Fred R. Owens, for appellee.

JORDAN, J. The trustee of Hensley school township, Johnson county, Ind., instituted this action in the name of the said school township in the Johnson circuit court, for the appropriation, by condemnation, of two and a fraction acres of real estate described in the petition, for the purpose of building a public schoolhouse thereon. Appellant, Robert D. Willan, was the owner in fee of the real estate, and Susan Willan, his wife, was made a party defend-

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
93 N.E.—42 ¹Rehearing denied.

ant to answer as to any interest she might claim to the lands. Quinton, the tenant in possession of said lands, was also made a party defendant. The proceedings were had under an act of the Legislature approved March 1, 1907, entitled "An act to provide for the appropriation of real estate for school purposes." Acts 1907, p. 114. See, also, section 6633 et seq., Burns' Ann. St. 1908.

Section 1 of this act provides as follows: "That, whenever, in the opinion * * * of the township trustee of any township in the state it shall be considered necessary to purchase any real estate on which to build a schoolhouse, or for any other purpose connected therewith, such township trustee * * * may file a petition in the circuit court of said county asking for the appointment of appraisers to appraise and assess the value of said real estate."

Section 2 of the act provides for giving notice to landowners of the filing of the petition and provides that "the court shall appoint three freeholders, resident in the school corporation or the township where the real estate is situate, to appraise and assess the value thereof."

Section 3, after requiring that the appraisers so appointed by the court shall take an oath to make a fair, true, and honest appraisal of the real estate, shall proceed to examine said real estate, hear such evidence as they may consider necessary, and make report of their appraisal to the court within five days. This section further provides that upon the making of such report the township trustee of such school corporation may pay to the clerk of said court, for the use of the owner or owners thereof, the amounts thus assessed, and upon a showing to the court that such payment had been made, the title to said real estate shall at once vest in such school corporation or school township for said purposes, and the court shall cause the real estate to be conveyed to said school corporation or school township by a commissioner appointed therefor, and the school corporation or school township may immediately take possession of the real estate for said purpose. Upon the report of the appraisers being filed, any party to the action, within 10 days, may except to the amount of the appraisal and valuation of said real estate, and a trial may be had thereon before the court as other civil cases are tried, and the court shall fix the amount of the appraisal and assessment, and any party to said action may appeal from the judgment as other civil cases are appealed.

It is further provided by section 3 that the court shall cause the real estate to be conveyed to the school corporation or school township, and the title to the lands shall at once vest in the school corporation or school township for said purposes, and subsequent proceedings upon exceptions filed to the ap-

praisement shall only affect the amount of such appraisal and assessment.

Section 4 provides that before the filing of a petition by the township trustee, the latter may offer or tender to the owner or owners of the real estate an amount deemed a reasonable value therefor, and should the amount fixed by the appraisers or by the court subsequently thereto be the same or less than the amount so tendered, then the cause shall be prosecuted at the cost of the owner or owners, etc.

After denying an offer by appellants to file what they termed an answer to the appropriation petition, the court appointed three appraisers to make an appraisal of the land. These appraisers, after qualifying as required by law, appraised the land to be appropriated at \$2,500, which they reported to the court as the sum awarded for the appropriation of the real estate. Appellee appears to have filed exceptions to this appraisal and on a trial in court before a jury the latter awarded \$1,500 as the value of the real estate, and over the appellants' motion for a new trial judgment was rendered upon this award in favor of the defendants, appellants herein, from which judgment the latter appealed to this court.

The points stated by appellants in their brief and relied upon for reversal are: (1) Insufficiency of the petition filed for the appropriation of the lands in question. (2) Error of the court in denying their offer to file an answer and objections to the petition. (3) Error of the court in ordering a conveyance of the real estate to appellee before the amount awarded for the real estate had been paid.

The sufficiency of the petition is for the first time assailed in this appeal. This pleading discloses that Hensley school township in Johnson county, Ind., is by its trustee the petitioner; that it is a body politic and a school corporation, and the real estate to be appropriated is therein described, the amount of which is 2.71 acres situated in Johnson county, Ind., and the specific purpose for which it is intended to be used is shown. It is further shown that in the opinion of the trustee of said school township it is necessary to purchase said described real estate upon which to build a schoolhouse; that the petitioner by its trustee has been unable to agree with the owner of the land for the purchase thereof; that prior to the filing of the petition it had tendered to the owner, Robert D. Willan, for the purchase of said real estate, \$1,200, which sum he refused to accept, etc. The prayer is that the court appoint appraisers to appraise and value the land to be appropriated. The petition may be said to show that the Johnson circuit court, under the statute, had jurisdiction over the subject-matter of the proceedings, and that the petitioner is a school corporation which under the statute in question is empowered to condemn and appropriate land for erecting thereon a public

schoolhouse, and that is the specific purpose which the petitioner has in view and in the opinion of its trustee the purchase of the land in question is necessary for such purpose. It is pointed out, among other objections, that the petition does not allege that the township intends in good faith to construct a schoolhouse on the land to be appropriated. Such showing by the petition in order to authorize the condemnation of the land was not necessary. Good faith in the matter in question on the part of the township trustee will be presumed until the contrary is shown.

It is further urged that the petition is insufficient because it does not show that any steps have been taken by the township trustee to build a schoolhouse upon the land after it has been appropriated; that there is nothing disclosing that the trustee has been authorized by the township advisory board to create or incur any indebtedness for the construction of a schoolhouse after it has been condemned and appropriated by the school township. These contentions are wholly untenable. It was not necessary that any of these facts should be averred in the petition in order to warrant the appropriation of appellants' real estate for the purpose mentioned in the petition. *Richard School Tp. v. Overmyer*, 164 Ind. 382, 73 N. E. 811.

As there was no demurrer to the petition, it is not essential that we determine its sufficiency to withstand a demurrer. It is certainly sufficient upon an assault made upon it for the first time in this appeal. *Farneman et al. v. Mount Pleasant Cemetery Association*, 135 Ind. 344, 35 N. E. 271.

As the record discloses, appellants on the 4th day of October, 1909, appeared in court and were ruled to answer the petition. Thereafter, on October 6th, they presented to the court an answer which they offered to file to the petition. Upon the objections of appellee to the filing of this answer the court refused to permit appellants to file it. The answer as offered has been brought into the record by a bill of exceptions. By this answer appellants, as landowners, attempt to set up as a bar to this action certain facts going to show that before the institution of this suit certain proceedings had been had by the patrons of school district No. 1 of Hensley township, Johnson county, Ind., before the superintendent of schools of that county, for the purpose of changing the site of the school in district No. 1 and for the relocation of the schoolhouse in which such school was held; that in these proceedings it was proposed to change the site of the school in district No. 1 to the land sought to be appropriated in this action.

The proposed answer by details proceeds to show that the petition signed in the proceedings had by the school patrons before the superintendent of schools was neither signed by the township trustee nor by the

required number of school patrons of district No. 1. It is further averred that the acts and circumstances set forth in the answer show that to relocate the said school in district No. 1 upon the real estate described in the petition of the plaintiff in this case would necessarily result in a change of the site of the existing schoolhouse in the district, and it is the aim and purpose of this action to secure a new building in lieu of the schoolhouse on the old site, to be constructed and erected on the real estate sought to be condemned in this proceeding, and that the present building and school site in said district shall be thereby abandoned and discontinued for school purposes by the said school corporation and Richardson, the trustee thereof.

Other facts of a similar character to those hereinbefore set out are contained in the answer, and it is charged that as shown thereby the trustee of Hensley township has no legal authority to change the site of the school in district No. 1. Wherefore, the prayer of the answer is that this action be denied and that the defendants have judgment for their costs. Appellee's counsel contend that the offer to file this answer was properly rejected by the court because there is no warrant under the provisions of the act of 1907, *supra*, for the filing of an answer or objections to the petition of a school corporation to condemn lands. Counsel for appellants base their right to file the answer upon section 933, *Burns' Ann. St. 1908*, the same being section 5 of the act of 1905 (*Laws 1905, p. 59*), authorizing the exercise of eminent domain in certain cases. By reason of the conclusions which we have reached, it is not essential that we decide this particular controversy as raised by the parties herein.

We are not apprised by the record upon what grounds the court based its rulings in rejecting the answer in question, but as in our opinion a correct result was reached by the ruling, we are constrained to uphold it without regard to the reasons upon which the court based its decision. This proposed answer on the part of the landowners, under the facts therein set out, is wholly irrelevant and impertinent in this case. In fact, counsel for appellants virtually admit that if, after it had been filed, it could have been properly stricken out under the rule affirmed in *Guthrie v. Howland*, 164 Ind. 214, 73 N. E. 259, and cases there cited, then, under the circumstances, the rejection thereof by the court would not constitute reversible error. The facts as therein stated are clearly dehors or outside of any of the merits of this case. The facts afforded no grounds on which appellants could predicate either a plea in abatement or an answer of any kind to the petition. The facts as therein set out do not even tend to constitute a cause of defense to this action or in any manner tend to defeat or break down the petition. Therefore,

under the circumstances, the answer, if it had been filed, might have been and should have been on the motion of appellee stricken out or rejected by the court. *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248; *Atkinson v. Wabash Railroad Co.*, 143 Ind. 501, 41 N. E. 947; *Guthrie v. Howland*, supra.

It would appear that its sole aim or purpose was to secure a review by the court in this action of the proceedings had before the county superintendent of schools in regard to the change of the school site in district No. 1 and the relocation of the school-house. As the answer, for the reasons herein stated, could have served no legitimate purpose had it been filed, and, as we have said, might have been stricken out on motion, certainly therefore, under the circumstances, appellants have not been harmed by the ruling of the court in rejecting their offer to file the answer.

It is next and lastly insisted by appellants' counsel that the court erred in ordering a deed of conveyance to be executed to appellee, Hensley school township, for the land appropriated and in receiving and approving such deed upon an unsigned application wherein it was alleged that the \$1,500 awarded by the jury as compensation for the land had been paid with interest thereon to the clerk of the court. There is no merit in this point. In fact no adverse ruling of the trial court is shown to sustain the argument which counsel advance.

As previously shown, section 3 of the statute provides that the school corporation or trustee may pay the money awarded for the real estate appropriated to the clerk of the court for the use of the owners thereof, and upon such payment being shown to the court the latter shall cause the real estate to be conveyed to the school corporation. In this case, as appellants state, it appears that the court ordered the land to be conveyed to appellee. Therefore, we must presume that the trial judge before he made this order found that the money had been paid to the clerk of the court as the law provides. If the money had been paid in to the clerk for the use of appellants, the fact that the court made the order for the conveyance of the real estate in controversy upon an application which was neither signed by appellee nor its attorneys can, under the circumstances, be of no avail to appellants in this appeal. If they were not satisfied with the application because it had not been signed either by appellee or its attorney then, under the circumstances, they should have made a motion to strike out the application for that reason.

We may suggest in passing that we have considered some questions presented by appellants which appear to us to be quite frivolous and in reality merited no consideration.

The record presents no reversible error, and the judgment is therefore affirmed.

(175 Ind. 367)

COMER v. LIGHT et al. (No. 21,808).¹

(Supreme Court of Indiana. Jan. 11, 1911.)

1. CONVERSION (§ 15*)—DIRECTIONS IN WILL.

A testator cannot change realty to personalty by the mere declaration that it shall be one or the other, and, when the question is one between the beneficiary and the trustee of a mere power of sale as to possession before sale, the right of the beneficiary is superior, or, if the rights of third persons attach or intervene before sale, the fiction that under a direction in a will to sell land and divide the proceeds conversion into money takes place does not apply.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 28-37; Dec. Dig. § 15.*]

2. PROPERTY (§ 4*)—TENURE OF REAL PROPERTY—"CHATELLE REAL."

A chattel real at common law was an interest annexed to or growing out of real estate, as a term for years, having the character of immobility, which denominated it real, while other chattels proper are movable; but they were regarded as personal property and went to the personal representative upon death, and not to the heir.

[Ed. Note.—For other cases, see *Property*, Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1107.]

3. PROPERTY (§ 4*)—TENURE OF REAL PROPERTY—"CHATELLE REAL."

Prior to 1843 a term for years was personalty subject to sale upon execution issued by a justice of the peace; but under Burns' Ann. St. 1908, § 635, judgments are liens upon chattels real, and they are sold as real estate.

[Ed. Note.—For other cases, see *Property*, Dec. Dig. § 4.*]

4. WILLS (§ 631*)—CONSTRUCTION—ESTATES CREATED.

Testator willed to his wife for life all his realty in a certain county; such realty at her death to be sold by the executors, and after payment of a certain legacy to be divided equally among testator's sons and daughters. *Held*, that the estate of one of the sons was in the nature of a chattel real and a vested interest.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1481, 1482, 1485; Dec. Dig. § 631.*]

5. EXECUTION (§ 45*)—PROPERTY SUBJECT—INTEREST OF HEIR IN ESTATE.

Where testator willed all his realty to his wife for life, and at her death the property to be sold and the proceeds divided among testator's sons, the interest of one of the sons was subject to levy and sale for his debts.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 141, 142; Dec. Dig. § 45.*]

6. EXECUTORS AND ADMINISTRATORS (§ 197*)—WIDOW'S ALLOWANCE—DESCENT AND DISTRIBUTION—INTEREST OF WIDOW—LIABILITIES.

A widow's allowance and her statutory one-third in the real estate of her deceased husband can, under Burns' Ann. St. 1908, §§ 2786, 2901, 2967, be reduced only by the amount necessary to defray the expenses of administration, last sickness, and funeral of her deceased husband.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 728; Dec. Dig. § 197.*]

7. EXECUTORS AND ADMINISTRATORS (§ 261*)—CLAIMS—JUDGMENTS.

There having been no sale under the judgments, they were only general liens, and in the order of distribution would take their place under the statute as claims of the fifth class.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied, 94 N. E. 326.

whether the estate be solvent or insolvent according to their priority under Burns' Ann. St. 1908, § 2958, relating to the satisfaction of liens on realty.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 944-974; Dec. Dig. § 261.*]

Appeal from Probate Court, Marion County; Frank B. Ross, Judge.

Proceedings for settlement of the estate of Henry Cruse. To the final report of Robert C. Light, administrator, Alfred W. Comer and Sarah J. Cruse filed exceptions. The exceptions were overruled, and on appeal of the mentioned contestants to the Appellate Court the judgment was affirmed. 92 N. E. 344. The case was transferred to the Supreme Court. Reversed, with directions.

Walter L. Carey, for appellant. Johnson & Mehring and Wm. Bosson, for appellees.

MYERS, C. J. This is an appeal upon exceptions to the final report of an administrator. The question for determination arises upon the construction to be given a will, and the order of distribution under it in case of an insolvent estate of a deceased beneficiary under the following facts: Henry Cruse deceased December 15, 1903, leaving a will the material portion of which is as follows: "I will and bequeath to my beloved wife, Eliza J. Cruse, all money and personal property of every description of which I may be possessed at my death, together with all my real estate situate in Hamilton county, Indiana (describing it specifically), to have and to hold and have the full use and control of the same so long as she shall live; and at the death of my said wife all of said personal property remaining, and all of said real estate shall be sold by my executors, and five hundred dollars from the proceeds thereof paid to my grandson, Charles L. Cloe, the remainder to be divided equally between my sons and daughters," naming them, of whom Jacob Cruse was one. Appellant on October 14, 1905, recovered a judgment against Jacob Cruse, son of Henry. On December 4, 1905, appellee McWhorter recovered a judgment against Jacob Cruse. Both of these judgments were in renewal of former judgments, and a transcript of each judgment was filed in the office of the clerk of the county in which the real estate of which Henry Cruse died seised was situate. The Comer judgment became a lien October 16, 1905, and the other judgment in December, 1905. No execution was ever issued upon either of these judgments, and no further steps taken respecting them, until after the death of Jacob Cruse, when they were filed and allowed as claims against his estate, in the form of judgments. Jacob Cruse died in Marion county November 15, 1907, intestate as to all his property, and appellee Light was appointed administrator

of his estate June 8, 1908. Eliza Cruse, widow of Henry, and mother of Jacob Cruse, died in April, 1908. Jacob Cruse at his decease left a widow, appellee, herein, and three children. Upon the death of Eliza, the executors of the will of Henry Cruse, under the provisions of the will, sold the real estate of which he died seised, and from the proceeds of the sale \$1,155.33 came into the hands of appellee Light as administrator of the estate of Jacob Cruse, who settled the estate as insolvent. He paid the widow the \$500 statutory allowance and the expenses of administration, leaving a balance for distribution of \$555.33. Appellee Sarah J. Cruse, widow of Jacob, claimed that she was entitled to an amount equal to one-third the proceeds of the sale of the real estate free of claims of creditors, and appellant Comer and McWhorter claimed that they were entitled to satisfaction of their judgment claims in full, as against the costs and expenses of administration, and all other claims except the widow's \$500. Their respective contentions were denied, and the administrator was directed to prorate the fund among the creditors including Comer and McWhorter, and excluding the widow of Jacob Cruse, upon the theory that the fund was to be treated as personal property from the date of the death of Henry Cruse, and that the judgments were general claims.

In *Doe v. Lanus* (1852) 3 Ind. 441, 56 Am. Dec. 518, it was held that, as against the executors under a will directing sale of real estate within one year after the testator's death and division of the proceeds among named persons, the right of possession and legal title, until the sale, is in the beneficiaries.

In *Rumsey v. Durham* (1854) 5 Ind. 71, it was held that a will directing a sale of real estate after the termination of the life estate or marriage of the widow operated as a conversion into money, and should be treated as if the donation had been in money. The real question in that case was whether there was such a vested interest in a parent, who had died after the death of the testator, and before the death of the life tenant, as to let in the child of such parent to inherit, and the equitable rule of conversion and vesting at the date of the death of the testator was invoked in justice to such grandchild, and upon equitable considerations. This case was followed in *Wilson v. Rudd* (1862) 19 Ind. 101, holding that one of the named beneficiaries under the will took a vested interest in the real estate, which was subject to levy and sale. The case goes further than *Doe v. Lanus* warrants, as that case did not involve the question of title to the realty, except upon the fiction of such a vested interest as was superior on the question of possession to the right of the execu-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tor. A fair test of the question arises from the inquiry whether the executor during the interim before sale would be compelled to account for it, or, if liable to account, whether he would be liable to account for the rents and profits of the realty, or account for it as money. He certainly would not be liable to account as for money, because it could not be known what to account for, and he should not account for rents and profits of real estate because he has no right of possession. The Rudd Case goes further in holding that there is a vested interest in real estate; but it will be seen that in that case there was a specific devise of a share in the real estate under the fourth clause of the will, and the same thing is true as to the case of *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310.

In *Simonds v. Harris* (1884) 92 Ind. 505, it was held under a will directing sale, after the termination of a life estate and division of the proceeds, that a share in the land was subject to attachment, which followed the proceeds after sale, following *Wilson v. Rudd*, but going further than the facts in the *Rudd Case* justify.

Ballenger v. Droom, 101 Ind. 172, was a case where the judgments against a distributee of the proceeds after sale were held to be such an interest as was subject to the lien of a judgment, and that the lien took preference in the distribution of the proceeds over the distributee and his grantee, following *Simonds v. Harris*, and *Brumfield v. Droom*, 101 Ind. 190, involving the same will, in which it was held that the title to the land before sale was not in abeyance, but in the testator's children, and this is likewise held in *Indiana Co. v. Morgan* (1903) 162 Ind. 331, 70 N. E. 368, and *Myers v. Carney* (1908) 171 Ind. 379, 86 N. E. 400.

In *Koons v. Mellett* (1889) 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231, it was held that a judgment was a lien upon lands which had been directed to be sold, and followed the proceeds.

The fiction of law that, under a simple direction to sell and divide the proceeds, conversion into money will be held in equity to have taken place at the date of the death of the testator, and that equity will treat that as done which is directed to be done, and it will be treated as that species of property into which it is directed to be converted, is grounded upon equitable considerations, and is interposed for the purpose of carrying out the intention of testators so far as that can be done within the rules of law, and generally for the purpose of equality, and doing equity between heirs or next of kin, where no other rights intervene; but it has never been understood that a testator can change realty to personalty, or vice versa, by the mere declaration that it shall be one or the other, and an examination of the cases will disclose that the fiction of constructive conversion is grounded upon the proposition

that, in the absence of intervening interests or rights, the testator's intention, as it affects the beneficiary, shall control; but when the question is one between the beneficiary and the trustee of a mere power of sale, as to possession before sale, the right of the beneficiary is superior, or, if the rights of third persons attach or intervene before sale, the fiction is destroyed. For example, before sale it can scarcely be questioned, in this state at least, that the right of possession is in the beneficiary; that is, that the interest vests in him; if this were not so, the property would go to his personal representatives, and necessarily the right of possession and control, and the executor would be required to account for it as personalty, which can hardly be claimed. *Matter of Hunter*, 3 Redf. Sur. (N. Y.) 176.

The question has frequently arisen under the crown's claim to legacy duty under the Stamp Act, providing that "money to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged or otherwise disposed of," shall be subject to duty. Under this act it is held that, when real estate is directed to be sold, the duty attaches, even though the beneficiary elects to take the land without sale; or where the trustee has an option to sell, and actually sells; but not if he does not sell. If the power is given only for reinvestment in land, or the variation of securities, or for raising debts, and legacies or other prior charges, the duty is not payable, whether the property is sold or not, although the beneficiaries after the sale elect to take the property as money. Nor does the duty attach where there is a sale made under the order of a court under its general jurisdiction, though it will attach if the trustee is compelled by a court to exercise a power of sale under a will. *Jarman on Wills* (6th Ed.) vol. 1, p. 591.

It appears, from these cases, that the fiction of conversion attaches to the status which a testator fixes upon a property or fund at the time the will becomes operative, as between himself and beneficiary and treating as an accomplished fact, for all the purposes of the will, a thing to be done in the future, and equity intervenes to require it to be treated as if done, and a conversion as of the date of the testator's death as a vested interest, for the purpose of letting in the beneficiaries, and their successors in estate. It would be unreasonable that the condition and character of the property as between the testator and the beneficiaries should depend upon the act of the instrumentality through which the conversion is to be effected, when no such power is reposed in him. These reflections seem to us to point the distinction between the cases above cited, and another line of cases in this state, and in other states, in which, under the facts in those cases, conversion is held to have taken place as of the date of the death of a

testator. *Rumsey v. Durham*, supra; *Nelson v. Nelson*, 36 Ind. App. 331, 75 N. E. 679; *Clark v. Worrall*, 33 Ind. App. 49, 68 N. E. 699; *McClure's Appeal*, 72 Pa. 414; *Hammond v. Putnam*, 110 Mass. 232; *Stagg v. Jackson*, 1 N. Y. 206. But, even in states where the rule is broadly applied, the doctrine is qualified to the extent that conversion does not take place until the event transpires when the conversion should be made, and the property reaches the beneficiary in his absolute right in the character impressed upon it. *Holland v. Cruft*, 3 Gray (Mass.) 162; *Holland v. Adams*, 3 Gray (Mass.) 188; *Savage v. Burnham*, 17 N. Y. 561; *Mansbach v. New*, 58 App. Div. 191, 68 N. Y. Supp. 674; *Shumway v. Harmon*, 6 Thomp. & C. (N. Y.) 627; *Sweezy v. Thayer*, 1 Duer (N. Y.) 302.

The character of interest of Jacob Cruse approaches a chattel real more nearly than any other. A "chattel real" at common law was an interest annexed to, or growing out of, real estate, as a term for years, having the character of immobility, which denominated them real, whilst other chattels proper are movable, but they are regarded as personal property, and went to the personal representative upon death, and not to the heir. *Schouler on Personal Property*, § 20. Prior to 1843 a "term of years" was held to be personal property, and the subject of sale upon execution issued by a justice of the peace. *Barr v. Doe* (1842) 6 Blackf. 335, 38 Am. Dec. 146. But under Rev. St. 1843, p. 454, § 3, and under the present statute (*Burns' Ann. St. 1908*, § 635, judgments are liens upon chattels real, and they are sold as real estate. *Hyatt v. Vincennes Nat. Bk.*, 113 U. S. 415, 5 Sup. Ct. 573, 28 L. Ed. 1009; *Putnam v. Westcott*, 19 Johns. (N. Y.) 76; *McLean v. Rockey*, 3 McLean, 235, Fed. Cas. No. 8,891; *Gunn v. Sinclair*, 52 Mo. 327.

The interest of Jacob Cruse has been held to be a vested interest, which is the subject lien, levy, and sale, the same as in the case of real estate proper. A fair test as to its character is, as to the rights of a wife on such sale being made prior to the termination of the life estate: Would a sale in the lifetime of Jacob Cruse have left any interest in his wife and subsequent widow? Manifestly it could not be sold as personal property, for the element of delivery of possession is wholly impossible; it could not be sold as money and returned without sale under section 762, *Burns' Ann. St. 1908*, or as a debt or thing in action under section 766, *Burns' Ann. St. 1908*. It is held under section 3052, *Burns' Ann. St. 1908*, with respect to sales of the real estate of a husband and the vesting of a wife's interest, that the section applies to equitable interests as well as legal ones. *Whitney v. Marshall*, 138 Ind. 472, 37 N. E. 964; *Shelton v. Shelton*, 94 Ind. 113; *Keck v. Noble*, 86 Ind. 1; *Ketchum v. Schicketanz*, 73 Ind. 137.

The statute of descents provides that she shall take in equitable interests of the husband, as well as legal estates. *Burns' Ann. St. 1908*, § 3029. It is then an interest in real estate, or an interest in money. Suppose that Jacob Cruse had survived his mother, and he and all the other beneficiaries under the will of Henry Cruse, being sui generis, had elected to take the property in kind, there could be no doubt but that they could have done so, and in that event a legal estate would clearly have vested in them in fee simple. If the sale had been made prior to the death of the widow on the judgments of appellant and McWhorter, the sale would have related back to the date of the judgments, and sale would have been made as real estate is sold, and with the incidents of the sale, and with the effect of a sale of real estate as an equitable interest. Shall his widow's interest be less than it would have been in that contingency? The law favors a liberal construction of such statutes, and we think it must be held, under our decisions, that it was an equitable interest or estate. Or suppose that the executors under the will had failed or delayed to make sale, and divide the proceeds, could there be any doubt that the administrator of Jacob Cruse's estate could have had partition and sale under section 2849, *Burns' Ann. St. 1908*? This being true, the wife was entitled to \$500 and one-third the real estate, or the proceeds free from all demands of creditors.

Coming to the claims of Comer and McWhorter, which are held to be liens: In the absence of a sale under them, they were only general liens, and in the order of distribution take their place under the statute as claims of the fifth class, whether the estate be solvent or insolvent, according to their priority under section 2958, *Burns' Ann. St. 1908*. *Snyder v. Thleme & Wagner Co.* (1910) 173 Ind. 659, 90 N. E. 314; *Hildebrand v. Kinney* (1909) 172 Ind. 447, 87 N. E. 832.

The widow's \$500 allowance and her statutory one-third in the real estate can only be reduced by the amount necessary to defray the expenses of administration, last sickness, and funeral of the deceased husband. *Burns' Ann. St. 1908*, §§ 2786, 2901, 2957.

The judgment is reversed, with instructions to the court below to enter judgment awarding Sarah J. Cruse, out of the money in the hands of the clerk for distribution, a sum equal to one-third of the gross fund received from the sale of the real estate, and deduct the expenses of administration and of the last sickness and funeral from the residue, and apply the remainder, first to the payment of appellant Comer, and second to payment of appellee McWhorter as lienholders under the fifth class under section 2901, *Burns' Ann. St. 1908*, and according to priorities under section 2957 and section 2958 construed together, and, if sufficient to pay

them in full, distribute the remainder among the claimants of each subsequent class under sections 2901 and 2957, Burns' Ann. St. 1908.

(175 Ind. 312)

STATE ex rel. WHEATLEY v. BECK et al.
(No. 21,640.)¹

(Supreme Court of Indiana. Jan. 25. 1911.)

1. BANKRUPTCY (§ 435*)—DISCHARGE OF JUDGMENT—PLEADING—REQUISITES.

In mandamus to compel an execution, answers relying on release from the judgment under Bankruptcy Act July 1, 1898, c. 541, § 17, cl. 2, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), by a discharge in bankruptcy, properly set out at length the complaint on which the judgment was obtained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 435.*]

2. PLEADING (§ 49*)—CHARACTER—HOW DETERMINED.

Where the pleadings under which a judgment was obtained are not ambiguous or equivocal as to the character of the action, they are the only means of determining the nature of the action and the character of the judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 107-111; Dec. Dig. § 49.*]

3. BANKRUPTCY (§ 435*)—DISCHARGE—JUDGMENT—PLEADING.

In mandamus to compel an execution, defended on the ground of release from the judgment under Bankruptcy Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), by a discharge in bankruptcy, it was not necessary for defendants to allege that the judgment was not obtained for fraud, that matter being properly shown by setting up the pleadings on which the judgment was obtained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 435.*]

4. ACTION (§ 28*)—CONTRACT OR TORT.

On conversion of the proceeds of stock placed in defendant's hands for sale, the principal could sue on contract or in tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28.*]

5. BANKRUPTCY (§ 423*)—DISCHARGE—LIABILITIES RELEASED—FRAUD.

A judgment for converting proceeds of stock placed in defendant's hands for sale is not excepted by Bankruptcy Act July 1, 1898, c. 541, § 17, cl. 2, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), from a discharge in bankruptcy as one obtained through fraud.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 423.*]

6. BANKRUPTCY (§ 423*)—DISCHARGE—LIABILITIES RELEASED—FRAUD.

To except a judgment from a discharge in bankruptcy within Bankruptcy Act July 1, 1898, c. 541, § 17, cl. 2, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), fraud must lie in the inception of the transaction on which the judgment is based.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 423.*]

7. MANDAMUS (§ 1*)—RIGHT TO RELIEF.

Mandamus lies only when there is a clear legal right and no other adequate remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-8; Dec. Dig. § 1.*]

8. MANDAMUS (§ 3*)—RIGHT TO RELIEF—ADEQUACY OF OTHER REMEDY.

Right under Burns' Ann. St. 1908, § 826, to amerce a sheriff for refusing to levy an

execution is an adequate remedy, as affecting the creditor's right to compel a levy by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 10-34; Dec. Dig. § 3.*]

Appeal from Circuit Court, Tipton County; Leroy B. Nash, Judge.

Mandamus by the State on the relation of Dora Wheatley against Frederick W. Beck and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Oglebay & Oglebay, for appellant. Gifford & Gifford, for appellees.

COX, J. The appellant (relatrix) filed her petition in the Tipton circuit court on the 3d day of May, 1909, for an alternative writ of mandate directing and ordering the appellee Beck as sheriff of that county to levy an execution then in his hands on personal property and on certain lands of appellee Johnson, to sell the same and apply the proceeds to the payment and satisfaction of an unpaid judgment held by relatrix against Johnson, upon which judgment the execution had been duly issued. The alternative writ was issued. Upon his own application Johnson was admitted as a party defendant, and answered. The appellee Beck, as sheriff, filed an answer and return to the complaint. Appellant's (relatrix's) demurrers, for want of facts addressed to these answers, were overruled, and, relatrix refusing to plead further, judgment was rendered for appellees and against relatrix for costs. The overruling of these demurrers is the basis of appellant's assignment of error in this court.

The answers of appellees which appellant in this appeal is contending should have been held insufficient by the trial court are substantially alike. It will serve no good purpose to set them out in full in this opinion. They admit the execution in the hands of the sheriff, Beck, and the existence of the judgment in question; that the judgment was rendered against Johnson in the Tipton circuit court in the year 1900, at the suit of one Frank J. Wheatley; that it was for the sum of \$813.50, damages and costs, and "without relief from valuation laws, and without benefit of exemption laws," and that on the 23d of March, 1909, it was duly assigned of record to the relatrix; they show by proper averments that the judgment was duly rendered after the trial of an issue formed by general denial of a complaint alleging "that on the 15th day of August, 1899, the plaintiff executed to the defendant his promissory note, calling for \$200, payable at the State Bank of Sheridan, Ind., 120 days after date, with interest and attorney's fees; that before the maturity thereof, defendant sold and transferred said note to Robert Picken et al. That in the month of October, 1899, the plaintiff was the owner of 22 head

of calves, which said calves the plaintiff placed in the hands of the defendant, as his agent, to sell and apply the proceeds to payment of the note hereinbefore described, and the remainder to be paid to plaintiff, or as he may direct; that the defendant sold the calves to one Lem Scott and for the price of \$420, and received from Scott the payment therefor; that defendant refused to pay said note, or any part thereof, and has and still has and retains the \$420 of plaintiff's money and has converted the same to his own use, to his damage in the sum of \$1,000; wherefore, he demands judgment for \$1,000 damages and for all other and proper relief;" that thereafter on March 27, 1901, Johnson filed his petition in bankruptcy in the District Court of the United States for the district of Indiana, and was duly adjudged a bankrupt; and, after averring facts showing that all the necessary intervening steps were taken, they show Johnson's discharge as such bankrupt "from all his personal obligations and liabilities." They show, further, that the land sought to be levied on and sold was acquired by Johnson after his discharge in bankruptcy. The one question seriously presented for determination in this appeal is whether the discharge in bankruptcy of appellee Johnson released him from the payment of the judgment set out in the foregoing answers under clause 2 of section 17 of the federal bankrupt act of July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), which reads as follows: "A discharge in bankruptcy shall release a bankrupt from all provable debts except * * * (2) judgments in action for fraud."

Preliminary to the discussion of this question, however, appellant's counsel earnestly and ably insist that these answers are bad, because neither of them contains the direct allegation that the judgment therein set forth, and upon which the execution involved in this case was issued, "was not rendered in an action for fraud," and at the same time urge that setting out at length in these answers the complaint on which the judgment was rendered made the answers objectionable. Neither of these contentions can be approved. The very life of the answers depended on the character of the judgment, and that is to be ascertained from the pleadings in the action in which it was rendered. Where the pleadings are not ambiguous, or equivocal as to the character of the action, they are the only means of determining the nature of the action and the character of the judgment. *Furry v. O'Connor* (1891) 1 Ind. App. 573-580, 28 N. E. 103; *Smith v. Wood* (1882) 83 Ind. 522-524; *Gentry v. Purcell* (1882) 84 Ind. 83, 84. The direct allegation that the judgment "was not rendered in an action for fraud" would, to say the least, not add anything to the strength of the answers. The existence of fraud or the absence of it as being the foundation of the

action on which the judgment was based must appear from the complaint and the issue joined upon it, and that could properly be shown by setting the complaint out in the answers, as was done.

The appellant can fare no better in the determination of the main question stated above. Counsel for appellant say in their brief that their action is predicated upon subdivision 2, section 17, of said act, which reads: "That judgments rendered in actions for fraud are not released by the discharge of the defendant in bankruptcy," and that "Johnson converted the money of Wheatley to his own use, and the judgment was rendered in an action against him for his fraud." It is obvious that the cause of action on which the judgment was rendered primarily grew out of contractual relations, and that whatever fraud attached itself to it was involved in the wrongful application or conversion of the proceeds of the sale. Wheatley had his election of remedies and could have sued on contract or for the tort. *Terrell v. Butterfield* (1883) 92 Ind. 1-10; *Kidder v. Biddle* (1895) 13 Ind. App. 653-660, 42 N. E. 298; *Rauh v. Stevens* (1898) 21 Ind. App. 630, 52 N. E. 997; *Bixel v. Bixel* (1886) 107 Ind. 534-536, 8 N. E. 614; *Crawford v. Burke* (1904) 195 U. S. 176-194, 25 Sup. Ct. 9, 49 L. Ed. 147.

There was no wrong in the beginning of the transaction, and the action was not and could not have been for the conversion of the 22 head of calves, which, in the language of the complaint, "the plaintiff placed in the hands of the defendant, as his agent, to sell and apply the proceeds," etc., for the complaint shows that the calves were sold by the defendant, as he was authorized to do, and it is then charged that the proceeds were not applied as agreed, but were converted by defendant. In the case of *Bixel v. Bixel*, supra, it was said, on page 537: "In the possession and sale of the property, appellee was in no way a wrongdoer, because he was acting under authority from appellant. His wrong, if any, was in not applying the proceeds of the sale as directed, and that wrong was subsequent to the possession and sale. He is not therefore liable for having converted the property." The fraud which would keep a judgment in force against a discharged bankrupt within the exception of the provision of the bankruptcy act above set out must be fraud in the inception. "If the original debt arose in contract and the fraud was but an incident and not its creative power, the debt is merged in the judgment, and the bankrupt released thereafter." *Collier on Bankruptcy* (8th Ed. 1910) p. 319; *Brandenburg on Bankruptcy* (3d Ed.) § 435; *Landgraf v. Griffith* (1907) 41 Ind. App. 372-376, 83 N. E. 1021.

In *Crawford v. Burk* (1904) 195 U. S. 176-193, 25 Sup. Ct. 9, 49 L. Ed. 147, it is held that if a debt originates in or is founded up-

on a contract, express or implied, it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover as for a fraudulent conversion, instead of in assumpsit on the contract. In the case of *Fechter v. Postel* (1906) 114 App. Div. 776, 777, 100 N. Y. Supp. 207, s. c. 17 Am. Bankr. Rep. 816, 817, *Fechter* recovered a judgment in an action for conversion against *Postel* and subsequently *Postel* filed his petition in bankruptcy and was duly discharged, and it was held that the judgment was founded on a provable debt, and was not excepted by clause 2 above quoted from the provisions which release the bankrupt from liability on his discharge. In reaching this conclusion, the court said: "A debt founded upon contract, express or implied, is provable against the bankrupt's estate, notwithstanding the fact that the creditor may have elected to bring his action in trover as for a fraudulent conversion instead of assumpsit." See, also, to the same effect, *Lewis v. Shaw* (1907) 122 App. Div. 99, 106 N. Y. Supp. 1012, 19 Am. Bankr. Rep. 866; *Tindle v. Birkett*, 183 N. Y. 267, 76 N. E. 25, 15 Am. Bankr. Rep. 179; *Maxwell v. Martin* (1909) 130 App. Div. 80, 114 N. Y. Supp. 349, 22 Am. Bankr. Rep. 93-96; *In re Ennis v. Stoppani* (D. C.) 171 Fed. 755, 22 Am. Bankr. Rep. 679-681.

On this question, *Collier on Bankruptcy* (8th Ed., 1910) pp. 315, 316, says: "Indeed the courts have already established this doctrine so firmly as to make it one of the few settled questions under the law. * * * Thus, dischargeability will be decreed in all cases, such as those of agents, brokers, factors, auctioneers, and the like. * * * Any claim or judgment rendered thereon for the conversion of personal property, possession of which is not obtained by false representations or pretenses, is released by the bankrupt's discharge."

It is manifest that the trial court did not err as contended in its rulings on the sufficiency of these answers. Moreover, it is the law that mandate is a writ which, to a certain extent, the court has a discretion in awarding, and it is only available where there is a clear legal right and where no other adequate remedy exists. *State ex rel. Roberts v. Beaver* (1895) 143 Ind. 488-492, 41 N. E. 802; *State ex rel. Moore v. Board, etc.* (1903) 162 Ind. 580-603, 68 N. E. 295, 70 N. E. 373, 984; *Western U. T. Co. v. State ex rel. Hammond Elevator Co.* (1905) 165 Ind. 492-512, 76 N. E. 100, 3 L. R. A. (N. S.) 153; *Couch v. State ex rel. Brown* (1907) 169 Ind. 269-271, 82 N. E. 457, 124 Am. St. Rep. 221; *State ex rel. v. Cummins* (1908) 171 Ind. 112-114, 85 N. E. 859; *Town of Windfall v. State ex rel.* (1909) 172 Ind. 302-306, 88 N. E. 505; *High's Ex. Legal Rem.* (3d Ed.) §§ 6, 9, 10.

It would seem that the relatrix had other

adequate remedies, if she had a clear legal right to have the execution in question levied on the property of *Johnson* and a sale thereunder. Section 826, *Burns' Ann. St.* 1908, provides: "If any sheriff shall neglect or refuse to levy upon or sell any property justly liable to execution when the same might have been done, he shall be amerced to the value of such property, not to exceed the amount necessary to satisfy the execution." See the following cases which have recognized the liability of a sheriff under this section: *State ex rel. Courter v. Buckles* (1893) 8 Ind. App. 282, 35 N. E. 846, 52 Am. St. Rep. 476; *Terrill v. State ex rel.* (1879) 66 Ind. 570; *State ex rel. v. Hawkins* (1882) 81 Ind. 486; *State ex rel. v. Harper* (1889) 120 Ind. 23, 22 N. E. 80; *State ex rel. v. White* (1883) 88 Ind. 587. "Where an officer fails or refuses to perform his duty in regard to the execution of process, the party injured may proceed against him for damages, or by an attachment for contempt of court." 25 Am. and Eng. Ency. of Law (2d Ed.) pp. 688, 689. See, also, *State ex rel. v. Craft*, 17 Fla. 722; *Armstrong v. Stansel*, 47 Fla. 127, 36 South. 762; *Mathews v. Nance*, 49 S. C. 389, 27 S. E. 408; *McFarlan v. State* (1897) 149 Ind. 149, 48 N. E. 625; 26 Cyc. 213.

Judgment affirmed.

(175 Ind. 133)

ROBISON et al. v. FISHBACK. (No. 21,673.) (Supreme Court of Indiana. Jan. 27, 1911.)

1. CONSTITUTIONAL LAW (§ 206*)—PRIVILEGES AND IMMUNITIES.

Const. U. S. Amend. 14, § 1, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, refers to the privileges and immunities arising out of the nature and character of the federal government, and operates on state action solely and not on individual action, and simply requires that all persons similarly situated be treated alike in privileges conferred or liabilities imposed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. § 206.*]

2. COURTS (§ 489*)—CONFLICTING JURISDICTION—UNITED STATES COURTS AND STATE COURTS—PATENT RIGHTS.

Even if a card index system installed by a city treasurer and his deputy is patentable and patented, the state courts are not ousted of jurisdiction of proceedings between the officers and the city to determine their rights to the card system by the fact that rights claimed or denied as growing out of the patent are incidentally involved; exclusive federal jurisdiction applying only to cases arising under the patent laws upon a bill, complaint, or declaration setting up a right under the patent laws as a ground of recovery.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1327; Dec. Dig. § 489.*]

3. MUNICIPAL CORPORATIONS (§ 172*)—RECORDS—OWNERSHIP.

Though indexes of assessments are not required to be kept by a city treasurer by any specific law, where they are made by a treasurer in the course of his administration of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office, the public have a direct interest in them not only during his term of office, but indefinitely.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 172.*]

4. RECORDS (§ 1*)—"PUBLIC RECORD."

A "public record" is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5818; vol. 8, p. 7773.]

5. EMINENT DOMAIN (§ 2*)—COMPENSATION—CONSTITUTIONAL PROVISIONS—"TAKING."

Where a city treasurer prepared a card index system referring to assessments for public improvements at his own expense, such indexes not being required by law, an injunction against the removal of the indexes at the expiration of his term is not a "taking" of services or property without just compensation, and does not violate Const. art. 1, § 21, prohibiting such taking without just compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 8-12; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6851-6863; vol. 8, p. 7813.]

6. CONSTITUTIONAL LAW (§ 305*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY IN GENERAL.

An injunction against the removal by a city treasurer at the expiration of his term of office of card indexes prepared at his own expense is not a deprivation of property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 305.*]

Appeal from Circuit Court, Marion County; Charles Remster, Judge.

Action by Frank S. Fishback against Edward J. Robison and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Merrill Moores and Walter Myers, for appellants. Henry Warrum, for appellee.

MYERS, C. J. Appellant Robison was treasurer of Marion county, Ind., and ex officio treasurer of the city of Indianapolis, from January 1, 1908, to January 1, 1910. Appellant Share was an employé of the treasurer. When the latter went into office, there was a card index system in the office which furnished a partial index to the assessment rolls for public improvements in the city of Indianapolis. There are some 43 volumes of public improvement assessments, involving more than 10,000 names of different persons and assessments. The card index in use prior to January 1, 1908, so far as the mechanical features of it were concerned, was the ordinary form of cards adjusted to a case, with rods to hold the cards in position, and each card had one name of a person at the top of the card, and under the name vertical, ruled spaces for indicating the property assessed, and the folio and page in which the assessment was to be found, and a like space for designating the improvement.

These were arranged in alphabetical order in the cases. There was an index to the improvement in each folio, and a general index to all folios, of the improvements, but the names of property owners were not indexed. There is no express statute requiring the keeping of any index of any kind. The only other reference to assessments against any property for public improvements was upon the general tax duplicates, where, opposite any parcel of land against which there was such assessment, a letter "b" was placed to indicate that there was a so-called Barrett law assessment against the property, and in case a property owner should not know upon what improvement an assessment had been made, there was no way of discovering it, without running through the general index, or the indexes in the various folios. Appellant Share had had long experience in the conduct of the treasurer's office, and especially with the collection of municipal assessments, and at the suggestion and under the pay of appellant Robison, set about devising a card index system to public improvement records. Appellant Robison personally visited a number of the larger cities of the country, examining into the methods employed in keeping trace of public improvement assessments, and directed Share to work out a system of card indexes, and procured at his personal expense the cases and cards. Share thereupon devised a card system in which, under the name of one owner, all improvements assessed in that name appear. The only practical difference between the two systems of cards was that in the one employed when Robison came into office but one improvement appeared upon a single card, though the cards were arranged for separate improvements, while in the system devised by Share all improvements assessed under the name of any one person or owner were designed to be shown by such card. Robison directed Share to obtain the necessary cards and cases to install the system in the treasurer's office, and, in the absence of the treasurer and without his knowledge, payment for the supplies was made out of the public funds. As soon as Robison discovered this fact, he covered the money into the treasury. The card system which was in vogue when Robison took office was not thereafter kept up, but the system devised by Share was completed at an expense of about \$3,000 to Robison, and proved to be a great success in expediting the work of referring to assessments, and highly essential if not indispensable, to the conduct of the office. Share applied for letters patent upon the device, and claims to be the owner of the system, while Robison claims to own the particular cards, and the cases in which they are contained. Upon going out of office January 1, 1910, Robison claimed the cases and cards as his

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

individual property, and the right to remove them, and appellee, as treasurer-elect and resident taxpayer, successfully maintained an application for an injunction against their removal, on the ground that they were parts of public records, from which judgment both defendants appeal and assign joint and separate errors upon the action of the court below in overruling their motion for a new trial.

Jurisdiction is lodged in this court by the contention of appellants that the judgment is in violation of article 1 of the fourteenth amendment to the federal Constitution, in abridging the privileges or immunities of citizens of the United States, and depriving them of their property without due process of law, and in violation of section 21 of article 1 of the state Constitution, in taking their services and property without just compensation first assessed and tendered. As to the first proposition, it is to be said that the privileges and immunities clause of the federal Constitution refers to the privileges and immunities arising out of the nature and character of the federal government, granted or secured by that Constitution. It operates upon state action solely, and not upon individual action, and simply requires that all persons similarly situated be treated alike, in privileges, conferred or liabilities imposed. *Hodges v. United States*, 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65; *Field v. Barber, etc., Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485.

Appellants contend that the device is patentable, and that a patent right is property, and the judgment a taking without due process or just compensation. Whether patentable or not is not material in this case, for there is some value in the cases and cards. Even if patentable and patented, while the state courts have no jurisdiction to determine rights or no rights, under an alleged patent, they are not ousted of jurisdiction by the fact that rights claimed or denied as growing out of the patent are incidentally involved. Exclusive federal jurisdiction applies only to cases arising under the patent laws upon a bill or complaint, or declaration of a plaintiff setting up a right under the patent laws, as a ground of recovery. *Pratt v. Paris, etc., Co.* (1897) 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, and notes; *Riverside Mills v. Atlantic, etc., Co.* (C. C. 1909) 168 Fed. 987; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. Ed. 204; *Pittsburgh, etc., Co. v. Mitchell*, 174 Ind. —, 91 N. E. 735.

The real point in this case turns on the question whether, as to the particular cards and cases, they have become so essential to the conduct of the office that appellants in installing them must be considered to have intended that they should become so much a part of the indispensable accessories of the

operation of the office that the public interest requires that they be not removed. It appears from the record that the former system of card indexing was abandoned; had that been kept up by appellants at their own expense, and for their own convenience, though less efficient than the plan installed, though possibly involving quite as much labor as the new scheme, it could hardly be claimed that appellants could remove them, or even those added by their labors, or at their own expense. This index is not required by any specific law, and it is wholly optional with treasurers whether they keep indexes to these records or not, but they are so far authorized that the public authorities might contract and pay for their making as conveniences for the use of the officers and the public, and, if so procured, whilst they may not, in the strict sense, be public records, they are undoubtedly authorized to be made and kept. They are not less so by reason of being made by an officer in the course of his administration of the office. The public have a direct interest in them not only during the term of the incumbent of the office, but indefinitely. *State v. Shutts*, 161 Ind. 590, 69 N. E. 397; *State v. Flynn*, 161 Ind. 554, 69 N. E. 159; *Board v. Mitchell*, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520; *Hoffman v. Board*, 96 Ind. 84; *Garrett v. Board*, 92 Ind. 518; *Hubler v. Board*, 19 Ind. App. 464, 49 N. E. 832.

It has been held that an index is simply a facility for learning the contents of a record, but not a part of the record itself, unless required by the law to be kept. *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Chatham v. Bradford*, 50 Ga. 327, 15 Am. Rep. 692; *Curtis v. Lyman*, 24 Vt. 338, 58 Am. Dec. 174. These cases arose upon a conflict of interest between third parties, owing to the failure of an officer to keep an index, owing to which fact some of them were misled, in cases where no index was required as a part of the record.

We are not called upon to determine whether they are so far public records as to constitute primary evidence without regard to any other fact, or facts, than their existence in a public office, though it is manifest that conditions might arise where they might become secondary evidence, as in case of the loss or destruction of the assessment rolls, though there is authority for their being regarded as public records. *Coleman v. Commonwealth*, 25 Grat. (Va.) 865, 23 Am. Rep. 711; *Herron v. McNery*, McGloin (La.) 108; *Bell v. Kendrick*, 25 Fla. 778, 6 South. 883; *Kyburg v. Perkins*, 6 Cal. 674.

A statement in 25 Grattan, whilst obiter, so aptly phrases the matter as to commend itself to our approval and judgment, at least as applied to the facts in this case: "Whenever a written record of the transaction of a public officer in his office is a convenient and an appropriate mode of discharging the

duties of his office, it is not only his right, but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not to the officer—it is the property of the state and not of the person, and is in no sense a private memorandum.”

It is said that a public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Commissioners v. Rodes*, 1 Dana (Ky.) 595; *Cyclopedic Law Dict.* The evidence in the case is all to the point that the indexes are indispensable to the discharge of the duties of the office.

It is said in *People v. Peck* (1893) 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, involving the question of the collection of statistical matter from which compilations are made and reports required to be made: “He is not to collect the facts merely to enable him to discharge his duty, but in the discharge of a duty.” Here the treasurer did not prepare the indexes in the discharge of a duty imposed upon him to make them, but to aid him, and those to succeed him, to discharge the duties of the office; but in the discharge of his duties he did invest the office which he held with facilities for the discharge of his duties which are highly essential in the efficient discharge of his duties, and in which the public, whose servant he was and is, are highly and deeply interested. Greater injury to the public would result from their removal than benefit could accrue to appellants, and we think it would be inequitable, when they have themselves created the situation, to allow them to disturb it. Because appellants were prevented from removing the cases and cards, it does not follow that their property is taken without just compensation, nor are they deprived of their property without due process of law. They cannot complain of a condition of their own creating.

The city has assumed to retain the property under circumstances rendered reasonable by the course of appellants respecting it, and in which the public interest is deeply affected and concerned, and it would be inequitable to allow them to take it.

The judgment is affirmed.

(175 Ind. 125)

HAZLITT v. STATE. (No. 21,687.)

(Supreme Court of Indiana. Jan. 25, 1911.)

CRIMINAL LAW (§ 1130*) — APPEAL — BRIEF — REQUISITES.

Where no part of the evidence is set out in the briefs and only an excerpt from one of

the instructions is set out therein, the court on appeal is not bound to search the record for errors, and under rule 22 (55 N. E. v), prescribing the requisites of appellant's brief, it may affirm the judgment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1130.*]

Appeal from Circuit Court, Wayne County; H. C. Fox, Judge.

Lida Hazlitt was convicted of practicing medicine without a license, and she appeals. Affirmed.

Robbins & Robbins and W. A. Bond, for appellant. James Bingham, Ray K. Shively, A. G. Cavins, E. M. White, Gavin, Gavin & Davis, Wm. H. Thompson, and Chas. L. Ladd, for the State.

MYERS, C. J. Appellant was charged upon affidavit with practicing medicine without a license, tried by a jury and convicted under section 8400, Burns' Ann. St. 1908. The errors assigned are in overruling her motion to quash the affidavit and in overruling her motion for a new trial. No question is here presented as to the affidavit.

No part of the evidence is set out in the briefs in any form, and no instruction is set out; the most that is done is to set out an excerpt from one of the instructions, thus leaving the court to search for alleged error. We would be justified and under rule 22 (55 N. E. v) required to affirm the judgment without further comment. *Radley v. State*, 92 N. E. 541.

We have, however, in view of the character of this case, examined the evidence and the instructions. The evidence makes a case similar to that before us in *Witty v. State*, 90 N. E. 627, 25 L. R. A. (N. S.) 1297, with the exception of a lack of advertising here, and to that presented in *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190. The instructions are quite as favorable to appellant as she could ask; there was no prejudice to the substantial rights of the appellant. See *Burns' Ann. St. 1908*, § 8409; *Witty v. State*, supra, and cases. *Groff v. State*, 171 Ind. 547, 85 N. E. 769; *State v. Webster*, 150 Ind. 607, 50 N. E. 750, 41 L. R. A. 212; *Benham v. State*, 116 Ind. 112, 18 N. E. 454; *State v. Buswell*, 40 Neb. 153, 58 N. W. 728, 24 L. R. A. 68; *O'Neil v. State*, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. (N. S.) 762; *In re First Church of Christ*, 205 Pa. 543, 55 Atl. 536, 63 L. R. A. 411, 97 Am. St. Rep. 753; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *State v. Marble*, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835, 106 Am. St. Rep. 570; *Bibber v. Simpson*, 59 Me. 181; *Territory v. Mewman*, 13 N. M. 98, 79 Pac. 706, 818, 68 L. R. A. 783.

The judgment is affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(175 Ind. 118)

ILLYES et al. v. WHITE RIVER LIGHT & POWER CO. (No. 21,655.)

(Supreme Court of Indiana. Jan. 24, 1911.)

1. APPEAL AND ERROR (§ 1078*)—WAIVER OF ERROR.

Errors specified as to which no authorities are cited and which are not argued are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. EMINENT DOMAIN (§ 7*)—STATUTES.

The power of eminent domain cannot be exercised unless clear legislative authority can be shown for so doing.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 24-26; Dec. Dig. § 7.*]

3. EMINENT DOMAIN (§ 58*)—STATUTES.

A statute authorizing an electric company to appropriate such amount of land as may be necessary to the carrying out of its objects enables it to take such an amount as may be reasonably necessary under the circumstances.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 58.*]

4. NAVIGABLE WATERS (§ 37*)—NONNAVIGABLE STREAM—LAND UNDER WATER.

A description of land bounding it on a non-navigable stream shows the boundary to be the thread of the stream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 214; Dec. Dig. § 37.*]

5. EMINENT DOMAIN (§ 318*)—STATUTES—EVIDENCE.

A condemnation of upland abutting upon a body of water embraces the riparian right of occupancy of submerged land, although no specific mention is made of riparian rights.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 841-846; Dec. Dig. § 318.*]

6. BOUNDARIES (§ 3*)—RELATIVE WEIGHT OF CONFLICTING ELEMENTS.

In descriptions of real estate, monuments first control, then courses and distances, and, lastly, the designated quantity.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 8.*]

7. EMINENT DOMAIN (§ 191*)—CONDEMNATION PROCEEDINGS—PLEADING.

The fact that a complaint to condemn lands avers that the tract contains only 65.5 acres, when in fact the tract contains 10 or 12 acres more within the monuments designated, does not render the complaint insufficient, nor affect the duties of the appraisers to take into consideration, in making their award, all the land embraced within the designated monuments.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 191.*]

8. EMINENT DOMAIN (§ 194*)—PROCEEDINGS—PLEADING—AMENDMENTS.

The trial court has power, if the description of the land is incorrect or uncertain, to permit an amendment of the complaint in condemnation proceedings, even after verdict.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 523; Dec. Dig. § 194.*]

9. STATUTES (§ 113*)—SUBJECT AND TITLE.

Acts 1907, c. 172, entitled "An act authorizing the formation of companies for the manufacture and sale of electricity for heating, lighting and power purposes to towns and cities and to the public, defining their powers," is not in violation of Const. art. 4, § 19, requiring that statutes shall embrace but one subject and matters properly connected therewith, which

shall be expressed in the title, because it contains provisions permitting such companies to condemn lands.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.*]

10. EMINENT DOMAIN (§ 196*)—EFFORT TO AGREE ON PRICE.

In condemnation proceedings, the evidence held to show a bona fide effort on the part of the plaintiff to agree on the purchase of the land, and an inability to agree, as required by Acts 1906, c. 48, as a condition precedent to the right to condemn.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 196.*]

Appeal from Circuit Court, Hamilton County; Meade Vestal, Jr., Judge.

Condemnation proceedings by the White River Light & Power Company against Emma A. Illyes and another. From an order overruling objections and appointing appraisers to assess damages, defendants appeal. **Affirmed.**

Fred E. Hines, for appellants. Ralph K. Kane and Thos. E. Kane, for appellee.

MORRIS, J. Appellee is a corporation organized in 1906, under the manufacturing and mining act, to manufacture electricity, to supply light, heat, and power to persons and municipalities, and for the purpose of securing power for such manufacture to erect and maintain a dam upon White river in Hamilton county.

In 1907 the General Assembly enacted a law authorizing the formation of companies for the manufacture and sale of electricity for lighting, etc., to cities and towns. Acts 1907, p. 277. Section 8 of that act authorized such corporations to condemn lands of individuals for dams and other structures, such condemnation to be made under the eminent domain act of February 27, 1906. By section 10 of this act the grant of the powers therein enumerated were limited to companies organized to produce electricity by means of water power only. In 1909 the above section was amended to read as follows: "Sec. 10. The provisions, powers and privileges contained within this act shall extend to and be used by all companies organized to produce electricity: Provided, however, that no condemnation shall ever be made by virtue of this law of any lands lying within the corporate limits of any city or town: Provided, nothing herein contained shall be construed to affect in any manner the rights or powers of any company or corporation organized or existing under or by virtue of the provisions of any other law of this state." Acts 1909, p. 276.

Appellee filed its complaint in the Hamilton circuit court to condemn a tract of land in said county owned by appellant Emma A. Illyes, which, it averred, it intended to use as a part of its reservoir above its dam, in process of construction, for storing water to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be used by appellee in generating electricity with which it intended to furnish light, heat, and power to the citizens of Noblesville and vicinity. Notice was served on appellant Emma A. Ilyes, and her coappellant, Peter P. Ilyes, who is her husband. A special appearance was entered by appellants, who filed a motion to quash the summons, which motion was overruled. Thereupon, on December 10, 1909, appellee, pursuant to leave granted by the court, filed an amended complaint, which contained the allegations above named. On December 24, 1909, appellants filed their written objections to the appointment of appraisers. The cause was submitted to the court for trial, which resulted in the court overruling the objections and appointing appraisers to assess the damages. From that interlocutory order this appeal is prosecuted.

Appellants specify 17 errors, but fail to support a number of them either by argument or the citation of authorities. The alleged errors, not waived, will be discussed in their order.

Appellants contend, first, that acts conferring the power of eminent domain are to be strictly construed, and, second, that the complaint does not state facts sufficient to show that appellee has the power to exercise the right to appropriate appellants' land.

The power of eminent domain has been characterized as a "high and dangerous one," and it cannot be exercised by appellee unless clear legislative authority can be shown for so doing. *Kinney v. Citizen Water & Light Co.* (1909) 173 Ind. 252, 90 N. E. 129, and cases cited; *Morrison v. Indianapolis, etc., R. Co.* (1906) 166 Ind. 511, 78 N. E. 961, 77 N. E. 744; *Board v. Jarnecke* (1905) 164 Ind. 658, 74 N. E. 520. Appellants' contention that the complaint is insufficient under section 4595, Burns' Rev. St. 1908 is correct. But appellee is not asserting any such right by reason of the provisions of that act, but is claiming the power of eminent domain in this case under the provisions of the act of 1907, which was amended as to section 10 thereof in 1909 as hereinbefore set out. Section 8 of the act of 1907 expressly authorizes companies organized under the provisions of that act to manufacture and sell electric current to towns and cities for the purpose of supplying heat, light, and power, to acquire, own, maintain, and operate all necessary and convenient lands and dams, and, to this end, to appropriate and condemn lands of individuals necessary to the carrying out of its objects; and expressly including also the overflowage by backwater from its dams. Appellee could not have availed itself of the privileges conferred by the act of 1907, as originally enacted; but the General Assembly of 1909 amended section 10 of the act so as to extend to all companies organized to produce electricity the powers and privileges contained in the act of 1907. It is provided, however, in said amendment, that

nothing therein contained "shall be construed to affect in any manner the rights or powers of any company or corporation organized or existing under or by virtue of the provisions of any other law of this state." It is evident that by this proviso the Legislature intended merely that no power or right held by any electrical company previous to the amendment, by virtue of the provisions of any other law of the state, should be abridged. The complaint states all the necessary facts to bring appellee within the express provisions of the act of 1907.

It is next contended that the evidence does not show a necessity for taking the amount of land described in the complaint. The statute authorizes appellee to appropriate such amount of land as may be "necessary" to the carrying out of its objects. This enables it to take such an amount as may be reasonably necessary under the circumstances. *Lewis, Eminent Domain* (2d Ed.) § 279. There was evidence tending to show that by the construction of a concrete dike, at a probable expense of \$100,000, the use of a great portion of appellants' land sought to be appropriated in this action might be avoided; but the evidence supports the decision of the trial court that it was reasonably necessary, under the circumstances, for appellee to take the amount of land designated in its complaint.

It is the next contention of appellants that the land described in the complaint extends only to the low-water mark of the river, when, in fact, the appellant Mrs. Ilyes owns the land to the thread of the stream; that between low-water mark and the thread of the stream there are 10 or 12 acres of land owned by appellant, which will be overflowed, but is not embraced in the description.

In the amended complaint and interlocutory order, so much of the description as pertains to this matter is as follows: "Thence south on said line to White river; thence up the meanderings of said White river to the north line of section 21, same township and range; thence west to the place of beginning." This description includes the land to the thread of the stream. White river, in Hamilton county, is not navigable, and the title of riparian proprietors extends to the thread of the river. *Ross et al. v. Faust et al.* (1876) 54 Ind. 471, 23 Am. Rep. 655; *Indianapolis Water Co. v. Kingan* (1900) 155 Ind. 476, 58 N. E. 715; *Lewis, Eminent Domain* (2d Ed.) § 60; *Sizor v. City of Logansport* (1898) 151 Ind. 626, 50 N. E. 377, 44 L. R. A. 814.

A condemnation of upland abutting upon a body of water embraces the riparian right of occupancy of submerged land, although no specific mention is made of riparian rights. *Hanford et al. v. St. Paul & D. R. Co.* (1890) 48 Minn. 104, 44 N. W. 1144, 7 L. R. A. 722.

In descriptions of real estate monuments first control, then courses and distances, and,

lastly, the designated quantity. *Allen v. Kersey* (1885) 104 Ind. 1, 3 N. E. 557. The fact that the complaint avers that the tract appropriated contains only 65.5 acres, when, in fact, the tract contains 10 or 12 acres more within the monuments designated therein, does not render the complaint insufficient, nor affect the duties of the appraisers to take into consideration, in making their award, all the land embraced within the designated monuments. Even if this were not true, the trial court has power, if the description of the land is incorrect, indefinite, or uncertain, to permit an amendment of the complaint, even after verdict. *Darrow v. Chicago, etc., R. Co.* (1907) 169 Ind. 99, 81 N. E. 1081.

Appellants further contend that the act of 1907, under which appellee derives its grant of the power to condemn this land, is unconstitutional because the subject of the act is not embraced in the title. Section 19, art. 4, of our Constitution requires every act to embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. The title of the act in question reads as follows: "An act authorizing the formation of companies for the manufacture and sale of electricity for heating, lighting and power purposes to towns and cities and to the public, defining their powers." The latter clause is general in its nature, and was calculated to give notice to the members of the General Assembly, and to the public, that the body of the act designated and defined certain powers conferred on such corporations. There is nothing restrictive in the title, nor anything to mislead, and it does not embrace more than one subject and matters properly connected therewith, and, consequently, does not violate the said provision of our Constitution. *Mull v. Indianapolis, etc., T. Co.* (1907) 169 Ind. 214, 81 N. E. 657; *Advisory Board v. State* (1906) 170 Ind. 439, 85 N. E. 18; *State v. Bailey* (1901) 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; 26 Am. & Eng. Ency. Law (2d Ed.) 582; *Bright v. McCullough* (1866) 27 Ind. 223; *Cooley, Const. Lim.* (5th Ed.) 179.

The sixth contention of appellants is that there was no bona fide effort made to agree to purchase the land before bringing condemnation proceedings. The evidence shows that appellee offered Mrs. Illyes \$7,925.40 for the land, and tendered her this amount of money therefor; but she refused to take less than \$200 per acre. The amended complaint states that the quantity of land is 65.5 acres. The \$7,925.40 was the amount, plus 6 per cent. interest, for which Mrs. Illyes had theretofore executed a contract to convey the land to the old Noblesville Hydraulic Company. Appellee made three ineffectual attempts to purchase the land, but Mrs. Illyes refused to consider any offer below \$200 per

acre notwithstanding her former option (then expired), given the old hydraulic company, to purchase the same for less than \$7,925.40. The evidence discloses a bona fide effort on the part of appellee to agree on a purchase price for the land, and an inability to agree. The appellee had done all, in that respect, that the law requires. Acts 1905, p. 59; *Lewis, Eminent Domain* (2d Ed.) § 302.

There is no error in the record warranting a reversal, and the judgment is affirmed.

(47 Ind. App. 7)

BRIER v. MANKEY. (No. 6,893.)

(Appellate Court of Indiana, Division No. 1.
Jan. 25, 1911.)

1. APPEAL AND ERROR (§ 274*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—EXCEPTIONS—SCOPE AND EFFECT.

Where the record shows that the court sustained demurrers to each of the first, second, and third paragraphs of the complaint, to which rulings plaintiff by counsel excepts, the exception must be regarded as an exception to the ruling in sustaining a demurrer to each of the paragraphs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274; Trial, Cent. Dig. §§ 691-693.]

2. APPEAL AND ERROR (§ 766*)—DISPOSITION OF CAUSE—REVERSAL—FAILURE TO BRIEF ASSIGNMENT.

Where the ruling of the court in sustaining demurrers to each of the first, second, and third paragraphs of a complaint is excepted to, and the appellee presents a brief in support of the ruling as to the first paragraph, but makes no reference to the ruling as to the other paragraphs, the appellate court is authorized to reverse the judgment without prejudice to either party, but such action is a matter of discretion, and where the appellee appeared to have acted in good faith on the theory that the exception was a joint one, the appellate court will consider all of the paragraphs on their merits.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8101; Dec. Dig. § 766.*]

3. FRAUD (§ 59*)—DAMAGES—MEASURE.

The measure of damages for fraud in the sale of personal property is the difference between the actual value at the time of sale and its value had the property been as represented.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-64; Dec. Dig. § 59.*]

4. FRAUD (§ 47*)—ACTION—PLEADING—DAMAGES.

Allegations in a complaint that plaintiff was induced to bid and pay for personal property \$206 by reason of a misrepresentation by defendant, that the property was worth only \$195, and that plaintiff was damaged in the sum of \$100, are sufficient to show damage to plaintiff; the amount to be awarded being a matter of proof.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 42; Dec. Dig. § 47.*]

5. PRINCIPAL AND AGENT (§ 156*)—LIABILITY TO THIRD PERSONS—SPECIAL AGENTS.

The rightful acts and authority of a special agent to bind his principal by representations on the sale of personalty are circumscribed by the authority conferred upon him by his prin-

cial, and all other acts are mere nullities so far as the principal is concerned.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583-587; Dec. Dig. § 158.*]

6. FRAUD (§ 34*)—ACTION—RIGHT OF ACTION.

A buyer on whom fraud and deceit are practiced by the seller, and by one with authority from the seller, to the buyer's damage, is entitled to retain what he has received and sustain an action for the damages suffered by reason of the fraud practiced.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 29; Dec. Dig. § 34.*]

7. PRINCIPAL AND AGENT (§ 104*)—RIGHT TO ACT BY AGENT.

Since one can do by agent what he can do as owner or in his own right, a seller, having the right to warrant the quality of the personalty sold, may bind himself by such warranty by an agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 294-297; Dec. Dig. § 104.*]

8. PRINCIPAL AND AGENT (§ 189*)—AUTHORITY OF AGENT—PLEADING.

Allegations that a seller represented animals in advertisements of a public sale, that the seller by his agent made the same representations at the sale, and that the agent had full charge and represented the seller in the business generally connected with the public sale, including the handling and exhibiting of the animals, sufficiently showed that the agent, at the time of making the representations, was engaged in carrying out his principal's business pursuant to his real or apparent agency.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 189.*]

Appeal from Circuit Court, Warren County; James F. Sanderson, Judge.

Action by Solon Brier against John Mankey. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chas. R. Milford, for appellant. McCabe & McCabe, for appellee.

MYERS, C. J. Appellant brought this action against the appellee to recover alleged damages sustained on account of the purchase of two mules at a public sale held by the appellee. The complaint was in three paragraphs, to each of which a demurrer for want of facts was sustained, and judgment was rendered in favor of appellee and against appellant for costs. The ruling of the court in sustaining a demurrer to each of said paragraphs is assigned as error.

Appellee first insists that appellant's exception to the ruling on demurrers was joint, and therefore if either paragraph of the complaint was insufficient, the judgment must be affirmed, citing *Shryer v. Louisville, etc., Traction Co.*, 35 Ind. App. 641, 74 N. E. 902. But since the ruling in that case, which was expressly made to rest upon the ruling theretofore made by the Supreme Court in two cases, which cases have since been disapproved in *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524, and *Honey v. Guillaume*, 172 Ind. 552, 88 N. E.

937, the case of *Shryer v. Louisville, etc., Traction Co.*, supra, is no longer precedent, and on that point it is now overruled. The record shows, "and the court being duly advised in the premises, does now sustain the demurrers to each of the first, second, and third paragraphs of plaintiff's complaint, to which ruling of the court plaintiff by counsel excepts." The exception saved by the appellant in this case must be regarded as an exception taken to the ruling of the court in sustaining a demurrer to each of the paragraphs. *Bessler v. Laughlin*, 168 Ind. 38, 79 N. E. 1033; *City of Decatur v. McKean*, 167 Ind. 249, 79 N. E. 982; *Honey v. Guillaume*, supra; *Quick v. Templin*, 42 Ind. App. 151, 85 N. E. 121; *United States Cement Co. v. Koch*, 42 Ind. App. 251, 85 N. E. 490; *Johnson County Sav. Bank v. Kramer*, 42 Ind. App. 548, 86 N. E. 84. Appellee has presented us with a brief in support of the ruling of the court as to the first paragraph of the complaint, but has made no reference to the ruling of the court as to the other paragraphs. For this omission on the part of appellee, we would be authorized to reverse the judgment "without prejudice to either party." *Miller v. Julian*, 163 Ind. 582, 72 N. E. 588; *People's Nat. Bank v. State*, 159 Ind. 353, 65 N. E. 6. Assuming that appellee acted in good faith in briefing the case upon the theory of a joint exception, and to reverse a judgment for the failure of appellee to file a brief is a matter within the discretion of the court (*Cobe, Receiver, v. Malloy*, 44 Ind. App. 8, 88 N. E. 620; *Wysong v. Sells*, 44 Ind. App. 238, 88 N. E. 954), and as the record is but 14 pages in length, we have concluded to consider all of the paragraphs upon their merits.

In the first paragraph of the complaint, in substance, it appears that appellee in January, 1905, was the owner of certain personal property, including two mules, located in Warren county, Ind., which he advertised for sale at public auction on a certain day, and said sale was had on that day; that prior to said sale he gave notice thereof in the newspapers published in said county, and by posters, wherein it stated that said mules were eight years of age, when, in fact, they were respectively of the ages of 11 and 12 years; that at the direction of the appellee said sale was in charge of his son, who had full charge of the same, and full power to manage and control the same as he deemed best, and to make such terms and conditions with the purchasers as he deemed best regarding the animals and property so sold; that appellant attended said sale, and that the defendant by his said agent, the latter having full authority so to do, warranted and represented to the appellant that each of said mules was only eight years of age; that appellant was ignorant of the true age of said mules, and had no opportunity to

then and there examine them and determine the fact as to their age for himself, but believing said statements to be true, relied upon the same, and was thereby induced to and did bid for said animals, and purchased them at and for the price of \$295; that said agent's statement regarding the age of said mules was not true, and that he knew it was not true, and that he made the same for the purpose of deceiving the appellant as to their true age; and "that at that time said mules were not worth said \$295, but that because of the difference in age alone they were not worth to exceed \$195 at the time they were purchased as aforesaid by the plaintiff of defendant"; that appellant by reason of the premises was damaged in the sum of \$100, for which he demands judgment.

In the second paragraph the same facts appear as in the first, with the addition that the 12-year old mule was blind in one eye and lame in one fore foot, and that the 11-year old mule was stringhalted in one hind leg; and "that at said sale the defendant, by said agent, who was then and there acting in the line and scope of his agency, caused said mules to be handled, driven, led, walked, and made to run in such a manner as to cause the true condition of the animals to be concealed and the defendant, by said agent, also caused certain tricks, deceptions, and artifice to be used, the nature of which the plaintiff does not know and is therefore unable to describe, but which are known to said agent," and which were thus employed for the purpose of deceiving the bidders for said mules at said sale including this appellant; that appellant was deceived thereby as to the true condition of said animals, and caused to believe them to be sound and in good condition and free from lameness, blindness, and the defect of stringhalt; that the appellant did not know of any of said defects prior to his purchase of said mules, nor was he aware of any of the tricks or deceptions employed by the appellee through his said agent; "that said mules, by reason of the defects as above described and because of their age being greater than as represented and warranted, were then and there worth less than said price as paid for them by plaintiff in the sum of \$140, wherefore plaintiff has been damaged," etc.

The third paragraph sets up practically the same facts as are exhibited in the first and second paragraphs, but with more care in its preparation. In addition it is alleged "that said defects in said animals of blindness, lameness, and the disease of stringhalt were not patent and could not be discovered except by close, careful, and thorough inspection and trial of said animals, by persons skilled in buying horses and mules and having a thorough knowledge of a manner and method of detecting defects and diseases in them." Appellant denies any knowledge of such defects and alleges that he was de-

ceived by the tricks or deception used by the appellee through his said agent, by the manner in which said animals were handled, and that he was thereby induced to bid for the same, etc. He further alleges "that said mules by reason of their defects as above described, and because of said misrepresentation as to their age, were then and there worth only \$150. That by reason of the premises the plaintiff has been damaged," etc.

The objections urged by the appellee to the first paragraph apply with equal force to each of the other paragraphs of the complaint. He first contends that the complaint proceeds upon an erroneous theory as to the measure of damages. On this question he asserts that in a case like the one before us the proper measure of damages, where the purchaser retains the property, is the difference between the actual value of the property at the time of the sale and its value had the property been as represented. This statement of the law is correct. *Nysecwander v. Lowman*, 124 Ind. 584, 24 N. E. 355. But as we see this case, the proposition announced by the appellee is more properly applicable to the proof, as a guide for the jury in fixing the amount of damage. *Gray v. Rich*, 10 Ind. 430; *Doran v. Eaton*, 40 Minn. 35, 41 N. W. 244. While it does not necessarily follow from the fact that the animals were worth only \$195, they would have been worth more had they been as represented, yet this fact, in connection with the fact that appellant was induced to bid and pay therefor \$295 by reason of a certain misrepresentation, and that he was thereby damaged in a sum stated, warrant us in holding each paragraph in this particular sufficient to require an answer.

It is also insisted that the facts show that said sale was in the hands of a special agent for the purpose of selling the property, and, this being true, such agent was without authority to warrant the quality of the animals on behalf of his principal.

It is provided by statute that a statement of the facts constituting a cause of action, in plain and concise language, and in such manner as to enable a person of common understanding to know what is intended, must be regarded as sufficient. Section 343, cl. 2, *Burns' Ann. St.* 1908.

The law applicable to that class of persons known as special agents is no longer in doubt, and if we regard the alleged agent in this case as belonging to that class, then his rightful acts and authority in the premises to bind his principal would be circumscribed by the authority conferred upon him by his principal, and all other acts would be mere nullities, in so far as his principal is concerned. In such cases the general rule requires a party dealing with such an agent, in the absence of circumstances giving him implied power, to ascertain the extent of his

authority, and, if he does not, he must abide the consequences. Story on Agency (9th Ed.) § 128; Clark & Skyles on Agency, 566, § 242.

The authors, Clark & Skyles, page 570, make the following general observation: "Any verbal statements and representations of an agent having authority to sell, and made at the time of selling personalty, and constituting an incident in, or inducement to, the trade, which amount to a warranty of any quality in the thing sold, will bind the principal." But in a case like the one before us, we think the better rule is that "where the agent is employed by a private person only as a special agent to sell and deliver the horse, he is not authorized to bind his employer by a warranty of quality, and to do so, authority in fact must be shown." Id. pages 570, 571; Court v. Snyder, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.

Appellant, in this case, proceeded upon the theory of fraud and deceit practiced upon him by the appellee, and by one with authority from the appellee so to do, to his damage. In such cases the law authorizes such defrauded party to retain that which he received, and sustain an action for the damages suffered by reason of the fraud practiced by the seller. Love v. Oldham, 22 Ind. 51. Appellee was the owner of the mules in question. Appellant alleges, in effect, that the appellee, by his agent authorized so to do, misrepresented the mules to him, for the purpose of inducing him to bid for and purchase them at a price largely in excess of their true value. The alleged agent had authority to sell. The misrepresentation and deceitful practices are alleged to have been made and done at the time, and while the agent was actually selling the animals. It must be conceded that the appellee, as owner of the animals, had the right to warrant their quality, and to bind himself by such warranty. Therefore, if appellee had this right, as owner, we see no good reason why he might not do the same thing by an agent, for it is quite elementary that "whenever a person has a power, as owner or in his own right, to do a thing, he may do it by an agent." Story on Agency (9th Ed.) § 6.

We next inquire, What authority, if any, did appellee either expressly or impliedly confer upon his agent? This question is to be answered from the pleaded facts measured by the rules of pleading.

Looking to each of the paragraphs, we find that the age of the animals was misrepresented, not only by appellee in the way of public advertisements, but it is alleged "that the defendant, by his agent," also made the same representation to this appellant. In the case of Gray v. Rich, supra, it was said: "If the defendant agreed to sell the plaintiff a certain article of property to be of a par-

ticular description, to wit, eight years old, for a fixed price, the plaintiff had a right to expect it to be of that age; for it was one of those facts, where reliance must, to some considerable extent, be placed upon the representations of the owner, and if he fraudulently deceived the purchaser, as averred, he must be willing to respond in such damage as resulted."

In addition to the allegation that the appellee, by his agent, did the things charged as fraudulent and deceitful, it appears that said agent had full charge and represented the appellee in the business, generally, connected with the public sale of the property in question, including the handling and exhibiting the animals for appellee to prospective purchasers, and that the appellant had no opportunity to examine them for himself until after the sale. From these facts and others appearing in each of the several pleadings, we think it sufficiently appears that the agent, at the time of the doing of the things and acts as charged, was engaged in carrying out his principal's business, pursuant to his real or apparent agency.

In this case it seems to us that the facts, although awkwardly pleaded, show that said agent was merely carrying out and communicating to the purchasers the will and scheme of the appellee, and if this be true, it does not follow that the agent was acting upon his own initiative, but with authority from the appellee to do the acts and make the declaration charged in the complaint. For in all the principal allegations charging misconduct the form used is, "that the defendant, by his agent," did, etc. If the agent was in fact acting under the instructions from the appellee, then it cannot be said that the appellee was no more than silent and entitled to protection. If he be more than silent, either by acts, words, or studied efforts to prevent others from learning the facts then known to him, which would lessen the value of the property he would sell, then the transaction would be tainted with fraud, and the purchaser entitled to his remedy. The demurrers should have been overruled.

Judgment reversed and cause remanded, with instructions to overrule the demurrer to each paragraph of the complaint, and for such other proceedings not inconsistent with this opinion.

DANIELS v. BRUCE et al. (No. 7,888.)¹
(Appellate Court of Indiana, Division No. 2
Jan. 25, 1911.)

1. JUDGMENT (§ 16*) — VALIDITY — JURISDICTION OF COURT.

If the circuit court to which a petition for the sale of realty to pay debts of a decedent's estate was transferred had no jurisdic-

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

²Rehearing denied. Superseded by opinion in Supreme Court, 96 N. E. 569.

tion of the subject-matter, the judgment of the court was mere nullity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 22, 24; Dec. Dig. § 16.*]

2. JUDGMENT (§ 261*)—PRESENTATION OF QUESTIONS IN LOWER COURT—MOTION IN ARREST OF JUDGMENT.

Jurisdiction of the subject-matter may be raised by motion in arrest of judgment in the court below.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 261.*]

3. APPEAL AND ERROR (§ 185*)—PRESENTATION OF QUESTIONS IN LOWER COURT—NECESSITY—JURISDICTION.

A judgment by a court without jurisdiction is void, and may be questioned at any time by the court on its own motion, and may be presented on appeal without first having been called to the attention of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1168; Dec. Dig. § 185.*]

4. EXECUTORS AND ADMINISTRATORS (§ 383*)—SALES UNDER ORDER OF COURT—JURISDICTION OF COURT—CHANGE OF VENUE.

Under Decedents' Act 1881, § 111 (Burns' Ann. St. 1908, § 2852), authorizing an administrator or executor to file his petition in the circuit court issuing his letters, for the sale of the real estate to pay debts of the deceased, and Burns' Ann. St. 1908, § 2863, providing that the petition for such sale shall remain pending on the docket until the real estate, or so much as may be necessary, be sold for the payment of debts and liabilities, a petition to sell real estate to pay debts being but an incident to the settlement of the estate, and no independent action being maintainable for the purpose, must be determined by the court issuing the letters, and the venue cannot be changed to another circuit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1372-1375; Dec. Dig. § 383.*]

5. COURTS (§ 24*)—NATURE OF JURISDICTION—CONSENT OF PARTIES—SUBJECT-MATTER.

Though consent of the parties will give the court jurisdiction over them, jurisdiction of the subject-matter is not acquired by consent, but by law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Proceedings by Kate B. Daniels, administratrix de bonis non with the will annexed of the estate of William P. Daniels, against Abby D. Bruce and another, for the sale of real estate to pay debts owing by the estate. From the judgment, the petitioner, individually and as administratrix, appeals. Reversed, with directions.

Walker & Walker, Woodfin D. Robinson, and Wm. E. Stilwell, for appellant. Spencer, Brill & Hatfield, John H. Miller, Lucius Embree, Morton C. Embree, E. B. Green, H. M. Phipps, Theodore G. Risley, and Joel E. Williamson, for appellees.

ADAMS, J. This proceeding was brought by Kate B. Daniels, administratrix de bonis non with the will annexed of the estate of William P. Daniels, deceased, to sell real

estate of decedent to pay debts owing by the estate of decedent.

The original proceeding was commenced in the Vanderburgh circuit court by the executor of the will of the deceased. Upon motion and affidavit of appellee Abby D. Bruce, the venue was changed to the Posey circuit court. Afterwards, upon the written agreement of the parties, the venue was changed from the Posey circuit court to the Vanderburgh superior court and then transferred to the Vanderburgh circuit court. Subsequently, upon motion and affidavit of appellee Sarah D. Moore, the venue was changed to the Posey circuit court and from that court, "by consent of parties," the case was taken to the Gibson circuit court, where it was finally heard and determined.

The amended petition upon which issues were formed and upon which the case was heard was filed in the Posey circuit court. As no question is presented upon the pleadings, it is unnecessary to make further statement of the issues.

The Gibson circuit court found that the estate of the decedent owed certain debts, and that certain real estate should be sold for the payment of such debts as the court found were due and owing by the estate.

The errors assigned in this court and relied upon for reversal are (1) the court erred in overruling appellant's motion in arrest of judgment; (2) the court erred in overruling appellant's motion for a new trial; and (3) the Gibson circuit court did not have jurisdiction of the subject-matter of the action.

Kate B. Daniels, in her individual capacity, has also appealed from the judgment of the Gibson circuit court and assigns the same errors. The appeal of Kate B. Daniels is numbered in this court 7,389, and the record being identical with that in No. 7,388, said appeal was by order of court consolidated with this case, and both will be considered together in this opinion.

By the first and third specifications of error the jurisdiction of the Gibson circuit court is called in question. It appears from the record that letters testamentary in said estate issued out of the Vanderburgh circuit court, and that the petition to sell the real estate was filed originally in said court.

The controlling question in this appeal relates to the right to a change of venue from the Vanderburgh circuit court to the circuit court of another county in a proceeding to sell real estate to pay debts of an estate. It is insisted on the part of appellant that the Vanderburgh circuit court not only had original jurisdiction in this case, but had exclusive jurisdiction. On the other hand, appellees contend that a petition to sell real estate to pay debts is a "civil action," and is governed by the rules of procedure in such cases, where the statute does not prescribe a different rule. It

the Gibson circuit court had no jurisdiction of the subject-matter, then the judgment of the court was mere nullity.

The statute authorizing a petition to sell real estate is section 111 of the Decedents' Act of 1881, being section 2852, Burns' Ann. St. 1908, and reads as follows: "Whenever an executor or administrator shall discover that the personal estate of a decedent is insufficient to satisfy the liabilities thereof, he shall, without delay, file his petition in the circuit court issuing his letters, for the sale of the real estate of the deceased, to make assets for the payment of such liabilities."

Prior to the enactment of this statute there was no law in this state requiring an administrator or executor to file such petition in the court granting his letters. The law in force relating to this matter was section 75 of the Decedents' Act of 1852 (2 Gav. & H. Rev. St. p. 506), and reads as follows: "Whenever any executor or administrator shall discover that the personal estate of the decedent is insufficient to pay the liabilities thereof the court having jurisdiction shall order to be sold the whole or any part of the real estate of the deceased. * * * " This statute gave rise to much doubt and uncertainty in the matter of jurisdiction.

The question first came up in the case of *Williamson v. Miles*, Adm'r; 25 Ind. 55. In that case it appeared that the common pleas court of Clay county issued letters of administration, and the petition to sell was filed in the common pleas court of Putnam county, as the real estate sought to be reached was located in Putnam county. In the course of its opinion, the court said: "The question is one of great practical importance, and has been one of much doubt and perplexity, both to the courts and the bar of the state. Statutory provisions may be found from which inferences may, perhaps, be drawn on either side, yet there is no positive statute on the subject. If it be legitimate, under such circumstances, to examine the reasons that should govern in fixing the rule, to aid us in determining the construction that should be given to the provisions of the statute from which, of necessity, a rule must be drawn, the arguments will be found equally conflicting. On the one side, it may be desirable that the court of the county where administration is granted, and in which the estate must be finally settled, should have the evidence upon its own records of the disposition of the estate, both real and personal, administered on or sold by the administrator, as a means of guarding the assets from waste, and compelling the proper and prompt application to the purposes of the trust. It would, ordinarily, also, be more convenient to the administrator, and frequently less expensive to the estate, that the application should be made to the court where the letters of administration are granted. Whilst, on the

other hand, it is perhaps equally desirable that the record of all proceedings and decrees, by which real estate is directed to be sold and the title transferred, should be found in the county where the real estate lies; and this would be more nearly in accordance with the principle that governs the venue in actions on kindred subjects." Again, it is said in the same opinion: "It is to be regretted that a question involving so many titles to real estate should have been left so long in doubt and uncertainty, for the want of a definite legislative enactment."

The statute of 1881 requiring the administrator to file his petition in the circuit court issuing his letters would seem to be in response to the suggestion made by the court in the foregoing case. In construing the later enactment, it is fair to assume that the Legislature intended to remedy the uncertainty which had theretofore obtained.

The immediate question, however, in this appeal is the right of a change of venue from the circuit court of the county in which the petition to sell was originally filed to the circuit court of another county. This question was properly presented by appellant in her first and third assignments of error.

Jurisdiction of the subject-matter may be raised by motion in arrest of judgment in the court below and by assignment of error on appeal. *Lowery v. State Life Ins. Co.*, 153 Ind. 100, 54 N. E. 442; *Debs v. Dalton*, 7 Ind. App. 84, 34 N. E. 236.

A judgment rendered by a court without jurisdiction is void, and may be questioned at any time by the court upon its own motion, and may be presented on appeal without first having been called to the attention of the trial court. Section 348, Burns' Ann. St. 1908; *Doctor v. Hartman*, 74 Ind. 221; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Huber v. Beck*, 6 Ind. App. 47, 32 N. E. 1025.

A petition to sell real estate to pay debts is but an incident to the settlement of the estate. No independent action can be maintained for this purpose. In the settlement of an estate the court has absolute jurisdiction over the personal estate, and conditional jurisdiction over the real estate, which may become absolute when it appears that the real estate, or any part thereof, is necessary to pay the debts of the decedent. In such event, the statute directs where the petition shall be filed; by whom it shall be filed; who shall be made parties defendant; and what shall be averred in the petition. It also prescribes the subsequent steps to be taken in the proceeding with particularity. It is also provided that "the petition shall remain pending on the docket until the real estate or so much as may be necessary be sold for the payment of debts and liabilities; and further sales may be ordered by the court from time to time without further petition or notice upon proof that the sales that are already made are in-

sufficient for that purpose." Section 2363, Burns' Ann. St. 1908.

From the foregoing it clearly appears that the statute which confers original jurisdiction in a case of this kind in the circuit court out of which letters of administration issue contemplates that the same court shall retain jurisdiction. The estate can only be settled by an adjudication of that court, and when the land is sold and the proceeds collected the administrator holds the same at the disposal of the court having jurisdiction of the estate.

Our attention has been called to the case of Scherer v. Ingberman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304, wherein it is held that a petition to sell real estate is a civil proceeding to the extent of permitting a change of judge. This does not aid appellees in their contention. The Vanderburgh circuit court is not a man; it is an institution. Judges come and go, but the Vanderburgh circuit court endures. However, the case of Scherer v. Ingberman, supra, has been limited by the later case of Bowen v. Stewart, 128 Ind. 507, 28 N. E. 168, 28 N. E. 73, in which it is said: "In that case (Scherer v. Ingberman), the administrator filed his petition to sell real estate for the payment of debts, and the litigation was between him and a remote grantee of some of the heirs, as to whether the real estate was subject to sale for the payment of debts. The litigation in that case under the issues was much nearer akin to an ordinary civil action than the proceeding under consideration, and we may here remark that we are not inclined to extend the doctrine of that case."

The case of Bowen v. Stewart, supra, denied the right of a change of venue, either from the judge or from the county, in a petition to remove an administrator. In that case the court said: "The appointment and removal of an administrator, and the dealings which he has with his trust, are so exclusively under the supervision of the judge of the court wherein the estate is pending for settlement that it is evident it was never the legislative intention that this supervision might be destroyed by the filing of an affidavit for a change of venue, or for a change of judge."

It is earnestly urged by counsel for appellees that as the change was taken from the Posey circuit court to the Gibson circuit court by the consent of all parties, and as the Gibson circuit court had jurisdiction of the subject-matter of estates and could hear and determine petitions for the sale of real estate in estate cases, there was jurisdiction not only over the parties, but over the subject-matter as well. It is true that consent will give the court jurisdiction over the parties, but jurisdiction over the subject-matter is not acquired by consent, but by law, and cannot be bestowed by agree-

ment of parties. *Lowery v. State Life Ins. Co.*, 153 Ind. 100, 54 N. E. 442. The Gibson circuit court has jurisdiction of the whole subject-matter of the settlement of decedents' estates, but this general class must be limited in petitions to sell real estate to estates where the letters have issued out of that court.

In the case of *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431, it is said: "There is * * * a difference between the subject of the court's jurisdiction and the subject-matter of the particular action, for the subject of the court's jurisdiction is a class; but the subject-matter of a particular case is a single thing, not a multitude of things."

The Vanderburgh circuit court having in the first instance assumed jurisdiction of the subject-matter of the petition to sell real estate, that jurisdiction remains unaffected, and the subsequent proceedings had in other courts up to and including the judgment of the Gibson circuit court were with our lawful warrant.

Judgment reversed, with directions to appellant to proceed in the Vanderburgh circuit court in a manner not inconsistent with this opinion.

(47 Ind. App. 30)

ALBAUGH BROS., DROVER & CO. v.
LYNAS et al. (No. 7,081.)

(Appellate Court of Indiana. Jan. 26, 1911.)

1. APPEAL AND ERROR (§ 294*)—PRESERVATION OF OBJECTIONS—NEW TRIAL.

Objections that the judgment is not supported by the evidence and is against the weight of the evidence are not questions for independent assignments of error, and are only available as causes for new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1727; Dec. Dig. § 294.*]

2. PLEADING (§ 201*)—DEMURRER TO SET-OFF OR COUNTERCLAIM—FORM.

A demurrer to an answer by way of set-off and counterclaim, "for want of facts to constitute a defense," is insufficient.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 473-479; Dec. Dig. § 201.*]

3. PLEADING (§ 201*)—DEMURRERS—GROUNDS.

The statute specifying grounds for demurrer must be substantially complied with.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 473-479; Dec. Dig. § 201.*]

4. APPEAL AND ERROR (§ 1078*)—BRIEFS—SETTING OUT PLEADINGS—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error to the overruling of a motion for a new trial is waived, as provided by Supreme Court rule 22 (55 N. E. vi), by the failure of the appellant to set out a copy or the substance of the motion in his brief.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

5. APPEAL AND ERROR (§ 762*)—REPLY BRIEF—OFFICE.

The purpose of a reply brief is not to supply parts of the record required by the Supreme

Court rule 22 (55 N. E. vi) to be set out in the appellant's original brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3097; Dec. Dig. § 762.*]

6. APPEAL AND ERROR (§ 762*)—REPLY BRIEF.

A reply brief filed more than six days after submission cannot serve as a supplementary brief or supply omissions of the original brief.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 762.*]

7. APPEAL AND ERROR (§ 766*)—REVIEW—NECESSITY.

Appellee having in his brief objected to appellant's failure to comply with Supreme Court rule 22 (55 N. E. vi), requiring a brief to set out parts of the record bearing on exceptions, the Appellate Court cannot refuse to consider the objections.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 766.*]

8. APPEAL AND ERROR (§ 1078*)—WAIVER OF QUESTIONS—INSUFFICIENT BRIEF.

All questions not set out in appellant's statement of points in his brief are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

9. APPEAL AND ERROR (§ 761*)—BRIEFS—SUFFICIENCY.

Stating under the head of "points and authorities" in a brief that the decision of the court below is not sustained by sufficient evidence and is contrary to law, and plaintiff should have been granted a new trial, is too indefinite to present any error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 761.*]

10. APPEAL AND ERROR (§ 1008*)—REVIEW—CONFLICTING EVIDENCE.

Under Act March 9, 1903, § 8 (Acts 1903, p. 341), authorizing a review of the evidence and a rendition of such judgment as may seem proper on the whole case, a decision of the trial court will be disturbed only when the evidence upon the controlling issue is documentary, by deposition or otherwise, of such conclusive character as to enable the court on appeal to say as a matter of law that the decision is erroneous, and conflicting testimony cannot be weighed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.*]

11. DAMAGES (§ 163*)—BURDEN OF PROOF.

One suing for breach of contract has the burden of proving damages in some amount.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.*]

On petition for rehearing. Judgment affirmed.

For original opinion, see 90 N. E. 908.

ADAMS, J. Appellant instituted this suit against the appellee George H. Lynas to recover damages for the alleged breach of a written contract. After the commencement of the suit, said Lynas conveyed certain of his properties to the other appellees, Sarah E. Lynas, Ethel Lynas, and Emma M. Tyrell. By amended and supplemental complaint, they were made codefendants.

Said complaint is in two paragraphs, and charges that on the 2d day of February, 1903, the appellant and appellee George H. Lynas entered into a written contract, which

is set out in full in the complaint. It is further charged that after having partly performed said contract appellee refused to further perform his part of the contract, to the plaintiff's damage in the sum of \$9,000. That for the purpose of defrauding, cheating, hindering, and delaying his creditors appellee George H. Lynas conveyed certain of his real estate, described, to the other appellees named herein, the first paragraph alleging that the conveyances were without consideration, and made with intent to defraud, and the second paragraph alleging the conveyance to be with the intent to defraud by appellee George H. Lynas, and knowledge of such intent and participation in said fraud by the other appellees. Appellees Sarah E. Lynas, Ethel Lynas, and Emma M. Tyrell filed answers in general denial to appellant's complaint. Appellee George H. Lynas filed answer in general denial and seven paragraphs of special answer. To the special answer appellant replied in seven paragraphs. A ninth paragraph of answer was afterwards filed, and by agreement all defenses thereto were admissible under general denial. Upon the issue thus formed trial was had by the court, resulting in a finding against appellant upon its complaint, and against appellee upon his cross-complaint, and that appellee recover costs.

The errors assigned and relied upon for reversal are (1) "the judgment of the trial court is not fairly supported by the evidence * * *"; (2) the same "is clearly against the weight of the evidence * * *"; (3 4, 5, and 6) the court erred in overruling appellant's demurrers to the fifth, sixth, seventh, and eighth paragraphs of answer, respectively; and (7) the court erred in overruling appellant's motion for a new trial.

That the judgment of the trial court is not fairly supported by the evidence, or is clearly against the weight of the evidence, are not questions for independent assignment of error, but are only available as causes for a new trial. *Hedrick v. Hall*, 155 Ind. 371, 373, 58 N. E. 257; *Leedy v. Capital Nat. Bank*, 35 Ind. App. 247, 73 N. E. 1000; *Robbins v. Magee*, 96 Ind. 174; *Migtaz v. Steiglitz*, 166 Ind. 361, 77 N. E. 400.

The third, fourth, fifth, and sixth specifications of error seek to question the sufficiency of the fifth, sixth, seventh, and eighth paragraphs of answer, respectively. None of said demurrers or the substance thereof are set out in appellant's brief, but an examination of the record discloses that each of said demurrers was "for want of facts to constitute a defense." The answers to which they were addressed being answers by way of set-off and counterclaim, no question is presented by said assignments for the decision of this court. The statute provides what shall constitute grounds for demurrer, and a substantial compliance therewith is required.

Kennedy v. Richardson, 70 Ind. 524; Flanagan v. Reitemier, 26 Ind. App. 243, 59 N. E. 389; Stoner v. Swift, 164 Ind. 652, 654, 74 N. E. 248.

Appellee insists that the seventh specification of error is waived by appellant on account of his failure to set out a copy of said motion or the substance thereof in their brief, as provided in the fifth subdivision of rule 22 (55 N. E. vi). This rule requires that a succinct statement of the record, fully presenting every exception or offer ruled upon, shall be fully set out in the brief of the complaining party, referring to the pages and line of the transcript. This rule has been construed, in many cases, to mean that briefs must be so prepared that all questions presented by the assignment of error can be determined from an examination of the briefs without looking at the record, and to the extent said rule is complied with the errors assigned will be determined, and others will be considered waived. Chicago, etc., R. Co. v. Wysor Land Co., 163 Ind. 288-294, 69 N. E. 546; McElwaine Richards Co. v. Wall, 159 Ind. 557, 559, 65 N. E. 753; Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242, 68 N. E. 170; Perry Stone Co. v. Wilson, 160 Ind. 435, 67 N. E. 183; Pittsburgh, etc., R. Co. v. Wilson, 161 Ind. 701, 68 N. E. 899. In appellant's reply brief the omission is recognized and the motion for a new trial is there fully set out. The purpose of a reply brief is not to supply the parts of the record required by the rule to be set out in appellant's original brief. "The rule that points not presented in a party's original brief shall be considered waived is reasonable and necessary, in order that the court and attorneys may be seasonably informed of the questions to be decided. It is also necessary, in order that the work of the court shall not be impeded, that there shall be a limit to the interchange of arguments by counsel." Eubank's Manual, § 191. As the reply brief in this case was filed more than sixty days after submission, it could not perform the office of a supplemental brief or supply the omissions of the original brief. Gates v. Baltimore, etc., R. Co., 154 Ind. 338, 341, 56 N. E. 722.

The appellee having in his brief directed attention to the failure of appellant to comply with the rule herein stated, it is not within the power of this court to ignore or arbitrarily refuse to consider the question thus raised. It is said in Magnuson v. Billings, 152 Ind. 177, at page 180, 52 N. E. 803, at page 804, that rules when adopted and published "have the force and effect of law, and are obligatory upon the court, as well as upon parties to causes pending before it." In the same case it is further said: "A rule of court is a law of practice, extended alike to all litigants who come within its purview,

and who, in conducting their causes, have the right to assume that it will be uniformly enforced by the court, in conservation of their rights, as well as to secure the prompt and orderly dispatch of business."

It is also urged by appellees that appellant has waived said specification of error in failing to specifically point out any infirmities under the head of "points and authorities." Appellant's seventeenth point is that "the decision of the court below is not sustained by sufficient evidence and is contrary to law, and plaintiff should have been granted a new trial." "All questions not set out in appellant's statement of points are waived. * * * Stating in the points that an instruction or ruling of the court is erroneous, or that a motion for a new trial is not supported by sufficient evidence, and the like, without giving any specific reason therefor, is too indefinite to present any error." Inland Steel Co. v. Smith, 168 Ind. 245, 252, 80 N. E. 538, 541; Pittsburgh, etc., R. Co. v. Lighteiser, 168 Ind. 438, 467, 80 N. E. 415; Kelley v. Bell, 172 Ind. 590, 599, 88 N. E. 53.

Appellant, in connection with the first and second assignments of error, asks this court to consider and weigh the evidence and render judgment as may seem right and proper on the whole case, as provided by section 8 of the act approved March 9, 1903 (Acts 1903, p. 341). This act has been construed in the case of Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, and held not to be mandatory; that the Legislature by this act did not contemplate a trial de novo, as this would require the court on appeal to exercise original as well as appellate jurisdiction in the same cause. The rule, as declared in Hudelston v. Hudelston, 164 Ind. 694, 74 N. E. 504, is that the decision of the trial court will only be disturbed when the evidence upon the controlling issue is documentary, by deposition or otherwise, of such a clear and conclusive character as to enable the court on appeal to say as a matter of law that such decision is erroneous. The case at bar was tried by the court, and the hearing occupied three days. The evidence, most of which was oral, takes up more than 200 pages of the record. The burden was upon the appellant to prove damages in some amount. We have examined the evidence and find the same conflicting on material matters. Without weighing the evidence of witnesses testifying at the trial, which we cannot do under the decisions, it is impossible to say that the cause was not determined upon its merits in the court below.

Judgment affirmed.

MYERS, C. J., and HOTTEL, FELT, and IBACH, JJ., concur; LAIRY, P. J., not participating.

(47 Ind. App. 50)

CITIZENS' NAT. BANK v. KLAUSS,
Treasurer. (No. 7,865.)(Appellate Court of Indiana, Division No. 2.
Jan. 27, 1911.)**1. TAXATION (§ 482*)—REVIEW OF ASSESSMENT—NOTICE.**

Where notice of the meeting of the county board of review as required by statute has been given, a special notice to stockholders of a bank of a revision of the assessment of their shares was not necessary, the assessment having been made in the name of the bank based on a verified statement submitted by the bank as to its capital stock.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 854-857; Dec. Dig. § 482.*]

2. TAXATION (§ 386*)—ASSESSMENT—BANK SHARES—SEPARATE VALUATION.

A gross assessment of the shares of stock of a bank at 75 per cent. of the aggregate capital stock was not subject to the objection that it did not specify the value of each share where such valuation was ascertainable by simple computation by the auditor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 637-647; Dec. Dig. § 386.*]

3. TAXATION (§ 436*)—ASSESSMENT ROLL—CORRECTION.

The auditor had power to make such computation under Burns' Ann. St. 1908, § 10,316, providing that the auditor shall from time to time correct all errors which he may discover in his duplicate, either in the name of the person assessed, the description of the property, or the amount charged.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 436.*]

4. TAXATION (§ 608*)—COLLECTION—INJUNCTION.

Where property is subject to the tax assessed, want of notice or insufficiency of notice or any other irregularity or informality in the assessment does not entitle the owner to restrain collection of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

5. TAXATION (§ 608*)—INJUNCTION—GROUNDS.

Though the market price of shares of stock was in excess of the actual value, owing to losses, where such fact was unknown to the public or to the holder of the stock, the collection of a tax, though based on an assessment of the shares at their market value, will not be restrained.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

6. TAXATION (§ 610*)—INJUNCTION—PAYMENT OF VALID TAXES.

As a general rule, until a taxpayer has paid or offered to pay the taxes admitted to be valid, he has no standing in a court of equity to restrain collection of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1244; Dec. Dig. § 610.*]

7. TAXATION (§ 505*)—CORPORATE STOCK—NAME IN WHICH ASSESSABLE.

That an assessment of bank shares is made in the name of the bank instead of the stockholders will not invalidate the lien of the tax.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 505.*]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by Citizens' National Bank against Otto L. Klauss, Treasurer, etc., to enjoin col-

lection of taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

Robinson & Stilwell, for appellant. Daniel H. Ortmeyer and Geo. A. Cunningham, for appellee.

ADAMS, J. This proceeding was instituted by appellant for and on behalf of certain of its stockholders named against appellee, as treasurer of Vanderburgh county, Ind., to enjoin appellee from collecting taxes which appellant claims were illegally assessed against its said stockholders. Issues were formed by complaint in one paragraph and answer in general denial. Upon request the court made a special finding of facts and stated conclusions of law thereon. Judgment was rendered on said conclusions of law that appellant take nothing by this action, and that appellee recover his costs.

It appears from the special finding of facts that on the 1st day of March, 1909, and for more than one year immediately following said date, the appellant was a banking corporation organized under the laws of the United States of America, and located in the city of Evansville, Ind.; that on the 10th day of May, 1909, appellant by its cashier made out a statement under oath, in duplicate, showing the number of shares of capital stock of such bank, the name and residence of each shareholder, with the number of shares owned by each, and delivered said statement to the auditor of said county. In addition to the above, said statement also shows that on March 1, 1909, said bank had a paid-up capital stock of \$200,000, surplus \$40,000, undivided profits \$16,757; that dividends were paid during the preceding year amounting to 7 per cent.; and that the assessed value of real estate held by the bank was \$46,030. It is further found that upon notice given as provided by statute the county board of review for said county met in the courthouse of said county on the first Monday of June, 1909, for assessment, review, and equalization of taxes, and remained in session 30 days; that said statement, aforesaid, was by the auditor of said county laid before said board of review; that on the 1st day of July, 1909, at a regular meeting of said board, on motion, the said board placed an assessment of 70 per cent. on the value of the capital stock, surplus, and undivided profits of appellant bank, amounting to \$179,730; that between the first Monday in July and the last day of December of the year 1909 the auditor of said county made out a duplicate list of taxes assessed in said county and entered the valuation of such capital stock of appellant on the tax duplicate of the current year, and computed and extended taxes thereon the same as against the valuation of other property in said city of Evansville, Ind., setting out a copy of the tax duplicate, as follows, omitting the names

of shareholders and number of shares owned by each:

City of Evansville—Tax Duplicate of Vanderburgh County, Indiana, for 1909.

Tax Duplicate # 4357 Citizens Nat'l Bank
Names

* * * [Number of shares omitted.]

Total Shares	2000 at \$100 per share	
70% Capital Stock, surplus and		
Undivided profits		\$179,730.00
Less real estate		46,030.00

		\$133,700.00
First installment		1,845.06
2nd		1,845.06

		\$ 3,690.12
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It is also found that on or before the last day of December of the year 1909 said auditor caused to be delivered to the appellee a copy of such duplicate; that appellee, as soon as he received such duplicate, caused notice to be given as provided by statute of the amount of taxes charged for state, county, school, road, or other purposes, etc.; that the first installment of taxes on said shares of capital stock was not paid on or before the first Monday in May, 1910; that after said date said appellee added to said taxes a penalty of 10 per cent.; that thereafter, on the 1st day of June, 1910, the auditor and treasurer of said county extended upon the tax duplicates of said county for the year 1909 the amount of taxes due from each shareholder of appellant, setting out opposite the name and number of shares of each shareholder on said tax duplicate, the amount of taxes assessed against such shares, with 10 per cent. penalty added. It is further found that appellee is threatening to, and will unless restrained, proceed to make demand upon each of said shareholders for the amount of said taxes due upon his respective shares of stock, and, if not paid, will proceed to levy upon the personal property of such shareholders; that no notice was given to said bank or to any of its shareholders by the auditor of said county or appellee that the taxes would be extended upon the tax duplicates of said county for the year 1909, as made by said auditor and appellee on the 1st day of June, 1910, and that neither said bank nor any of its shareholders had any notice that such action or that any action would be taken by said auditor and appellee to so extend said taxes on said duplicate; that certain persons, naming them, were each the owner of more than one share of the capital stock of said bank on March 1, 1909, and that all the taxes due from each on the first Monday of May, 1910, except the taxes claimed to be due on shares of stock in said bank, were paid prior to the bringing of this action; that on the 1st day of March, 1909, the usual selling and market price of the shares of stock in said bank was as much or more than the value at which such shares now appear upon the tax duplicate; that at such time, although such fact was not known

to the public nor to any of the stockholders of such bank, named in the complaint, the capital stock of such bank had become so much impaired by losses that the actual cash value of the shares of stock in said bank was not more than \$15 per share.

Upon the facts found substantially as above set out, the court states its conclusions of law as follows:

"(1) The plaintiff bank in case of an illegal assessment for taxation against its shareholders upon the shares of the plaintiff's capital stock respectively held by such shareholders is authorized to maintain an action to restrain the collection of such illegal tax from such shareholders.

"(2) The action of the board of review of Vanderburgh county, which is set out in the eighth finding of facts herein, and the entry made after such action of such board of review by the auditor of Vanderburgh county upon the tax duplicate of said county, which is set out in the seventh finding of facts herein and the subsequent extension of the value of the shares held by each stockholder of the plaintiff bank and of the amount of tax assessed against the same, as set out in the twelfth finding of facts herein, made a valid assessment for taxation upon the shares of each of the stockholders of such bank, whose names are set out as such stockholders in the complaint in this action.

"(3) The assessment for taxation upon the shares of stock of the stockholders of the plaintiff in whose behalf this action was brought by the plaintiff, and whose names are set out in the complaint in this action, was a valid assessment, and the defendant as treasurer of the county of Vanderburgh is authorized to sell the personal property of each of such stockholders for the collection of the tax so assessed against such stockholders, and the collection of such taxes by the defendant treasurer by such proceeding should not be restrained.

"(4) The plaintiff should take nothing by this action, and the defendant should have judgment for his costs."

The first conclusion of law is not questioned by either appellant or appellee, and for that reason is not considered in this opinion.

Appellant reserved exceptions to the second, third, and fourth conclusions of law as stated by the court, and upon these conclusions error is predicated. It is insisted by the appellant that the assessment was illegal, in that the tax duplicate could not be changed or corrected by extending to the individual stockholders, without notice, the taxes assessed in the first instance against the bank. It was the duty of the county board of review to settle and determine the true cash value of each share of stock in appellant bank as of the 1st day of March, 1909. The county auditor gave notice as required by law of the time, place, and purpose of the meeting of the board. Prior to the

meeting the cashier of appellant bank had filed with the auditor the verified statement required by statute. No additional notice other than that given by the auditor was required to give the board of review jurisdiction to determine the value of the stock for taxation. The appellant and its stockholders were bound to know that the board at its June meeting would place a valuation upon the shares of bank stock, and, if they were not satisfied with the statement filed by the cashier, it was their right to appear before the board and offer proof showing the true cash value of the shares. The board fixed 70 per cent. of the aggregate capital stock, surplus, and undivided profits as the true cash value of the stock, less the assessed value of real estate, making a net valuation of \$133,700. The failure of the board to expressly value each share was not material, since it appeared that there were 2,000 shares. The valuation of each share was a simple matter of division. The subsequent extension on the tax duplicate of the amount of taxes assessed to each individual stockholder, as shown by the findings, could only be regarded as the correction of an error, and the auditor was fully warranted in making such correction.

Section 10,316, Burns' Ann. St. 1908, provides in part that: "He (the auditor) shall from time to time correct all errors which he may discover in his duplicate, either in the name of the person charged with taxes, the description of the property or the amount charged." Nor would the assessment be rendered invalid or illegal by any irregularity in matter of form not affecting the merits of the case, and which did not prejudice the rights of the party assessed. Burns' Ann. St. 1908, § 10,395. The bank stock involved in this proceeding was clearly taxable, and it has been many times held in this state that want of notice or the insufficiency of notice or any other irregularity or informality does not entitle the owner to an injunction where the property is taxable. *Crowder v. Riggs*, 153 Ind. 158, 161, 53 N. E. 1019; *McCrary v. O'Keefe*, 162 Ind. 534, 536, 70 N. E. 812; *Hunter Stone Co. v. Woodard, Treas.*, 162 Ind. 474, 53 N. E. 947; *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277; *City of Delphi v. Bowen*, 61 Ind. 29.

In the case of *Nyce v. Schmoll*, 40 Ind. App. 555, 558, 82 N. E. 539, it is held that, in order to enjoin the collection of taxes, it must be alleged and proved either that the property is not subject to taxation, or that the taxes thereon have been paid. The trial court found as a fact that the usual market or selling price of the shares of stock in appellant bank on March 1, 1909, as much or more than the value at which the shares now appear on the tax duplicate, but the actual values of such shares on account of losses was on said date not more than \$15

per share, although such fact was unknown at the time to the public and to the stockholders named in the complaint. This finding does not support appellant's right to enjoin the collection of taxes on the valuation fixed. The general principle is that until it is shown that the shareholder has paid or offered to pay the taxes admitted to be owing he has no standing in a court of equity. *Buck et al. v. Miller, Treas.*, 147 Ind. 586, 591, 45 N. E. 647, 47 N. E. 8, 37 L. R. A. 384, 62 Am. St. Rep. 436; *Shepardson v. Gillette, Auditor*, 133 Ind. 125, 130, 131, 81 N. E. 788; *Thiebaud v. Tait, Treas.*, 138 Ind. 238, 250, 36 N. E. 525; *City of Jeffersonville v. Louisville, etc., Bridge Co.*, 169 Ind. 645, 656, 83 N. E. 337; *Peoples' Nat. Bank v. Marye*, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180. The well-considered case of *Small, Rec., v. City of Lawrenceburgh et al.*, 128 Ind. 231, 27 N. E. 500, is based upon facts very similar to those in the case under consideration. In that case it was held that an averment that the bank stock had no value and that the owners were entitled to deductions on account of indebtedness was of no avail; that the parties who owned the stock on the 1st day of April, 1883, and being assessed by a proper officer, became liable for the taxes charged against the stock, the same as any other property owned by them, and they cannot enjoin its collection on account of entry being made upon the books against the bank, instead of against them individually. It is also held in the same case that, where the assessment was made in the name of the bank instead of the stockholders, that fact will not invalidate the lien or relieve the stockholders from the payment of the tax for which they are liable.

Judgment affirmed.

(49 Ind. App. 126)

PITTSBURGH, C. C. & ST. L. RY. CO. v. JOHNSON. (No. 7,660.)¹

(Appellate Court of Indiana, Division No. 1. Jan. 26, 1911.)

1. APPEAL AND ERROR (§ 351*)—TIME OF TAKING.

An appeal will be deemed to have been taken at the time of the filing of the transcript and assignment of errors in the Appellate Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1915-1919; Dec. Dig. § 351.*]

2. NEW TRIAL (§ 163*)—GRANTING OF MOTION—EFFECT.

The granting of a motion for new trial vacates the judgment.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 330-332; Dec. Dig. § 163.*]

3. NEW TRIAL (§ 12*)—FILING OF MOTION—EFFECT.

The filing of a motion for new trial within the time allowed operates to hold the judgment in abeyance until ruled on.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 17, 253; Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹Rehearing denied, 95 N. E. 610. Transfer to Supreme Court denied.

4. APPEAL AND ERROR (§ 345*)—TIME TO APPEAL—MOTION FOR NEW TRIAL.

Under Burns' Ann. St. 1908, § 672, providing that appeals must be taken within one year from the rendition of judgment, an appeal may be taken within one year from the time of the overruling of the motion for new trial, since the running of the statute is suspended until the motion for new trial is ruled on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.*]

5. APPEAL AND ERROR (§ 347*)—TIME TO APPEAL—STATUTES.

The time within which an appeal must be taken under Burns' Ann. St. 1908, § 672, providing that appeals must be taken within one year from the rendition of judgment begins to run from the rendition of the judgment and not from the day of entry or signing, the rendition of a judgment being the act of the court while the entry is the act of the clerk thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 347.*]

6. JUDGMENT (§ 282*)—RENDITION—ENTRY—SIGNING.

Under Burns' Ann. St. 1908, § 1451, providing that where the circuit judge has, for any cause, left the record unsigned, his successor may sign the record at any subsequent term, a judgment is not invalid because of the failure of the judge rendering it to sign the entry recording the judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 282.*]

7. APPEAL AND ERROR (§ 518*)—"RECORD"—TRANSCRIPT FOR APPEAL—"COURT DOCKET"—"BENCH DOCKET."

The court or bench docket is not a record of the court in which its official entries are kept, but is merely a docket for the convenience of the court, and the notes of the judge are not the record entries to be incorporated in a transcript for the appeal of the case, and in determining what the record discloses the entries on such docket may not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 518.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6008-6014; vol. 8, p. 7781.]

8. APPEAL AND ERROR (§ 344*)—TIME TO APPEAL—MOTION IN ARREST OF JUDGMENT—EFFECT.

A motion in arrest of judgment made after motion for new trial does not prevent the running of Burns' Ann. St. 1908, § 672, providing that appeals must be taken within one year from the rendition of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 344.*]

Appeal from Circuit Court, Pulaski County; F. J. Vurpallet, Judge.

Action by Carl Johnson against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Dismissed.

G. E. Ross, for appellant. M. Winfield, Geo. A. Gamble, and M. M. Hathaway, for appellee.

HOTTEL, J. This is an appeal from a judgment of \$8,000 in favor of appellee, rendered in the Pulaski circuit court, against appellant. Appellee filed motion to dismiss

the appeal, which, omitting the caption, is as follows: "Comes now the appellee, Carl Johnson, and moves the court to dismiss the appeal, in this cause, for the following reasons, to wit: By the return of the clerk of the Pulaski circuit court to the writ of certiorari issued in this cause, it fully appears that the judgment appealed from was rendered on the 8th day of October, 1908, by the Honorable John C. Nye, sole judge of said court, and that judgment was duly entered in Order Book No. 34 on page 402 of the records of the Pulaski circuit court, and that the transcript on appeal, in this cause, was not filed with the clerk of the Appellate Court until December 28, 1909, one year, two months, and eight days after the rendition of final judgment; that the appeal, therefore, is too late, and the appellee prays that said appeal be dismissed and for all other proper relief." This appeal was taken to the Supreme Court, and the transcript was filed and the appeal perfected in that court on December 28, 1909. The case was afterwards transferred to this court. While the cause was pending in the Supreme Court, the appellee filed his petition for a writ of certiorari. This petition was afterwards granted, and the writ ordered and issued. On May 26, 1910, the clerk of the Pulaski circuit court filed his return to the writ. On May 31, 1910, appellee filed a motion for an order to modify the original order directing the issuing of the writ. On December 13, 1910, this court, per curiam, overruled said motion for the reasons following: "We are asked to modify the order heretofore made for certiorari in this cause, but we are of the opinion that the response filed on the 26th day of May, 1910, by the clerk of the Pulaski circuit court, to the certiorari issued herein sufficiently shows that the judgment in said cause was entered on the 8th day of October, 1908, but was not signed by the judge thereof until the 17th day of December, 1909. The motion to modify the order heretofore made in this cause for certiorari is therefore overruled."

The transcript, as originally filed, affirmatively shows the following facts: That on October 8, 1908, the appellant filed its motion for a new trial. That on October 10, 1908, the appellant's motion for a new trial was overruled and exceptions given, and 90 days given in which to file bill of exceptions, and the defendant (appellant) prayed an appeal to the Appellate Court, which was granted "upon defendant filing bond in the sum of \$8,000 with American Surety Company of New York, as surety thereon, within ninety days." That in vacation, to wit, on December 31, 1908, the appellant filed its bond in said sum of \$8,000 payable to Carl Johnson (appellee), conditioned as follows: "The condition of the above obligation is such that, whereas, heretofore, to wit, on the 9th day

of October, 1908, the said Carl Johnson in the Pulaski circuit court recovered a judgment against the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company for the sum of six thousand dollars, in damages and cost of suit, etc., from which said judgment of said Pulaski circuit court, the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company appeal to the Supreme Court of Indiana: Now, if the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company shall and will duly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against it, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, by G. E. Ross, Its Solicitor. [Seal.] The American Surety Company of New York, by John F. Brookmeyer, Its Attorney in Fact. [Seal.]

The return to the order of certiorari discloses that the original transcript incorrectly set out the proceedings of the court had on October 8, 1908, before the Hon. John C. Nye, the then regular judge of said court, in that it omitted the order book entry of said court of that date, to wit, October 8, 1908, which showed the rendition of the judgment as of that date, and, instead thereof, copied into that day's proceeding the notes of the judge made on his "court" or "bench" docket which notes contained no rendition of judgment. This return also shows that the transcript, as originally filed, incorrectly set out the proceedings of date December 17, 1909, which were had before the Honorable Francis J. Vurpillat, the then regular judge of said court, in that such transcript set out as a part of the proceedings of said date of December 17, 1909, the order-book entry of date October 8, 1908, showing the rendering of the judgment, thereby transposing the entry of proceedings had before the Hon. John C. Nye of date October 8, 1908, when judgment was rendered, and making it a part of the proceedings had before the said Francis J. Vurpillat of date December 17, 1909, and showing the rendering of the judgment of that date. This return to the order of certiorari certifies that the entry on page 571 of the transcript originally filed (which the transcript shows to be an entry of the proceedings had on the 17th day of December, 1909), contains in fact a copy of the entry of proceedings had on October 8, 1908, which is the entry containing the judgment, and the return to said writ of certiorari also shows that no other judgment was ever rendered in the case. The return to the writ also sets out and certifies to an entry from the "court" or "bench" docket of said court of proceedings had in said cause on November 15, 1908, showing the filing of a motion in arrest of judgment of that date, which was overruled and exceptions saved by the defendant, a prayer for appeal to the Appellate Court,

prayer granted upon the filing of bond in the sum of \$10,000 in 10 days, with Rufus L. Mayer as surety, the approval of the surety, the filing of the bond and its approval. The return to the writ of certiorari also sets out and certifies to another entry from the "court or bench docket" of date of December 2, 1910, being since the filing of this transcript, which we think unnecessary to set out here.

We think we have, in the above statement, set out enough of the contents of the record in this case, as shown by the transcript in the case originally filed, and by the return to the order of certiorari, correcting and amending the same, to show conclusively that the judgment from which this appeal was taken was rendered on October 8, 1908, in proceedings then had in said cause before the Honorable John C. Nye, the then regular judge of the said court, in which said cause was then pending, and that afterwards, to wit, on December 17, 1909, said judgment was signed by the Honorable Francis J. Vurpillat, the then regular judge of said court in which said judgment was before rendered. These being the facts presented by the record, Was the appeal perfected within the time fixed by the statute, controlling appeals and fixing the time limit within which they shall be perfected?

Section 672, Burns' Ann. St. 1908, is as follows: "Appeals in all cases hereafter tried must be taken within one year from the time the judgment is rendered. In all cases heretofore tried they must be taken within one year from the time this act takes effect; but the time allowed the appellant by the pre-existing law shall not be enlarged. Where the appellant is under legal disabilities at the time the judgment is rendered, he may have his appeal at any time within one year after the disability is removed."

An appeal will be deemed to have been taken at the time of the filing of the transcript and assignment of errors in the Supreme Court. *Lake Erie R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443. The wording of the above statute is plain, and would seem to be susceptible of but one construction, but we are not without abundant authority construing the same. *Moon, Trustee, v. Cline*, 11 Ind. App. 460, 39 N. E. 432; *Wheeler v. Barr*, 6 Ind. App. 580, 33 N. E. 975; *Kinney v. Heuring*, 42 Ind. App. 263, 85 N. E. 869.

In the case of *Reading v. Brown*, 19 Ind. App. 90, at pages 90 and 91, 49 N. E. 41, at page 42, this court said: "Our Supreme Court had repeatedly held that, when an applicant is not under a legal disability that the record in an appealed cause must be filed in the Appellate Court and errors must be assigned within one year from the rendition of the judgment, and that the time begins to run from the *rendition of the judgments* and *not its entry*. (Our italics.) *Anderson v. Mitchell*, 58 Ind. 592; *Joyce v. Dickey*, 104 Ind. 183, 3 N. E. 252; *Johnson v. Steph-*

enson, 104 Ind. 368, 4 N. E. 46; Bacon v. Withrow, 110 Ind. 94, 10 N. E. 624; Lawrence v. Wood, 122 Ind. 452, 24 N. E. 159. It follows from what we have said that the motion to dismiss in this cause will have to be sustained."

The granting of a motion for new trial would, of course, vacate the judgment and filing of the same within the time allowed for filing such motion operates to hold the judgment in abeyance, and the running of the statute is suspended until the motion for new trial is ruled upon, and the appeal may be taken under the above section within one year from the time judgment overruling the motion for new trial is rendered. Moon, Trustee, v. Cline, supra; Blaemire v. Barnes, 91 N. E. 232; N. Y., etc., Ry. Co. v. Doane, 105 Ind. 92, 4 N. E. 419.

In the case of Kinney v. Heuring, supra, the court said: "Appellee moves to dismiss the appeal for the reason that the transcript was not filed within the time fixed by statute. The time for taking appeals under section 672, Burns' Ann. St. 1908 (Joyce v. Dickey, 104 Ind. 183, 3 N. E. 252; Moon v. Cline, 11 Ind. App. 460, 89 N. E. 432; N. Y. R. Co. v. Doane, 105 Ind. 92, 4 N. E. 419), begins to run from the date that the motion for a new trial of the cause is overruled." "In legal contemplation, there is no final judgment until the motion for a new trial has been overruled, though the formal judgment on the verdict or finding had been entered previously." N. Y., etc., R. Co. v. Doane, supra; Joyce v. Dickey, supra.

In the case at bar, the judgment was rendered October 8, 1908, and the motion for new trial was filed on the same day, and overruled October 10, 1908. The rendition of the judgment is the act of the court, while the entry is the act of the clerk of the court. The entry, or entries, of the day's proceeding, are then signed by the judge before whom the proceedings are had. Anderson v. Mitchell, Adm'r, 58 Ind. 592, 593, 594, 595; Reading v. Brown et al., supra. The time within which the appeal begins to run is from the day of the rendition of the judgment, not from the day of entry or signing. Reading v. Brown, supra; Anderson v. Mitchell, supra; Johnson v. Stephenson, 104 Ind. 368, 4 N. E. 46; Bacon v. Withrow, 110 Ind. 94, 10 N. E. 624; Lawrence v. Wood, 122 Ind. 452, 24 N. E. 159. The fact that the judge before whom the judgment was rendered failed or neglected to sign the entry recording the judgment, and that the entry was afterwards signed by his successor, does not invalidate the judgment. We have a special statute controlling in such cases. Section 1451, Burns' Ann. St. 1908 provides: "In all cases where business of any kind has been or shall be transacted by any circuit or superior judge and put of record, and the judge from death, resignation, or any other

cause has left or may leave the record of such proceeding or proceedings unsigned, the successor of such judge shall have the same power and authority to sign such record, at any subsequent term of the court, as if such record has been made by such judge." Parties cannot be heard to say that they are not bound by what has been done by the court simply because the minutes have not been read and signed. A judgment rendered but not signed is not void, the failure to sign the same being but an irregularity. Griffith v. State, 38 Ind. 408; Beltman v. Hopking, 109 Ind. 177, 9 N. E. 720.

The clerk of Pulaski county, in his return to the writ of certiorari, brings into the record some entries of the "court" or "bench" docket, as he designates them in his return, among which is an entry showing that on the 15th day of November, 1908, a motion was filed in this case in arrest of judgment, the overruling of the same, prayer for appeal, etc. The "court" or "bench" docket is not a record of the court in which its official entries are kept, but is merely a docket for the convenience of the court, in which is kept the data or memoranda, often very meager and incomplete, from which the true and official entries are made. These notes of the judge are not the record entries contemplated by record entries called for, to be incorporated in a transcript for the appeal of the cause, and we think should have no consideration in this case in determining what the record discloses. However, if this entry, showing the filing of the motion in arrest of judgment and the appeal from the ruling thereon was given full force, it could not avail appellant anything in this appeal.

It has been expressly held by the Supreme Court of this state that a motion in arrest of judgment, made after a motion for new trial, does not hold the cause before the trial court and save the appeal. Blaemire v. Barnes, supra, decided March 17, 1910.

Under the facts disclosed by the record as it now appears in this case, and the authorities supra, a dismissal of the appeal seems imperative.

Appeal dismissed.

(47 Ind. App. 1)

A. D. BAKER CO. v. CORNELIOUS.
(No. 6,708.)

(Appellate Court of Indiana, Division No. 2
Jan. 25, 1911.)

1. SALES (§ 425*)—BREACH OF WARRANTY.

In the absence of fraud, the general rule is that a breach of warranty does not give rise to a right to rescind an executed contract; the remedy of the injured party being to sue for the breach, or to set it up by way of counterclaim.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1207, 1238; Dec. Dig. § 425.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. SALES (§ 442*)—BREACH OF WARRANTY—DAMAGES.

When a breach of warranty is pleaded as a defense, it must appear, in order that the defense may be complete, that the damages occasioned by such breach are equal to the cost of the article warranted, or that the article is of no value for any purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284-1801; Dec. Dig. § 442.*]

3. SALES (§ 429*)—BREACH OF WARRANTY—COMPLIANCE WITH CONDITIONS BY BUYER.

Under a warranty of a machine providing that, if any part cannot be made to fill the warranty, the part which fails shall be returned immediately to the place where it was received, with the option of the warrantor either to furnish another machine in place of the machine or part so returned or, return the money or notes received for the same, in order to avail himself of breach of such warranty, the party claiming the breach must show that he complied with the terms of the warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1224-1229; Dec. Dig. § 429.*]

4. SALES (§ 441*)—BREACH OF WARRANTY—EVIDENCE.

On the issue of breach of warranty on the sale of a traction engine, evidence held insufficient to show that the buyer had complied with the conditions of the warranty as to a return of the engine, or that the engine was worthless for any purpose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge.

Action by John H. Cornelious against A. D. Baker Company. From a judgment for plaintiff, defendant appeals. Reversed.

P. V. Hoffman and William A. Booth, for appellant. W. S. Christian and Fred E. Hines, for appellee.

LAIRY, P. J. The appellee, John H. Cornelious, brought an action of replevin in the Hamilton circuit court for two horses, which he alleged had been unlawfully taken and were unlawfully detained by the appellant. The complaint was in the ordinary form. The appellant filed an answer in general denial and also an answer alleging that it was the owner of a chattel mortgage executed by appellee to secure certain promissory notes executed by appellee to appellant; that one of the notes was due and unpaid; that the horses described in the complaint were covered by the chattel mortgage referred to and filed as an exhibit in the answer; and that the appellant had taken and held said horses under and by virtue of the chattel mortgage. To this answer the appellee filed a general denial, and also a special reply, in which he alleged that the chattel mortgage set up by way of answer was given to secure three notes of \$400 each, given for the purchase price for one Baker traction engine, 16 horse power, one jacket, two injectors, one jar pump, and one Mason Kipp oil pump; that said machinery was purchased under a written contract, containing a warranty, which written contract and warranty were

filed as an exhibit to the reply; that said engine was defective in material and construction, and did not generate sufficient power and failed to comply with the terms of the warranty; and that it was wholly worthless for any purpose. The case was tried by the court without the intervention of a jury, and, upon request of appellee, the court made a special finding of fact, and stated its conclusions of law thereon. The judgment of the trial court was in favor of appellee. A motion for a new trial was filed and overruled, and this ruling is assigned as error in this court. The causes assigned for a new trial are, first, that the decision of the court is not sustained by sufficient evidence; second, that the decision of the court is contrary to law.

The special finding is too lengthy to be set out in full; so we will refer to only so much of it as is necessary to an understanding of the question presented by this appeal. The substance of the court's finding, so far as is material to the questions involved, is "that on the 16th day of July, 1906, the appellee mortgaged to appellant the personal property described in the complaint, together with other personal property; that said mortgage was executed to secure the payment of three several notes of \$400 each, which notes were given as evidence of the purchase price of said traction engine, and as a part of the same transaction the appellant executed and delivered to said appellee a written warranty which is set out in the finding; that said engine failed in many particulars specified in said finding to comply with the terms of said warranty, and that appellant after notice and proper tests was unable to make it satisfy or comply with said warranty; that said engine was worthless to appellee and wholly worthless for any purpose; that appellee long before the filing of his complaint herein offered to return said engine and all of its appurtenances to the appellant, and offered to return said machinery to the place from which he had received it, and demanded his said notes and the surrender of the chattel mortgage hereinbefore mentioned; that said appellant refused to receive said machine, and refused to deliver up the said chattel mortgage and the said purchase-money notes, and demanded that appellee retain and keep said engine." There is no question made as to the sufficiency of the evidence to support the finding, except as to the finding that the machinery was of no value for any purpose, and the further finding that, before appellee filed his complaint, he returned or offered to return the machinery to the place where he received it, and demanded his notes and mortgage. Upon these questions appellant contends there is a total failure of proof. The burden was upon the plaintiff below to establish these facts, and, if they were necessary to a recov-

ery by him, his failure to do so would be fatal, and the case must be reversed. In absence of fraud, the general rule is that a breach of warranty does not give rise to a right to rescind an executed contract by the party affected by the breach. When there is no provision in the contract or warranty for a return of the property in case of breach, the remedy of the injured party is to sue for the breach of such warranty, or he may set it up by way of counterclaim. *Hoover v. Sidener*, 98 Ind. 290; *Marsh v. Low*, 55 Ind. 271.

In the warranty set up by way of reply in this case, however, there was a provision for a return of a part or all of the machinery in the event that it could not be made to comply with the warranty. The appellee in this case, therefore, had two remedies in case of a failure of the machinery to comply with the warranty. After making the tests and giving notice to the seller as provided in the contract, if the machinery could not be made to comply with the warranty, he had a right to rescind the contract in the manner and according to the terms therein provided, or he had a right to retain the machinery and treat the contract as still subsisting, and sue for a breach of the warranty, or, in case he was sued, set up said breach as a defense. When a breach of warranty is pleaded as a defense, it must appear, in order that the defense may be complete, that the damages occasioned by such breach is equal to the cost of the article warranted, or that the article is of no value for any purpose. *Booher et al. v. Goldsborough*, 44 Ind. 490; *Smith v. Borden*, 160 Ind. 223, 68 N. E. 681; *La Fayette, etc., Works v. Phillips*, 47 Ind. 259.

It therefore appears that it was necessary for the appellee to prove, either that he had rescinded the contract, or that the machinery was of no value. If he relied upon the rescission, it was necessary for him to show such acts on his part as constitute a substantial compliance with the terms of rescission provided in the warranty. The right to rescind is given by the contract, and, in order to avail himself of that right, the appellee must show that he has substantially complied with the conditions stipulated therein, upon which that right depends. The provision of the warranty with reference to rescission is as follows: "If, after giving notice as above provided, any part of the machinery cannot be made to fill the warranty, that part which fails shall be returned immediately by the undersigned to the place where it was received, with the option of the company either to furnish another machine, or part, in place of the machine or part so returned, which shall perform the work, or return the money and notes which shall have been received by the company for the same, and thereby rescind the contract to that extent, or the whole, as the case may be, and be released from any further liability here-

in. The failure of any separate machine, or any part thereof, shall not affect the contract or liability of the purchaser for any other separate machine, or for any parts of such machine as are not defective." We find no evidence tending to prove that appellee at any time returned or offered to return any part of the engine or the engine as a whole, or that he ever requested appellant to furnish a new engine. There is no evidence that appellee ever returned the engine or any part of it to the place where he received it, or that he at any time requested the return of his notes and mortgage. Upon this subject the appellee testified that an expert came to see the engine some time after the state fair; that he came over to where the appellee was hulling clover seed at Mr. Bell's; that the expert said, "I have seen the engine. It is not any good until it is worked over and a new cylinder put on it"; that appellee then told him that he did not want the engine if that had to be done. Appellee further testified that on the day they came to get their pay for the engine he told them he would not keep it; that they could have the engine. This is the most favorable evidence to appellee on the subject, and it falls far short of showing such acts on his part as would constitute a rescission under the terms of the warranty. There is also a total want of evidence to support the finding that said engine was wholly worthless for any purpose. The testimony on this question most favorable to appellee was that of the appellee himself, in which he says: "The engine was not worth anything for me for the purpose for which I purchased it." This is not equivalent to saying that the engine was of no value for any purpose. Such testimony is no evidence of a total failure of consideration. *Smith v. Borden*, supra; *La Fayette, etc., v. Phillips*, supra. In the case of *Smith v. Borden*, supra, the Supreme Court says: "It may be conceded in this case that were it not for the offer to return the machine to the plaintiffs which the facts show the defendant made, and which he continues to make in his answer in question, the latter would be bad on demurrer, as the averments therein that the wheel is utterly worthless for any purposes for which it was purchased, and is worthless and of no value for any purpose to the defendant, would not excuse his failure to return or offer to return the property to the plaintiffs, and, under the circumstances, the answer would not be sufficient as a defense of a total failure of consideration of the note in suit." This court is reluctant to set aside the finding of the trial court on the evidence. We recognize the well-established rule that this court will not weigh conflicting evidence, and that every legitimate inference that can be drawn from the evidence will be indulged in favor of the trial court. We have considered only the evidence favorable to the appellee, and we are forced to the conclusion that the parts of the special finding,

hereinbefore referred to, are not sustained by the evidence, and that the facts therein found cannot be rightly or reasonably inferred from any facts proved.

The judgment is reversed, with directions to sustain the motion for a new trial.

(200 N. Y. 138)

In re CITY OF NEW YORK (Special Fund).
(Court of Appeals of New York. Dec. 6, 1910.)

1. MUNICIPAL CORPORATIONS (§ 986*)—OWNERSHIP.

A defalcation aggregating \$33,079.65 having occurred in the surrogate's office in the city and county of New York prior to December 31, 1869, a tax was levied to make up the deficiency, and paid to the surrogate under Act April 26, 1870 (Laws 1870, c. 382) § 10, authorizing the supervisors of New York county to investigate the deficiency, and include the amount thereof in the taxes for the ensuing year. *Held* that, when the fund produced by such tax was paid over to the surrogate for the specific purpose of reimbursing the funds embezzled, it ceased to be a fund of the city of New York, or one in which the city had any interest.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 986.*]

2. MUNICIPAL CORPORATIONS (§ 986*)—DISPOSITION—UNEXPENDED RESIDUE—SUPREME COURT—JURISDICTION.

Laws 1884, c. 350, provides that county treasurers shall receive and disburse funds deposited in the Surrogate's Court according to Code Civ. Proc. § 2537, which requires that such moneys shall be received to the credit of the beneficiary, or the estate, or the special proceeding in question, and that all such moneys shall be held, invested, and paid in like manner as in the case of money paid into the Supreme Court in an action pending therein. Code Civ. Proc. § 747, provides that "each court into which money is paid" in any action or proceeding brought therein may pay out, transfer, invest, or reinvest the same on proper orders in such manner and form as appears to the best interest of the owners. *Held*, that where a tax was levied to reimburse a defalcation in the surrogate's office in the city and county of New York, as authorized by Act April 26, 1870 (Laws 1870, c. 382), and after being paid over to the surrogate for the purpose specified, a balance remaining unexpended was paid into the office of the city chamberlain of the city of New York by order of the Supreme Court, the chamberlain would be regarded as holding the money in the same manner as a county treasurer, under section 2537, and hence the Supreme Court had no jurisdiction under the act of 1884, or otherwise, to direct a return of the unexpended balance to the city.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 986.*]

Appeal from Supreme Court, Appellate Division, First Department.

On petition by the City of New York, by its comptroller, for the payment of a fund in the hands of the chamberlain of the city, collected by taxation, to supply a defalcation in the office of the surrogate of New York county. The Attorney General appeared, and asked that the money be paid over to the State, and from an order of the Appellate

Division (137 App. Div. 808, 122 N. Y. Supp. 656), directing payment of the fund to the city after deducting certain expenses payable therefrom, the State appeals. Reversed, and application denied.

Edward R. O'Malley, Atty. Gen. (Frederick C. Tanner, of counsel), for appellants. Archibald R. Watson, Corp. Counsel (Theodore Connolly, of counsel), for respondents.

CHASE, J. When the surrogate of the county of New York was about to retire from office, December 31, 1869, he reported by letter to the surrogate-elect that a former assistant surrogate, duly appointed by the board of supervisors of the county of New York in 1863, had received and appropriated to his own use the moneys of certain estates, a detailed statement of which was attached to the letter, amounting in the aggregate to \$33,079.65. The surrogate-elect, upon taking office, sent a communication to the board of supervisors of the county, apprising it of the defalcation and attached to his communication a copy of the letter received by him from the outgoing surrogate. Chapter 382, Laws 1870, was passed April 26, 1870, and is entitled "An act to make further provision for the government of the county of New York." Section 10 thereof provides as follows: "The board of supervisors are authorized and directed to investigate the alleged deficiency in the accounts of the late surrogate, to employ an accountant for such purpose, and to provide for the amount of such deficiency, including the same in the taxes for the ensuing year, and to institute the proper legal proceedings to recover the amount of such deficiency." On May 26, 1870, there was presented to said board of supervisors the report of an accountant apparently appointed pursuant to the provisions of said statute, which report is as follows: "The undersigned accountant in the matter of the alleged defalcations in the office of the surrogate would respectfully report that he has made and has caused to be made, as thorough examination of the matters as the books and records of the surrogate's office will allow, and that the amount required to replace the several sums unaccounted for, with interest to the first day of January, A. D. 1870, is fifty-eight thousand and thirty dollars and twenty-nine cents (\$58,030.29)." A resolution was thereupon adopted by the board of supervisors as follows: "Resolved, that the report of Charles E. Wilbur, the accountant appointed by this board to examine into the deficiency existing in the trust funds of the surrogate's office prior to January 1, 1870, be referred to the comptroller with directions to embody the amount of such deficiency in the tax levy of this year, and to draw his warrant in favor of R. C. Hutchings, Esq., surrogate, for the said amount, with directions to the surrogate to deposit

the same in a trust company in a special account out of which shall be paid claims only in favor of estates wherein such deficiencies existed in said office on the 1st of January last." If the accountant accompanied his report with a detailed statement of the items of the deficiency aggregating \$58,030.29, it does not appear in the record. It does appear, however, that included in the amount so reported was \$6,500 previously allowed by the board of supervisors to certain persons in connection with the investigation and determination of the amount of such deficiency. The amount to replace the several sums not accounted for with interest to January 1, 1870, was \$51,530.29, and such amount was raised by general tax and paid to the surrogate July 29, 1870, "to pay deficiencies ascertained to December 31, 1869, in the accounts of the surrogate's office." The disposition of such fund by the surrogate is not clearly shown, but on February 8, 1871, he deposited in the Union Trust Company the sum of \$13,786.88, which it is assumed was the balance remaining in his hands of such special fund on that date. On October 10, 1873, he withdrew that sum from the Union Trust Company with \$1,944.16 interest, and deposited the amount, aggregating \$15,731.02, in the Farmers' Loan & Trust Company.

Chapter 350, Laws 1884, was passed May 23, 1884. It is provided by such act as follows: "The Supreme Court at the first general terms thereof held in the several departments of this state, next after the passage of this act, shall appoint some suitable and proper person for each county in the respective departments in which such appointment is made, to examine the books, accounts and vouchers of the Surrogate's Court of the county for which such appointment is made." Section 1. "After said reports have been examined and approved by such General Term, an order shall be made accordingly, and by the clerk transmitted to the surrogates of the several counties, and such surrogate shall thereupon make an order directing the payment and transfer, and shall pay over and transfer to the treasurer of their counties all moneys and securities on deposit with them or their courts in trust for the several estates, and persons to whom the same is payable, as appears by the said accounts of the surrogate so approved. The several county treasurers to whom such money shall be paid or securities delivered shall receive and dispose of the same as is provided in section two thousand five hundred and thirty-seven of the Code of Civil Procedure." Section 4.

On January 20, 1886, the General Term of the Supreme Court in the First judicial department appointed a referee to examine the books and accounts of the Surrogate's Court of the county of New York as provided by said act of 1884. The referee in his report, referring to the amount raised by tax and paid to the surrogate to provide for the deficiency

in the surrogate's office and also referring to the deposit in the Farmers' Loan & Trust Company, said: "Precisely how it was applied is not clear. * * * The only tangible thing left of that misty time is a certificate of deposit in the Farmers' Loan & Trust Company for \$15,731.02, bearing date October 13, 1873. It is reasonable to believe that at least this much of the \$51,530.29 was never used for the purpose for which it was appropriated." The General Term made an order December 30, 1886, referring to the certificate of deposit in the Farmers' Loan & Trust Company, and provided: "It is further ordered and adjudged that so much of said moneys, funds, and securities as are represented by the said certificate of deposit with the interest thereon to the time of payment or transfer to said chamberlain together with such interest as shall subsequently accrue or be payable thereon, be held by the said chamberlain as a special fund subject to the special order of the General Term of this court." The deposit in the Farmers' Loan & Trust Company was thereupon transferred to the chamberlain of the city of New York, and such amount has since remained as a special fund in the hands of the chamberlain, who has received and accumulated the interest thereon, so that at the time of the commencement of this proceeding it amounted to \$39,772.08. This proceeding was commenced by petition in behalf of the city of New York to have the amount of said special fund and all accrued interest thereon paid over to it.

The petition was made to the Appellate Division of the Supreme Court in the First judicial department, and it was opposed by the appellants. A referee was appointed to take proof of the matters and things alleged in the petition and answers, and report to the court. The referee reported among other things the facts that we have mentioned and he concluded: "The General Term of the Supreme Court in this order of December 30, 1886, directing the transfer to the chamberlain of the balance in question provided that such balance should be held as a special fund subject to the special order of the General Term, and I do not consider that I am authorized to review the question of such provision. Under all the circumstances, therefore, I am of the opinion that the city is now entitled to the return of the balance in question with the accumulations of interest thereon." An order was thereupon made by the Appellate Division directing the payment of certain expenses from said special fund and further directing the transfer and payment to the city of New York of the balance of the moneys remaining in said special fund after the payment of said disbursements and expenses. It is from such order that this appeal is taken.

The question of law presented for our consideration is whether the Supreme Court has any jurisdiction to direct that such special

fund be withdrawn from the Surrogate's Court and paid over to the city of New York, without an act of the Legislature expressly conferring such jurisdiction. It appears in the recital in the resolution of the board of supervisors of May 28, 1870, that the authority of the accountant was "to examine into the deficiency existing in the trust funds of the surrogate's office." It will, in the absence of proof, be assumed that he did not include in his report any items other than such as came within his authority. When the fund was paid by the city to the surrogate, July 29, 1870, it ceased to be a fund of the city of New York, and became a fund in the possession of the surrogate for a particular purpose. The purpose as stated by the resolution was for deposit "in a special account out of which shall be paid claims only in favor of estates wherein such deficiencies existed in said office on the 1st of January last (1870)." It was received and held by the surrogate in his official capacity. When the fund was transferred to the chamberlain of the city of New York, pursuant to chapter 350 of the Laws of 1884, it was, notwithstanding the form of the order of the General Term, received by him pursuant to the terms of the statute, which provides: "The several county treasurers to whom such money shall be paid, or securities delivered, shall receive and dispose of the same as is provided in section two thousand five hundred and thirty-seven of the Code of Civil Procedure." The chamberlain of the city of New York may in this proceeding be treated as the treasurer of the county. Section 2537 of the Code of Civil Procedure provides as follows: "Where a statute requires the payment of money into, or the deposit of a security with, the Surrogate's Court, * * * the same must be paid to or deposited with the county treasurer of the county to the credit of the beneficiary, or of the estate, or of the special proceeding. * * * All money collected by or paid to the county treasurer, as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the Supreme Court in an action pending therein. The regulations contained in the general rules of practice, as specified in subdivision 8 of section 4 of the state finance law, and the provisions of title third of chapter eight of this act, apply to money paid to and securities deposited with the county treasurer, as prescribed in this section; except that the Surrogate's Court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the Supreme Court by section seven hundred and forty-seven of this act." The section quoted has been several times amended, but at all times, since the payment of the money to the chamberlain, it has provided in substance that the

Surrogate's Court exercises control over the fund or securities so held by such court, notwithstanding the fact that the possession of the fund or security is in the chamberlain of the city or the treasurer of the county.

It is provided by section 747 of the Code of Civil Procedure as follows: "Each court may direct that money paid into that court in any action or proceeding brought therein, or any bond, mortgage or other security which represents property belonging to any suit or party interested therein, may be paid out, transferred, invested or reinvested in any manner or form that appears to it best for the interests of the owners thereof. But such directions must be embodied in an order or decree of said court, founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein." It is also provided by section 751 of the Code of Civil Procedure as follows: "No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition."

The statute of 1884 established and provided the procedure to transfer the moneys and securities then on deposit with the several surrogates and Surrogates' Courts in the counties of this state to the county treasurers of said counties. It does not purport to enlarge the jurisdiction of the Supreme Court at the General Term thereof or otherwise, but relates to and affects the custody of such money and securities. *People v. Keenan*, 110 App. Div. 537, 97 N. Y. Supp. 77; affirmed 185 N. Y. 600, 78 N. E. 1108. If it had been intended that the Supreme Court should have concurrent or other jurisdiction with the Surrogate's Court to direct in regard to the distribution of the funds and securities which are transferred to the possession of the chamberlain of the city, the statute would have so provided. Moneys and securities deposited with a surrogate or a Surrogate's Court, but actually delivered to the chamberlain of the city of New York or the treasurer of the county in which such surrogate or Surrogate's Court is situated, remain in the control of such surrogate or Surrogate's Court, so far as their final disposition is concerned, as fully as if they remained in their personal custody. If it is true that there was some error in determining the amount of the deficiency at the time the general tax was laid and a greater amount than necessary was paid over to the surrogate, or if for any other reason the city of New York is now entitled to the whole or any part of the fund remaining in the jurisdiction of the Surrogate's Court for the

purpose of paying alleged deficiencies, an act of the Legislature should be passed granting jurisdiction to direct in regard to the disposition of such special fund after an opportunity to all persons having a possible interest therein to be heard in the proceeding.

The Supreme Court did not have jurisdiction to make the order appealed from, and the order should, therefore, be reversed, with costs, and application denied.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Order reversed, etc.

(207 Mass. 451)

INGRAHAM v. BOSTON & N. ST. RY. CO.
(three cases).

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1911.)

1. DEATH (§ 75*)—ACTION—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a young child by being struck by defendant's street car, evidence held to sustain a finding of due care by the child's mother in looking after the child.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 75.*]

2. EVIDENCE (§ 588*)—WEIGHT AND SUFFICIENCY.

The jury, in an action for a child's death against a street car company, were not bound to believe the motorman's testimony as to what he did after discovering the child on the track.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

3. STREET RAILROADS (§ 114*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a street car company for the death of a young child on the track, evidence held to sustain a finding of gross negligence by the motorman.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243, 244; Dec. Dig. § 114.*]

Exceptions from Superior Court, Essex County; Frederick Lawton, Judge.

Actions by Don M. Ingraham, as administrator, and by Don M. Ingraham, against the Boston & Northern Street Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

The actions were to recover damages for the death of plaintiff's child, three years and four months of age, by being struck by defendant's street car.

G. L. Mayberry and J. D. Upton, for plaintiff. Sweeney & Cox, for defendant.

LORING, J. 1. So far as due care on the part of the child's mother goes these cases come within Hewitt v. Taunton Street Railway, 167 Mass. 483, 46 N. E. 106, and not within the later case of Cotter v. Lynn & Boston Railroad, 180 Mass. 145, 61 N. E. 818, 91 Am. St. Rep. 207. The age of the child in Hewitt v. Taunton Street Railway was the same as

that of the child in these cases. The yard in question in that case had a fence "with gates opening" on one of the main thoroughfares in the city of Taunton, while in these cases the yard had no fence on the side next to Salem street, but Salem street was "like the ordinary village street, not thickly settled." There both parents were in the house and one of them had looked at the child in the yard 15 minutes before the accident, while in these cases the mother looked at the child in the yard not more than 10 minutes before the accident happened. In addition there were facts here which did not exist there. The child in these cases was playing with another somewhat older child and had been "always" instructed by her mother not to leave the yard, an instruction which had been repeated on the morning of the accident and one which up to that time never had been disobeyed. The principal difference between these cases and Cotter v. Lynn & Boston Railroad lies in the fact that in that case an hour to an hour and a half (in place of 10 minutes) had elapsed between the time when the mother last looked to see if the child was still in the yard and the time of the accident; and there are some minor differences in addition between the two cases. There was therefore evidence of due care on the part of the child's mother.

2. If the jury believed (1) the motorman's story as to what he did after he first saw the child 150 to 200 feet away, (2) his testimony that such a car as the car here in question under like conditions could be stopped in 25 feet, and (3) the testimony of Cornell and Legrow that there were no leaves on the rails, the only explanation of the car not having come to a stop before it ran over the child was that the brakes or the machinery to start the reverse or both were out of order. The motorman's story was that the car was going 4 miles an hour when he first saw the child 150 to 200 feet away; that he immediately began to put on his brakes and "the reverse" alternately and kept doing so, but that the car kept going four miles an hour until it ran over the child. There was therefore evidence of negligence on the part of the corporation.

3. But the jury were not bound to believe the motorman's story that he put on the brake and the machinery to put on the "reverse" continuously after he discovered the child 150 to 200 feet away. Hankinson v. Lynn Gas & Electric Co., 175 Mass. 271, 56 N. E. 604. If they did not believe that part of his story and did believe (1) his testimony that the brake and the machinery to put on the reverse were in good order, (2) his testimony that the car in question, under the conditions which then obtained, could be stopped in 25 feet; (3) the testimony of Cornell and Legrow that there were no leaves on the rails; and (4) that the child (who was a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

very young one and so incapable of taking care of itself) was walking with its back toward the car, they were warranted in finding that he was guilty of gross negligence, if indeed any other conclusion is possible.

In all but two of the cases cited by the defendant in which it was held that there was no evidence of gross negligence (*Brennan v. Standard Oil Co.*, 187 Mass. 376, 73 N. E. 472; *Manning v. Conway*, 192 Mass. 122, 78 N. E. 401; *Dimauro v. Linwood Street Railway*, 200 Mass. 147, 85 N. E. 894) the accident happened by the person killed unexpectedly putting himself in the place of danger. There is nothing in the other two (*Pearlstein v. New York, New Haven & Hartford Railroad*, 192 Mass. 20, 77 N. E. 1024; *Lanci v. Boston Elevated Railway*, 197 Mass. 32, 83 N. E. 1) which helps the defendant. There was therefore evidence of gross negligence on the part of the defendant's servants.

The entry must be:

Exceptions overruled.

(207 Mass. 447)

WORK v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.

Essex. Jan. 6, 1911.)

1. CARRIERS (§ 298*)—INJURIES TO PASSENGERS—JERKS AND JOLTS.

Jerks while running, and in stopping and starting to let off and take on passengers, jolts in going over frogs or switch points, and lurches in going around curves, are among the incidents in electric cars which every passenger must expect; and if a passenger is injured by such a jerk, jolt, or lurch, the company is not liable. On the other hand, a car can be started and stopped with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. § 298.*]

2. CARRIERS (§ 318*)—INJURY TO PASSENGERS—BURDEN OF PROOF.

In order for a passenger to recover for an injury from a jerk, jolt, or lurch, he must show, by evidence of what the motorman did, that he was negligent in the way he stopped or started the car, or by evidence of what took place as a physical fact, or by evidence of what appeared to take place as a physical fact, and it is not enough for witnesses to testify that the jerk was unusual.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

3. CARRIERS (§ 318*)—INJURY TO PASSENGER—EVIDENCE.

In an action against a carrier for injury to a passenger from the manner in which the car was started, evidence held to warrant a finding that the motorman was negligent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

Exceptions from Superior Court, Essex County; Marcus Morton, Judge.

Action by Charles T. Work against the Boston Elevated Railway Company. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions sustained.

W. J. Corcoran and M. F. Cunningham, for plaintiff. Endicott P. Saltonstall, for defendant.

LORING, J. It is settled that jerks while running, jerks in stopping and starting to let off and take on passengers, jolts in going over frogs or switch points, and lurches in going around curves are among the usual incidents of travel in electric cars which every passenger on them must expect to encounter, and that, if a passenger is injured by such a jerk, jolt or lurch the company is not liable. On the other hand an electric car can be started and stopped, for example with a jerk so much more abrupt and so much greater than is usual that the motorman can be found to be guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises.

But some points are settled. It is settled that it is not enough for a plaintiff in such a case to introduce the testimony of witnesses who characterize the jerk as an unusual one or as worse than usual. *Foley v. Boston & Maine R. R.*, 193 Mass. 332, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; *Sanderson v. Boston Elevated Ry.*, 194 Mass. 337, 80 N. E. 515; *McGann v. Boston Elevated Ry.*, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509; *Olund v. Worcester Consolidated St. Ry.*, 206 Mass. 544, 92 N. E. 720. The plaintiff to make out a case must go further than merely to characterize the jerk, jolt or lurch and must show (1) by direct evidence of what the motorman did that he was negligent in the way that he stopped or started the car (as in *Cutts v. Boston Elev. Ry.*, 202 Mass. 450, 89 N. E. 21), or (2) by evidence of what took place as a physical fact (as in *Lacour v. Springfield St. Ry.*, 200 Mass. 34, 85 N. E. 868; *Black v. Boston Elev. Ry.*, 206 Mass. 80, 91 N. E. 891), or by evidence of what appeared to take place as a physical fact (as in *Nolan v. Newton & Boston St. Ry.*, 206 Mass. 384, 92 N. E. 505) show indirectly that the motorman was negligent. The earlier cases are collected in *McGann v. Boston Elev. Ry.*, 199 Mass. 446, 85 N. E. 570, 18 L. R. A. (N. S.) 506, 127 Am. St. Rep. 509. The cases which have been decided since then are *Stevens v. Boston Elev. Ry.*, 199 Mass. 471, 85 N. E. 571; *Lacour v. Springfield St. Ry.*, 200 Mass. 34, 85 N. E. 868; *Hunt v. Boston Elev. Ry.*, 201 Mass. 132, 87 N. E. 489; *Cutts v. Boston Elev. Ry.*, 202 Mass. 450, 89 N. E. 21; *Tupper v. Boston Elev. Ry.*, 204 Mass. 151, 90 N. E. 422;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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Black v. Boston Elev. Ry., 206 Mass. 80, 91 N. E. 891; Nolan v. Newton & Boston St. Ry., 206 Mass. 384, 92 N. E. 505; Olund v. Worcester Consolidated St. Ry., 206 Mass. 544, 92 N. E. 720.

The plaintiff's story in the case at bar is that he told the conductor when he boarded the car in question that he wanted to get off at a real estate office, and that later on, seeing the sign of a real estate office, he "motioned" to the conductor to stop and he nodded to the plaintiff in answer. At the time he was seated at the forward end of the car on the right-hand side. The car was a 30-foot car with seats on each side running lengthwise of the car. He then turned and gathered up some tin signs which lay on the seat beside him. He took them in his right hand and proceeded to the rear door to alight. The car was then at a standstill. The conductor was on the platform and with his right hand he was helping a woman get off the car; that he had his left hand on the bell rope apparently ready to ring the bell to start the car as soon as the woman had stepped off. The plaintiff was then 8 or 10 feet from the rear door. Seeing that the conductor was looking at the woman and not at him and anticipating that the car would be started before he got to the platform he "grabbed" a strap with his left hand, when "the car started instantly with a tremendous jump, it shot right forward and I lost my hold on the strap and I twisted myself and I landed right right down in the corner on the opposite side from where I was standing," 8 or 10 feet away. "I struck on the corner of the seat right up on the left side of my head." The plaintiff further testified that the car was not in motion when he took hold of the strap and (to quote his own words) "I took a pretty good hold on it because when I see him reach for the bell I thought the car would start."

There was evidence of negligence on the part of the conductor in that he rang for the car to go ahead without waiting for the plaintiff to get off after the plaintiff had "motioned" to him to stop and he had nodded in answer. But that negligence was not the cause of the injury which the plaintiff suffered. The plaintiff saw that the car was about to be sent forward by the conductor; he had time while the car was standing still to take hold of a strap to steady himself as the car went forward, and he did so. If the car went forward with no more than the usual jump he has no remedy. His right to recover depends upon the way in which the car was started by the motorman.

There is no direct evidence as to what the motorman did in starting the car. But there is indirect evidence that the motorman was negligent in the way he started the car in the fact that although the plaintiff took hold of

the strap to steady himself on the starting of the car while it was standing still, and got a "pretty good hold," he was thrown 8 or 10 feet and struck on the corner of the seat on the side of his head.

In *Stevens v. Boston Elevated Ry.*, 199 Mass. 471, 85 N. E. 571, the plaintiff's hold on the handle of the car was broken, and in spite of that fact it was held that the evidence did not warrant a finding of negligence on the part of the motorman in starting the car. The trouble with the plaintiff's case there was that he had got down on to the step to get off, thinking that the stopping place was on the nearer in place of the farther side of Dartmouth street, and that he thought that when the car slowed down before crossing the tracks on Dartmouth street it was slowing down to stop for passengers to alight. The fact that under these circumstances the plaintiff had hold of the handle of the car did not justify the inference that the hold taken was a good enough one to guard against the usual jerk incident to a car starting forward; while in the case at bar the plaintiff's hold on the strap was taken when the car was at rest because the plaintiff was afraid that the car was about to start forward. Under these circumstances the jury were justified in thinking that the hold taken was good enough to guard against the usual jerk incident to a car starting forward and in that it was corroborated by the plaintiff's testimony that his hold was a pretty good one.

There was no evidence that there was any other passenger on the car.

We are of opinion that this evidence warranted a finding that the motorman was negligent in the way he started the car and the entry must be:

Exceptions sustained.

(207 Mass. 551)

MCCARTHY v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 6, 1911.)

CARRIERS (§ 318*)—INJURY TO PASSENGER— NEGLIGENCE—EVIDENCE.

Evidence in an action by a passenger for injuries by being thrown down by a too sudden stopping of the car held sufficient to sustain a finding that the motorman was negligent in the way he brought the car to a stop.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.*]

Exceptions from Superior Court, Middlesex County; Marcus Morton, Judge.

Action by Catherine McCarthy against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Coakley & Sherman and R. H. Sherman, for plaintiff. H. D. McLellan, for defendant.

LORING, J. The plaintiff in this case was a passenger in a long car with side seats at each end and cross seats with sliding backs in the center. She testified that she was sitting on the last cross seat with one Callahan. As the car was nearing the crossing where she had asked the conductor to stop, she got up, took hold of the handles in the upper corner of each of the two rear seats, and stood in the aisle waiting for the car to stop, but the car did not stop. Then the conductor "gave another quick bell," saying in a disturbed tone, "What is the matter with that fellow?" Thereupon, to quote the plaintiff's words, "the car came to a terrible stop"; the stop "was an unusual stop; I never saw one like it" "in its violence." "I was thrown on the ground, on my back." She testified that she "had quite a firm hold" of the two handles, and that she knew of the signs in the defendant's cars asking passengers to "please be at the door when nearing your stop." This story of hers was corroborated by Callahan. Callahan also testified that he stepped into the aisle to let the plaintiff, who was sitting next the window, pass out; that he took hold of the handle of the seat next in front of the seat on which he and the plaintiff had been sitting, and that he "was thrown backward like that against the side of the seat" by the abrupt stop, and the seat back, of which he had hold, slid forward. The conductor was called as a witness by the defendant. He testified that the plaintiff was standing in the vestibule when the car stopped and that she was thrown against the end of the car; that she "started to swing around" and that he "caught her arm and held her. I wasn't staggered at all, because I was used to the cars, and wasn't thrown at all." The conductor added that the motorman slowed down the car as it went over some switches and connections just before the plaintiff's stopping place, and then in place of bringing the car to a stop to let the plaintiff off he put on the power and started ahead, whereupon he "gave another bell" and the motorman put on too much air, or put it on too fast, and "brought up kind of abrupt."

We do not mean to intimate that the story of Callahan and the plaintiff taken alone would not have brought this case within *Lacour v. Springfield Street Railway*, 200 Mass. 34, 85 N. E. 868, *Black v. Boston Elevated Railway*, 206 Mass. 80, 91 N. E. 891, and *Work v. Boston Elevated Railway*, 93 N. E. 693, nor that the conductor's testimony taken alone would not have brought it within *Cutts v. Boston Elevated Railway*, 202 Mass. 450, 89 N. E. 21. Upon those points it is not necessary to express an opinion, for when the two are taken together there was without question evidence which warranted a

finding that the motorman was negligent in the way he brought the car to a stop and the case comes within the class of cases like *Work v. Boston El. Ry. Co.*, 93 N. E. 693.

Exceptions overruled.

(207 Mass. 398)

KELLY v. MUTUAL LIFE INS. CO. OF NEW YORK (two cases).

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 4, 1911.)

1. INSURANCE (§ 668*) — LIFE INSURANCE — POLICY — INCREASED RISK.

In an action on a life insurance policy, the question whether a disease is such as to increase the risk of loss is generally for the jury.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

2. INSURANCE (§ 668*) — LIFE INSURANCE — FALSE STATEMENTS — QUESTIONS FOR JURY.

Under Rev. Laws, c. 118, § 21, providing no misrepresentations in application for life insurance should avoid the policy, unless made with intent to deceive, or such misrepresentations increased the risk of loss, whether the disease the insured had was the acute or chronic form of Bright's disease, and whether, if acute, it increased the risk of loss, *held*, under the evidence, questions for the jury.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.*]

Exceptions from Superior Court, Middlesex County; John H. Hardy, Judge.

Actions by John B. Kelly and by Christopher P. Kelly against the Mutual Life Insurance Company of New York. The jury was ordered to return a verdict for defendant in each case, on the ground that the answer, "No," to the question in the application, "Have you any gravel, bladder, or kidney disease?" was a statement which as matter of law increased the risk of loss. To this action of the court, plaintiffs excepted. Sustained.

J. J. O'Connor and J. J. O'Sullivan, for plaintiffs. Foster & Turner and George Hoague, for defendant.

HAMMOND, J. It does not seem to be disputed that Margaret E. Kelly, upon whose life the policy was issued, suffered from some form of Bright's disease and was treated therefor, that this occurred only a few months before she applied for the policy, and that her negative answer to the inquiry of the defendant's medical examiner as to whether she had ever had "gravel, bladder or kidney disease" was false. By the terms of the policy this misrepresentation is fatal to the validity of the policy if it was made with actual intent to deceive, or if it was as to a matter which increased the risk of loss. Rev. Laws, c. 118, § 21. The trial judge seems to have been of the opinion that the kidney trouble with which she was afflicted before the application increased the risk of

loss and upon that ground ordered in each case a verdict for the defendant.

"Some diseases or bodily conditions are of such a nature that the question whether they increase the risk of loss is for the jury. Rupture was said to be of that class in *Levie v. Metropolitan Ins. Co.*, 163 Mass. 117 [39 N. E. 792]. On the other hand, there are conditions and diseases of a nature which requires it to be held, as matter of law, that a misrepresentation as to them is one as to a matter which increases the risk of loss, within the meaning of the statute. That the applicant was addicted to the excessive use of intoxicating liquors was held to be such a matter in *Rainger v. Boston Mutual Life Association*, 167 Mass. 109 [44 N. E. 1088]." *Barker, J.*, in *Brown v. Greenfield Life Association*, 172 Mass. 498, 506, 53 N. E. 129, in which case it was held that "consumption" increased the risk of loss. See, also, *Dolan v. Mutual Reserve Fund Life Association*, 173 Mass. 197, 53 N. E. 398. Generally, however, the question whether the disease is such as to increase the risk of loss is for the jury. See, in addition to cases before cited, *Hogan v. Metropolitan Ins. Co.*, 164 Mass. 448, 41 N. E. 663; *Coughlin v. Metropolitan Ins. Co.*, 189 Mass. 538, 76 N. E. 192; *Barker v. Metropolitan Ins. Co.*, 198 Mass. 375, 84 N. E. 490.

There was evidence that the disease which Mrs. Kelly had before the application was an acute form of Bright's disease; that that form of the disease is curable; that at the time she applied for this insurance she had fully recovered and for many months appeared to be well, and performed hard manual labor.

Upon the whole evidence, including the testimony of the physicians, the questions whether the disease she had was the acute or chronic form of Bright's disease, and whether, if acute, it increased the risk of loss, were for the jury. Nor do we see any ground upon which the order directing verdicts for the defendant can be sustained.

Exceptions sustained.

(207 Mass. 413)

WILLIAMS et al. v. INHABITANTS OF TOWN OF DEDHAM.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

TAXATION (§ 821*)—TAX DEED—REMEDY OF PURCHASER.

The grantee in a tax deed, who receives a defective title because of insufficient notice of sale, cannot recover from the town the amount paid by him, where he did not within two years from the deed offer, by writing given to the collector, to surrender and discharge the deed, or to assign to the town all his right, as authorized by Rev. Laws, c. 13, § 44.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 821.*]

Exceptions from Superior Court, Suffolk County; Henry A. King, Judge.

Action by Moses Williams and others against the Inhabitants of the Town of Dedham. Judgment in favor of defendant, and plaintiffs bring exceptions. Exceptions overruled.

Frank W. Grinnell, Roger D. Swaim, and Kenneth Howes (Hale & Grinnell, of counsel), for plaintiffs. Jos. H. Soliday, for defendant.

KNOWLTON, C. J. This is an action to recover from the defendant the amount paid by the plaintiffs for a tax deed of property described in the declaration, given by the collector of taxes of Dedham, it having been discovered that the title conveyed by the deed was defective by reason of an insufficient notice of the sale by the collector. The plaintiffs did not, within two years after the date of the deed, offer by writing given to the collector, to surrender and discharge their deed, or to assign and transfer to the town all their right, title and interest in the premises, as they might have done under Rev. Laws, c. 13, § 44. The question is whether they can recover without having made such an offer.

It was held in *Lynde v. Melrose*, 10 Allen, 49, that, in the absence of a statute, a purchaser at a sale of real estate for taxes cannot recover from a city or town the amount paid, if the title proves to be invalid by reason of defects or informalities in the proceedings. The court said: "He buys the title without warranty, except such covenants as he takes from the collector, and he must rely only upon them." These, in the form prescribed for a collector's deed, are the personal covenants of the collector, and not covenants of the town. The town is not liable by reason of them, except in the manner and to the extent declared by the statute.

The first act on this subject was St. 1862, c. 183, § 6, which required a collector to insert a covenant that the sale had "in all particulars been conducted according to the provisions of law." It is then provided that, if it should appear that by reason of any error, omission or informality in any of the proceedings of assessment or sale, the purchaser had no claim upon the property sold, he might surrender and discharge his deed, and receive back from the city or town the amount paid by him. This was similar to the present statute, except that no limit of time was stated for the surrender and discharge of the deed. By St. 1878, c. 206, § 1, this section was amended by adding a proviso that the purchaser should, within two years from the date of the deed, offer in writing to surrender and discharge the deed, or to assign and transfer to the town or city

all his right, title and interest therein, as the collector should elect. This provision has been retained in all subsequent re-enactments. Pub. St. 1882, c. 12, § 39; St. 1888, c. 390, §§ 43, 44; Rev. Laws, c. 13, § 44; St. 1909, c. 490, pt. 2, § 45.

These provisions of the statute create the only liability of a city or town for any defect in the title conveyed by the deed of a collector of taxes. The last sentence of the section is as follows: "No city or town, and no treasurer or collector thereof, shall be liable for any amount due under the provisions of this section, unless such statement is filed." Rev. Laws, c. 13, § 44. It is also said that the payment "shall be in full for all damages for any defects in the proceedings or under the warranty in such deed." Upon payment the collector is relieved from liability on his warranty, and the city or town is also relieved in like manner, so far as the liability of the municipality under these sections, or by implication under Rev. Laws, c. 13, § 70, may be considered a liability upon the warranty.

In *Spring v. City of Cambridge*, 199 Mass. 1, 85 N. E. 160, is this language: "By the terms of the statute it is only 'upon such surrender (of the deed) and discharge or assignment and transfer' that such a city or town is required to pay."

We are of opinion that the failure of the plaintiffs to avail themselves of their rights under this statute leaves them without a remedy against the town.

Exceptions overruled.

Judgment affirmed.

(207 Mass. 439)

HUNNEMAN v. PHELPS.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 4, 1911.)

1. EXECUTION (§ 338*) — RETURN — AMENDMENT.

The power of the court to allow sheriffs to amend returns upon execution, for the purpose of making the return conform to the truth, is well established.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1015-1023; Dec. Dig. § 338.*]

2. EXECUTION (§ 338*) — RETURN — LEVY — AMENDMENT OF WRIT.

On motion of deputy sheriff to amend his return upon an execution, for the purpose of making the return conform to the truth, evidence held sufficient to warrant the finding of the judge that the statements in the proposed amendment were true.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 1015-1023; Dec. Dig. § 338.*]

Report from Superior Court, Norfolk County; Wm. F. Dana, Judge.

Action by Carleton Hunneman against DeHa C. Phelps. On motion of defendant to amend his return upon an execution. On report from superior court. Motion allowed.

Peabody, Arnold, Batchelder & Luther, for plaintiff. Albin L. Richards, for defendant.

KNOWLTON, C. J. The question before us arises upon a motion of a deputy sheriff to amend his return upon an execution. The power of the court to allow an amendment to such a return, for the purpose of making the return conform to the truth, is well established, and is not questioned in this case. Bayley, Petitioner, 132 Mass. 457; Sawyer v. Harmon, 136 Mass. 414; Frazee v. Nelson, 179 Mass. 456-461, 61 N. E. 40, 88 Am. St. Rep. 391. The contention of the defendant is that there was no evidence to warrant the judge in finding, as a fact, that the levy was made as stated in the proposed amendment.

The amendment changed the original return by making the levy upon the execution cover the interest of the debtor in the real estate on January 19, 1905, the time when the property was attached on mesne process, instead of her interest on June 30, 1908, the day when the levy was made. The notice which was given to the debtor and published in a newspaper stated the levy in accordance with the statement in the amendment. The return upon the copy of the execution which was filed in the registry of deeds, and that upon the original execution, stated it as covering the debtor's interest on the later date.

The officer testified very fully that he levied upon the right of the debtor at the time of the attachment on mesne process, and that when he received the execution he was given the date of the original attachment, and was told to levy upon the property attached. He also said that he made a memorandum for the levy on a paper which has been lost, and that he directed a clerk in his office to make the necessary copies and to prepare the return for his signature. To constitute a valid levy, no more formal overt act was necessary to be proved. Hall v. Crocker, 3 Metc. 245; Haven v. Snow, 14 Pick. 28-32. The evidence well warranted the finding of the judge that the statements in the proposed amendment were true.

Motion allowed.

(207 Mass. 235)

SCANLON v. CAREY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. APPEAL AND ERROR (§ 308*) — RECORD — RESERVATION.

Under Rev. Laws, c. 173, § 105, authorizing the report of a case for determination by the full court, only questions of law arising at the hearing may be reported to or reserved for the Supreme Judicial Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1770; Dec. Dig. § 303.*]

2. MUNICIPAL CORPORATIONS (§ 192*) — OFFICERS — ORDINANCES.

Rev. Laws, c. 104, § 4, providing that the superintendent of public buildings or such other officer as the mayor and the aldermen of the

city may designate, shall be inspector of buildings, does not increase the number of persons holding office, but simply adds another office to that of the superintendent of public buildings, unless the mayor and aldermen designate some other officer of the city to be the incumbent of the new office; and an ordinance providing for the appointment by the mayor, triennially, of an inspector of buildings, subject to the confirmation by the city council, is in violation of the statute, which calls for a designation in another way.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 192.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition for a writ of mandamus by Michael F. Scanlon against Jeremiah J. Carey. Case reserved on petition, answer, and agreed statement of facts for the consideration of the full court. Petition dismissed.

M. A. Cregg, for petitioner. Sweeney & Cox, for respondent.

KNOWLTON, C. J. The reservation in this case is informal, but the parties have treated it, and we treat it, as intended to report to this court questions of law that arose at the hearing, which was all that properly could be reserved or reported under the statute. Rev. Laws, c. 173, § 105; *Com. v. National Contracting Co.*, 201 Mass. 248, 87 N. E. 590.

The principal question of law that appears upon the record is whether the petitioner has been legally appointed to the office of inspector of buildings of the city of Lawrence, so that he is entitled to perform the duties of that office, which are now being performed by the respondent. The statute that bears directly upon the case is Rev. Laws, c. 104, § 4, which provides that "in a city or town which accepts the provisions of this and the eight following sections, or has accepted the corresponding provisions of earlier laws, the superintendent of public buildings or such other officer as the mayor and aldermen of said city, or the selectmen of said town may designate, shall be inspector of buildings," etc. These provisions have been accepted by the city of Lawrence and are now in force. For a series of years the city acted under them by a designation by the mayor and aldermen of the chief engineer of the fire department as inspector of buildings. In 1906 a building ordinance was passed that presumably was intended to be ordained under the authority of Rev. Laws, c. 104, § 1, which had previously been accepted by the city. This ordinance provided for the appointment by the mayor triennially of an inspector of buildings, whose appointment should be confirmed by the city council. It also provided regulations for the inspection, construction and materials of buildings. It is plain that the officer to be appointed un-

der this ordinance was intended to hold the same office and perform the same duties that are referred to in Rev. Laws, c. 104, § 4. In the provision for his appointment by the mayor, subject to confirmation by the city council, instead of a designation by the mayor and aldermen, the ordinance is in conflict with the statute, which evidently did not intend to increase the number of persons holding office, but simply to add another office to that of the superintendent of public buildings, unless the mayor and aldermen designated some other officer of the city to be the incumbent of the new office. In the original enactment in St. 1873, c. 47, § 1, the words, "of said city," followed the words "or such other officer," and the meaning was not changed by the re-enactments in the Public Statutes and in the Revised Laws without these words. Unless the mayor and aldermen desired the superintendent of public buildings to hold the office, they should have designated some other officer of the city for the place. They could not increase the number of officers in the city by electing to this office a person who held no other office. The original attempt of the mayor to appoint the petitioner under the ordinance, and later to appoint numerous other persons in succession under the ordinance, was of no effect, not only because the city council refused to confirm the appointments, but because the ordinance in that part which prescribes an appointment and confirmation seeks to set aside the statute which calls for a designation in a different way.

The statute being in force, and providing the only way in which one can legally become an inspector of public buildings, the attempt to appoint the petitioner under it was ineffectual, because it was not a designation by the mayor and aldermen of an officer of the city other than the superintendent of public buildings, but was an appointment of a person who was in no way connected with the official business of the city. The petitioner shows no right to the office.

Petition dismissed.

(307 Mass. 559)

McCUMBER v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1911.)

1. CARRIERS (§ 296*) — PASSENGERS — ASSUMPTION OF RISK — OVERLOADING CAR.

A street car passenger, who voluntarily entered a crowded car, knowing that she could not get a seat and might have to stand in the vestibule, assumes any risk of injury incident to the crowded condition of the car, including the risk from alighting temporarily to enable other passengers to leave the car, even though she was not negligent in entering it.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1200-1203; Dec. Dig. § 296.*]

2. CARRIERS (§ 296*)—PASSENGERS—NEGLIGENCE.

It is not negligence for a street car company to permit passengers to enter cars which are already crowded.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1200-1203; Dec. Dig. § 296.*]

3. CARRIERS (§ 296*)—PASSENGERS—INJURIES—NEGLIGENCE.

When plaintiff entered defendant's elevated street car, it was so crowded that she could not obtain a seat and was compelled to stand in the vestibule, and when the car stopped to permit passengers to alight the conductor told plaintiff that she was blocking the passageway and must stand aside to permit other passengers to alight, and in the jostling which accompanied the efforts of the other passengers to alight plaintiff was pushed off the car. *Held*, that the company was required to exercise the highest degree of care for plaintiff's safety which was consistent with a similar duty to the other passengers, and it was not negligent under the circumstances, so as to make it liable for plaintiff's injuries.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1200-1203; Dec. Dig. § 296.*]

4. CARRIERS (§ 317*)—PASSENGERS—NEGLIGENCE.

The language used by a street car conductor in telling a passenger that she was blocking the passageway and asking her to move aside being proper in form and substance, evidence that his tone of voice was harsh and loud, so as to agitate and confuse her, was not admissible in an action for injuries sustained by being pushed off the car by other passengers in alighting.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 317.*]

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Mabel S. McCumber against the Boston Elevated Railway Company. Verdict for defendant, and plaintiff excepts. Exceptions overruled.

C. E. Tupper and A. F. Tupper, for plaintiff. W. G. Thompson, G. F. Kimball, and F. D. Putnam, for defendant.

RUGG, J. The plaintiff with a dress suit case in hand became a passenger on one of the defendant's closed cars after dark on a December day. When she boarded the car she perceived that it was crowded, and she was able to get only to the door leading from the vestibule to the aisle. Later she gave way for the conductor to go inside to collect fares, and thereafter she stood just in the door, with one foot in the door and the other in the vestibule. After one stop, at which other passengers came upon the car, the plaintiff knew by a bell and the slowing of the car that persons inside were intending to get out, and she saw them begin to push their way to the door or move down the car "as they always do." The conductor, who was near the plaintiff, but inside the car collecting fares, told her she was blocking the passageway, and that she must make room for the other passengers to alight. There was some conflict in the plaintiff's testimony after this point. She

said she tried to push back into the vestibule, but it was so crowded there was no room for her there, that people on the step and a gentleman beside her got off and left a narrow passageway, and while she was turning around and trying to see what she could do the crowd surged against her, and she felt herself going off. In answer to the question, "How did you expect those people, who wanted to get off that car * * * at that stop, could get by you, standing, filling up that door?" she testified, "That was the conundrum." Other portions of her testimony tend to show that she thought other men would get off the vestibule, or that the conductor would make room for her by compelling persons to move up inside the door. It is impossible to understand how she could have reasonably entertained the latter opinion in view of her own observation as to the number of people there.

The plaintiff voluntarily and intelligently became a passenger upon a car so crowded that she could not get a seat, and knew that perhaps she might be obliged to stand in the vestibule. This was not negligence on her part, but by doing so she assumed whatever obligation or risk was incident to that condition. One of these might be to alight temporarily in order to enable other passengers to leave the car. It is not negligence on the part of a carrier in the present state of transportation to permit passengers to come upon cars which are already crowded. *Jacobs v. West End St. Ry.*, 178 Mass. 116, 59 N. E. 639; *Tompkins v. Boston Elev. R. R.*, 201 Mass. 114, 87 N. E. 488, 20 L. R. A. (N. S.) 1063, 131 Am. St. Rep. 392. It was the duty of the defendant to exercise the highest degree of care toward the plaintiff as its passenger, which was consistent with its equal duty to all its other passengers of transporting them and affording them a reasonable opportunity to alight at the end of their journey. It owed the plaintiff no higher or more exclusive duty than it owed each one of its other passengers on the car. There is nothing in the evidence to indicate that the passengers inside the car were turbulent or disorderly in any respect. They were simply trying to move to the door in the ordinary way in order to get off the car. It is plain from the testimony of the plaintiff that the narrow door of the car was completely obstructed by her person, and that other passengers could not pass unless she moved. The conductor, in the performance of what appears to have been his obvious duty to other passengers, told the plaintiff she was blocking the passageway, and that she must make room. In this respect he did not fail in his duty to the plaintiff. The plaintiff does not show any conduct on the part of other passengers which would naturally have caused a careful conductor to apprehend any violence or disorder on their

part or any disregard by them of the rights of the plaintiff as a fellow passenger. That there was some pushing in the effort to pass the plaintiff is not significant. It is only when done in a disorderly way that it becomes of consequence. Hence there was no evidence of negligence on the part of the defendant. The case is fully covered in principle by *Jacobs v. West End St. Ry.*, 178 Mass. 116, 59 N. E. 639, and *Treat v. Boston & Lowell R. R.*, 131 Mass. 371. *Kuhlen v. Boston & Northern St. Ry.*, 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516, and *Beverley v. Boston Elevated Ry.*, 194 Mass. 450, 80 N. E. 507, are distinguishable in that they relate to failure to properly control crowds of people under circumstances such that the carrier ought reasonably, in the exercise of the high degree of care required of it, to have anticipated violence.

Exception was taken to the refusal of the trial court to permit the plaintiff to testify that the tone of voice in which the conductor told her she was blocking the passageway and asked her to move was harsh and loud with the result that she was agitated and frustrated. The language used was proper in form and substance and in the performance of duty. It was unaccompanied by threat of speech or gesture. Perturbation of mind which inevitably depends upon individual peculiarities of experience, sensitiveness and nervousness, and fluctuates in the same person with varying conditions of health and happiness, and which is claimed to arise solely from inflection of voice in the course of necessary speech, is too unstable a foundation upon which to rest a standard of legal liability in a case of this kind. See *Beal v. Lowell & Dracut St. Ry.*, 157 Mass. 444, 82 N. E. 653.

Exceptions overruled.

(207 Mass. 497)

GLENNEN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. CARRIERS (§ 284*)—PASSENGERS—CARRIER'S DUTY TO PROTECT.

A carrier must exercise the highest degree of care to anticipate and protect passengers from violence from other passengers or other persons; the extent of the care required depending upon the particular circumstances.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1125-1135, 1173, 1222; Dec. Dig. § 284.*]

2. CARRIERS (§ 284*)—PASSENGERS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE.

In determining whether a street car company exercised the requisite degree of care to protect a passenger from injury from a crowd which rushed on the car at a public amusement place, the kind of assembly, and of the people likely to attend it, the time of the day, and the natural impatience and turbulence of a crowd

boarding the car at such a place, should all be considered.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1125-1135; Dec. Dig. § 284.*]

3. CARRIERS (§ 280*)—PASSENGERS—CARE REQUIRED.

A common carrier does not insure the safety of its passengers, and need not adopt every conceivable precaution, or exercise the utmost conceivable diligence, to prevent injury to them.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1085-1109; Dec. Dig. § 280.*]

4. CARRIERS (§ 317*)—PASSENGERS—INJURIES—ACTIONS—ADMISSION OF EVIDENCE.

In an action against a street car company for personal injuries to a passenger by the jostling and turning of the seats by a crowd which rushed onto the car at a public amusement place, where it stopped on the Sunday on which plaintiff was injured, evidence that at about the same hour on Sundays in the amusement season of preceding years the crowd had customarily rushed upon the cars and jostled passengers, was admissible on the question of the degree of care the company should have exercised to protect passengers in alighting at such place on such occasions.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 317.*]

5. CARRIERS (§ 284*)—PASSENGERS—CARE REQUIRED.

A female passenger with a small child in her arms was entitled to protection from being jostled, etc., by other passengers, commensurate with the impairment of her ability to care for herself resulting from carrying the child.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 284.*]

6. CARRIERS (§ 320*)—PASSENGERS—INJURIES—ACTIONS—JURY QUESTIONS—NEGLIGENCE.

In an action against a street car company for personal injuries by a crowd at an amusement resort, where the car stopped, rushing in and attempting to turn the seats while plaintiff was in the car with a child, catching her arm between the seat backs, etc., whether the company's employes were negligent in not protecting plaintiff held a jury question.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 320.*]

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Katherine Glennen against the Boston Elevated Railway Company. Verdict for defendant, and plaintiff excepts. Exceptions sustained.

Francis Juggins and Amos W. Shepard, for plaintiff. L. R. Chamberlin and R. A. Stewart, for defendant.

RUGG, J. A common carrier of passengers is required to exercise the utmost care consistent with the nature and extent of its business to carry its passengers to their destination in security and enable them to alight there with safety. This extraordinary vigilance is owed, not only as to its own instrumentalities and employes, but also as to other passengers or strangers, so far as any harmful misconduct on their part may be foreseen and guarded against. The highest degree of prudence and circumspection is exacted of the carrier in anticipating and suppressing violence to passengers from all out-

side sources. The precautions which the carrier must take in the performance of this duty depend upon the facts of each case. No positive regulation or absolute usage has been or can be defined as a final standard for the discharge of its obligation. The natural turbulence of a multitude of people to be expected at a public celebration may require provision against unusual occurrences. The kind of assembly and the character of people likely to attend it, the place from which they have come and to which they are going, the hour of the day and the normally accompanying impatience of restraint, the probable temper and disposition of a crowd in view of the causes which bring it together are all circumstances to be regarded in determining whether in any instance the carrier has performed the highly onerous and stringent obligation imposed on it. *Kuhlen v. Boston & Northern St. Ry. Co.*, 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516, and cases cited; *Beverley v. Boston Elevated Ry.*, 194 Mass. 450, 80 N. E. 507.

On the other hand, a common carrier does not insure to its passengers immunity from harm. It is engaged in a public service which must be managed in such a manner as to be practical and adapted to the needs of contemporary society, both as to expense, convenience, comfort, and rapidity. Hence it cannot be held responsible for manifestations of lawlessness, heedlessness, impetuosity or force which a high degree of prevision and sagacity could not reasonably be expected to forestall. Injury arising from the sporadic act of an individual or the aggregated impulses of a throng, if outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventable wrongs, affords no ground of liability. The carrier is not bound to adopt all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. *Simmons v. New Bedford Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *O'Neill v. Lynn & Boston St. Ry. Co.*, 180 Mass. 576, 62 N. E. 983; *Pitcher v. Old Colony St. Ry.*, 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481, 124 Am. St. Rep. 518; *Lyons v. Boston Elevated Ry.*, 204 Mass. 227, 90 N. E. 419; *McCumber v. Boston Elevated Ry.*, 93 N. E. 698. These principles are well settled and have been steadily adhered to. It is not necessary to cite or review the many other cases by which they are illustrated, but only to apply them to the facts before us.

The plaintiff was a passenger upon one of the defendant's open cars, and reached the terminus of the route near a portion of the Charles River reservation, between 5 and 6 o'clock on a Sunday afternoon in May. She was accompanied by her son 2½ years old. It was customary at this terminus, which

was on a public street, for the trolley to be reversed, the seats turned over, and for the car to start to return on the same track. At the time of the events to be narrated the conductor was on the rear platform. The motor-man was at his post on the front platform, and there was a starter in the employ of the defendant 8 or 10 feet away from the car. A great many people were in the habit of going to this reservation, and a boathouse was near by, where canoes were kept. When the car came to a stop at its terminus the plaintiff's description of what happened was as follows: "I started to get out of the car. * * * There was a crowd of people there. There seemed to be about 100 people or more. There was a great crowd rushed onto the car and started turning over the seats. There was a great confusion. I started to get out of the car and I was pushed back * * * into my seat again. * * * I grasped hold of the stanchion, but I was forced back again into my seat. * * * [The child] was in my arms. I was going to step down off the car. I had my arm on the back of the seat * * * waiting for a chance to get out of the car when this seat in back was turned over and pinned my arm between the backs of the two seats. * * * Passengers [were] getting onto the railing and on the outside on the right hand and on the left hand as well. * * * Right around me it seemed that most of [the seats] were turned over." She further testified that no employé of the defendant said or did anything to restrain the crowd or assist her, and that the events she had described happened within a period of two or three minutes. The plaintiff offered to show that on preceding Sundays of 1907 and 1908, at about the same hour, there had been rushing and crowding and jostling by passengers in getting upon the cars at this place, but this line of inquiry was excluded subject to her exception.

Evidence as to what has been the custom of a crowd at a particular place or under special circumstances in boarding the defendant's cars was competent, because a railway company has reasonable cause to know what has been habitually done respecting its cars. It bore upon the care which the defendant ought to have exercised and the protection which it ought to have furnished to its passengers who were entitled to alight even in the face of a large number of people desiring to become passengers. *Nichols v. Lynn & Boston*, 168 Mass. 528, 47 N. E. 427. The evidence as to the conduct of crowds of the year before the accident at the same season of the year, when it may be fairly inferred that conditions as to the reservation, boathouses and use of canoes were substantially the same, had some tendency in the same direction. The plaintiff appears to have gone far enough to bring herself within the operation of this rule. The fact that the superior court excluded the line of inquiry excused her from making so complete an of-

fer of proof as would otherwise have been necessary. It is also to be observed that the plaintiff was a woman incumbered with a small child and entitled to protection commensurate with the impaired capacity to care for herself resulting from this burden. *Hamilton v. Boston & Northern St. Ry. Co.*, 193 Mass. 324, 79 N. E. 734. Her own testimony as to the length of time elapsing after the car stopped and before her injury and the facts that she had once risen from her seat and been forced back into it by the violence of the crowd and having risen again was compelled to pause for opportunity to step and that while thus waiting the seat was thrown against her tend to show that the boisterousness was not an instantaneous act without forewarning, but was of appreciable duration and might be found to have afforded in connection with all the other attendant conditions a premonition such as to call for action on the part of the conductor or starter. That this occurred upon a public street rather than in a station under the exclusive control of the defendant is not decisive in its favor. It is not a question of policing the public way, but of shielding its passenger while in the car. Evidence of unruly conduct of crowds at this place on prior occasions when the circumstances were similar should have been received and the case submitted to the jury.

Exceptions sustained.

(207 Mass. 556)

COHEN v. LONGARINI.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. APPEAL AND ERROR (§ 695*)—REVIEW—REFUSAL TO DIRECT VERDICT—INSUFFICIENT RECORD.

The Supreme Judicial Court may refuse to review plaintiff's exceptions to a refusal to rule that he was entitled to recover, where the bill of exceptions does not purport to report all the material evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.*]

2. ATTACHMENT (§ 374*)—BURDEN OF PROOF—OWNERSHIP.

One suing for conversion of goods attached by defendant as belonging to a third person has the burden to establish ownership, though it be undisputed that he once owned the goods.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1363-1372; Dec. Dig. § 374.*]

3. TROVER AND CONVERSION (§ 66*)—OWNERSHIP—JURY QUESTION.

Plaintiff's title to property, for conversion of which he sued, being disputed, his ownership could not be ruled as a matter of law.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 288-294; Dec. Dig. § 66.*]

4. EVIDENCE (§ 588*)—CREDIBILITY—PROVINCIALITY OF JURY.

The jury may disbelieve all the material parts of a witness' testimony.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 588.*]

5. TROVER AND CONVERSION (§ 40*)—OWNERSHIP OF GOODS—EVIDENCE—WEIGHT.

In an action for converting goods claimed by plaintiff, evidence held to sustain a finding that they belonged to a third person, as whose goods they were attached by defendant.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 232-244; Dec. Dig. § 40.*]

Exceptions from Superior Court, Suffolk County; Charles A. De Courcy, Judge.

Action by Samuel A. Cohen against Antonio Longarini. Verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

Wm. Charak, for plaintiff. W. M. Blatt, for defendant.

RUGG, J. This is an action for the conversion of certain property alleged to belong to the plaintiff. At the close of the evidence the plaintiff asked the court to rule that he was entitled to recover. His exception to the refusal to grant this prayer presents the only question to be determined. A brief answer to the plaintiff's contention is that the bill of exceptions does not purport to report all the material evidence. Hence it does not appear that any harm has been done to him or any error committed. But as neither party has argued this point, we consider the case in another aspect.

It was not disputed that on August 26, 1908, the plaintiff purchased from one who had been his partner the latter's interest in a shoe store, which the two had before conducted as copartners. The plaintiff testified that on the day following he made an agreement of conditional sale of this store and all its stock with one Siegel, the price being \$3,439, of which the receipt of \$1,000 was acknowledged, the title to remain in the plaintiff until payment was made, and that contemporaneously he executed an absolute bill of sale to Siegel, and placed it in escrow to be delivered when full payment had been made; that thereupon Siegel entered into possession of the store and conducted the business, having the right to make sales in the ordinary course of trade; that in February, 1909, for breach of the agreement he took possession of the store and employed Siegel as his agent to run the store thereafter; that except at rare intervals after the conditional sale the plaintiff was not at the store, and Siegel was apparently in sole control; and that on March 4, 1909, the defendant attached goods in the store as the property of Siegel. Several witnesses testified to seeing the plaintiff take possession of the store in February, and the agreements and bill of sale were offered in evidence. The plaintiff made a perfect case on paper. But the defendant claimed it was a fraud, and that the goods attached were in truth the property of Siegel. The question at issue was, not as claimed by the plaintiff whether the goods were liable to attachment, but

whether the defendant had converted goods which were the property of the plaintiff. The plaintiff alleged that he was the owner. The burden was on him to prove that fact. It was an affirmative proposition, and could not have been ruled as matter of law upon disputed evidence. That the plaintiff once owned the property was not decisive, nor did it shift the burden of proof. He still had the burden of proving by a preponderance of all the credible evidence that he was the owner at the time of the attachment. *Phelps v. Cutler*, 4 Gray, 137; *Wylie v. Marinofsky*, 201 Mass. 583, 89 N. E. 448. The jury may have disbelieved all the material parts of the plaintiff's evidence. *Lindenbaum v. N. Y., N. H. & H. R. R. Co.*, 197 Mass. 314, 84 N. E. 129. But there was direct evidence tending to contradict the claim of the plaintiff on this point. The plaintiff admitted that he had stated that he had sold the store. There was testimony that Siegel had asserted that he was proprietor of it. He admitted that he was indebted to various New York firms and was a bankrupt and came to Boston at about the time he entered into possession of the store, and was an entire stranger to the plaintiff. No corroborating evidence of check, deposit slip in bank or otherwise was offered to support the oral testimony of payment of only \$1,000 in August. The business was conducted under an impersonal name, which remained the same during the entire period under inquiry. The terms of the alleged conditional sale agreement might have been found to afford intrinsic indications of improbability so great as to amount to a badge of fraud. The circumstances were such as to warrant a finding that the mode of dealing with the store by Siegel as its owner represented his real relation to it. *Raymond v. Worcester*, 172 Mass. 205, 51 N. E. 1077.

Exceptions overruled.

(207 Mass. 288)

LARIVÉE v. A'HEARN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

PRINCIPAL AND AGENT (§ 96*)—ARCHITECTS
—PURCHASING MATERIAL ON CREDIT OF
OWNER.

The defendant's contract with his supervising architect provided that the defendant should furnish the architect with money sufficient to pay all material bills within such time after the delivery of the material as to entitle the architect to take the cash discounts, and that the architect should make all contracts for the furnishing and erection of the different portions of the building to be erected on the defendant's premises, and make contracts therefor in the name of the owner; and by a further proviso defendant was to furnish on each Saturday such sums of money to cover the expenditure of the necessary work as appeared to be necessary from an estimate list made up by the architect and furnished to the owner on the preceding Friday. Lumber was delivered on defendant's premises and used in the construction of the building erected under his architect's su-

pervision; the defendant having no actual knowledge as to its delivery or use. *Held*, that the architect had authority to contract for the lumber on defendant's credit.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 254-343; Dec. Dig. § 96.*]

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Action by Cyril J. Larivée against Michael A'Hearn. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

George W. Reed, for plaintiff. Samuel R. Outler and Harry W. James, for defendant.

MORTON, J. This case is here on the defendant's exceptions, and the only question is whether the architect had authority to contract on the credit of the defendant for the lumber which is the subject of this suit. The lumber was delivered upon the defendant's premises and was used in the construction of a building which he erected thereon under the supervision and direction of the architect, who was acting in relation thereto under a written contract between himself and the defendant. The defendant had no knowledge of the delivery of the lumber or that it was used in the construction of the building. The contract provided amongst other things that the defendant "should furnish said architect a sum of money sufficient to pay all lumber bills and material bills within such time after the delivery of the materials as will enable the architect to take the cash discounts"; and the contention of the defendant is that this and another similar provision in regard to the defendant's furnishing money to the architect to pay the bills excludes by necessary implication any power or authority on the part of the architect to pledge the defendant's credit therefor. But the contract provides in express terms that the architect shall "make all contracts for the furnishing and erection of the different portions thereof [meaning the building] for him [the defendant], and in his behalf"; that he shall "receive bids for various parts of the work, and * * * make contracts therefor in the name of the owner"; and that the defendant shall "furnish, by 10 o'clock a. m. on each Saturday, such sums of money to cover the expenditures of the preceding week as may appear to be necessary from an estimate list made up by said architect and furnished said owner [the defendant] before the close of business on Friday preceding." This last provision clearly implies that the money is not to be furnished till after the bills are contracted, and, when taken in connection with the provision that the architect is to make all contracts in the name of and in behalf of the defendant, plainly shows that it was contemplated and understood between the architect and the defendant that the former should have authority to pledge the lat-

ter's credit for materials used in the construction of the building. The rulings requested were, therefore, rightly refused. Exceptions overruled.

(207 Mass. 378)

BURNHAM v. WILSON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. PRINCIPAL AND AGENT (§ 105*)—IMPLIED AUTHORITY—COLLECTIONS.

One who was merely authorized to collect and receive the interest on an overdue mortgage note, but did not have possession of the mortgage or note, did not have implied authority to receive payment of the principal sum due.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 298-310; Dec. Dig. § 105.*]

2. PRINCIPAL AND AGENT (§ 148*)—IMPLIED AUTHORITY—NOTICE.

One who did not know that another, authorized by defendants to collect the interest on an overdue mortgage note, had theretofore collected an installment of the principal upon another note held by defendants and another, could not have been influenced by such fact, so as to have relied thereon in paying such agent the principal of the overdue note.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 534-552; Dec. Dig. § 148.*]

3. PRINCIPAL AND AGENT (§ 148*)—AUTHORITY—LIMITATIONS OF AUTHORITY—NOTICE.

Where one had not been held out as a general agent, but merely had authority from his principal to receive payment of the interest on a mortgage debt, it was not necessary to show knowledge by one dealing with him with reference to the mortgage of his limitation of authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 534-552; Dec. Dig. § 148.*]

Exceptions from Superior Court, Suffolk County.

Action by Lewis Burnham against George H. Wilson and others. Judgment for plaintiff, and defendants except. Exceptions sustained.

Wm. H. Brown and John H. Coakley, for plaintiff. William H. Bent, for defendants.

SHELDON, J. There was ample evidence that Fisher was authorized by the defendants to receive payments of interest upon the mortgage note here in question, and that is not now in dispute. But we are unable to find in the evidence any sufficient support for the claim that Fisher had authority to receive payment of the principal sum due. The judge at the hearing was unable to find such authority, although he found that Simpson, when he paid the principal sum to Fisher, "believed and had reason to believe that Fisher had authority to receive payment of the principal as well as the interest"; that is, that Fisher had been held out to Simpson by the defendants as having such authority, so that Simpson was justified by their conduct in believing that such was the fact.

The fundamental question in the case is whether this finding was justified.

Neither the note nor the mortgage was in Fisher's possession. That he had been given authority to collect and receive the interest upon an overdue mortgage note would not, without more, tend to indicate that he was authorized to receive payment of the principal sum. Accordingly this was not of itself such conduct on the part of the defendants as would justify Simpson in believing that Fisher had the additional authority. *Biggerstaff v. Marston*, 161 Mass. 101, 104, 36 N. E. 785; *Murphy v. Barnard*, 162 Mass. 72, 77, 38 N. E. 29, 44 Am. St. Rep. 340, et seq. This doctrine has been sustained in other jurisdictions in a great number of decisions which have been collected by the industry of the defendants' counsel, to which it is not necessary now to refer.

The testimony that Fisher had collected an installment of the principal due upon another note held by one of the defendants and a third party had no bearing. It was not known to Simpson, and could not have influenced his mind at all. He could not justify his belief by reason of a fact of which he was ignorant.

In *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36, the mortgagee had authorized his agent to receive payments of both principal and interest, and set up only a subsequent limitation of this authority, of which no notice had been given to the mortgagor. In *Doyle v. Carey*, 170 Mass. 337, 49 N. E. 651, the mortgagee had known of previous payments of principal made to her agent and indorsed upon the note without any objection from her. Neither of these cases is applicable here.

Fisher was in no sense the general agent of either of the defendants, nor had he been held out as such by either of them; and it was not necessary to bring home to Simpson notice of any limitation of Fisher's authority.

The testimony of Mrs. Eastman was admitted *de bene esse*, and was finally excluded. It cannot now be considered. It was incompetent as being a private conversation between husband and wife. This is not now disputed.

It is not worth while to go further into detail. We have been over all the evidence, and have weighed with care the suggestions made by the plaintiff's counsel in argument. We find no evidence to justify a finding that either of the defendants held out Fisher as having a general agency about this note and mortgage, or a particular authority to receive payment of the principal. The defendant's exception to the refusal of the court to give their first request for rulings must be sustained.

So ordered.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(175 Ind. 126)

VAIL et al. v. PAGE. (No. 21,626.)

(Supreme Court of Indiana. Jan. 26, 1911.)

1. COURTS (§ 202*)—PROBATE COURTS—PRACTICE—APPEALS.

Where a decision grows out of any matter connected with a decedent's estate, it is necessary to comply with Burns' Ann. St. 1908, § 2978, fixing the time for the filing of an appeal bond and the transcript on appeal from decisions growing out of any matter connected with a decedent's estate; the remedy provided by the statute being exclusive.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

2. COURTS (§ 202*)—PROBATE COURTS—PROCEDURE—TIME TO APPEAL.

Under Burns' Ann. St. 1908, §§ 2828, 2829, 2842, requiring the filing of claims against decedents, and prohibiting actions by complaint and summons against an administrator and others jointly or severally liable, and authorizing the court on it appearing that any one is bound with decedent on any contract which is the foundation of the claim to direct that the claim shall be amended by making such person a defendant in the action, a proceeding on an appeal bond against a deceased surety, in which the principal and cosureties were made parties defendant, involves the exercise of probate jurisdiction, and an appeal from a judgment on the bond is governed by sections 2977 and 2978, authorizing appeals in matters connected with a decedent's estate on filing an appeal bond within 10 days after the decision complained of, and filing the transcript within 90 days after the filing of the bond, and not by section 672, requiring that appeals shall be taken within one year after final judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 202.*]

3. APPEAL AND ERROR (§ 356*)—FAILURE TO FILE TRANSCRIPT—EFFECT.

The failure to file the transcript on appeal within the time fixed by statute for regulating appeals prevents the court from acquiring jurisdiction of the appeal, and the court on its own motion must order a dismissal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1928, 1927; Dec. Dig. § 356.*]

Appeal from Circuit Court, Wells County; C. E. Sturgis, Judge.

Action by Charles Page against Aaron T. Vail and others. From a judgment for plaintiff, defendants appeal. Dismissed.

Vesey & Vesey, for appellants. Lesh & Lesh, for appellee.

MORRIS, J. In April, 1905, the appellee, Charles Page, brought suit in the Miami circuit court against the Ft. Wayne Cooperage Company for damages for personal injuries, and in the following June recovered judgment in the sum of \$6,500, from which an appeal was taken to the Appellate Court, the bond for the appeal having been executed by said Cooperage Company as principal and Aaron T. Vail, William H. Niblick, and John W. Vail as sureties. The judgment of the circuit court was affirmed by the Appellate Court, and the cause was thereupon appealed to this court, which likewise affirmed it. After the affirmance of said judgment by the

Supreme Court, execution was issued against the Cooperage Company, but returned unsatisfied; the said company having become insolvent. On November 8, 1906, said William H. Niblick died intestate in Adams county, and thereafter his widow, Christina R. Niblick, was appointed by the Adams circuit court as administratrix of his estate. On October 8, 1907, this action was commenced by appellee filing in the office of the clerk of the Adams circuit court his claim against the said estate of William H. Niblick. The claim was founded on said appeal bond, alleged a breach thereof, and demanded an allowance of \$3,500. The administratrix did not allow the claim, and it was thereupon transferred to the issue docket of said Adams circuit court for trial. Afterwards said appellee asked and was granted leave to file a second paragraph of complaint, or claim, making said Aaron T. Vail and John W. Vail and the Ft. Wayne Cooperage Company, new parties defendant, for whom process was issued. Said Aaron T. Vail and John W. Vail entered a special appearance, and filed motions to quash the summons, which motions were sustained. Thereupon the administratrix filed her petition, in which she represented that the bond sued on was executed by said Cooperage Company as principal, and Aaron T. Vail and John W. Vail and her decedent as sureties, and she prayed that the claim be amended and the Cooperage Company and the Vails be ordered made parties defendant thereto. This petition was granted, and the court ordered the plaintiff to amend his claim making the company and said Vails defendants, which was thereupon done, and on motion of plaintiff the court ordered the issuance and service of process on the new defendants. After the service of new process, various motions were made by defendants, and the venue of the cause was changed to the Wells circuit court. On May 15, 1909, the cause was at issue, and was tried by the court without a jury. On September 23, 1909, judgment was rendered by the Wells circuit court, in favor of appellee, against the Cooperage Company as principal and Christina R. Niblick as administratrix of the estate of William H. Niblick and Aaron T. Vail and John W. Vail as sureties in the sum of \$8,198.79 and costs. From that judgment this appeal is prosecuted. During the progress of the cause Christina R. Niblick and Jesse G. Niblick were made parties defendant. All of said defendants are named in this appeal as appellants, but Aaron T. Vail alone has assigned errors.

March 2, 1910, the transcript was filed in the office of the clerk of this court. The cause was submitted April 1, 1910, and on May 20th appellants' briefs were filed. On June 27th appellee filed his motion to dismiss the appeal, and at the same time filed his briefs on the merits. On August 8th ap-

pellant filed his reply brief on the merits, and his brief on appellee's motion to dismiss the appeal. The appellee's motion to dismiss, among other causes, is based on the failure of appellant to file the transcript within the time required by the section 2978, Burns' Ann. St. 1908. As the transcript was not filed until after the lapse of more than 100 days from the date of the judgment, and as no bond was ever filed, it becomes necessary to decide whether this appeal is governed by the provisions of the Civil Code (Burns' Ann. St. 1908, § 672), or by sections 2977 and 2978, Burns' Ann. St. 1908. These latter sections are sections 228 and 229 of the decedents' estates act of 1881, the latter of which was amended for the last time in 1899. Acts 1899, p. 379. Said section 2977 provided that "any person feeling himself aggrieved by any decision of a circuit court * * * growing out of any matter connected with a decedent's estate may prosecute an appeal to the Supreme Court, upon filing with the clerk of the circuit court a bond," etc. The following section (2978) provides that "such appeal bond shall be filed within 10 days after the decision complained of is made. * * * The transcript shall be filed in the Supreme Court within 90 days after filing the appeal bond. * * *"

Does the judgment appealed from grow out of "any matter connected with a decedent's estate"? If so, this appeal should be dismissed. Since the decision in *Seward v. Clark* (1879) 67 Ind. 289, overruling *Hamlyn v. Nesbit* (1871) 37 Ind. 284, it has been held in an unbroken line of decisions that, if the decision grows out of any matter connected with a decedent's estate, it is necessary to comply with the provisions of said section 2978, or provisions of like character in earlier statutes, and that this remedy is exclusive. *Bell v. Mousset* (1880) 71 Ind. 347; *Yearley v. Sharp* (1884) 96 Ind. 409; *Browning v. McCracken* (1884) 97 Ind. 279; *Miller v. Carmichael* (1884) 98 Ind. 236; *Bennett v. Bennett* (1885) 102 Ind. 86, 1 N. E. 199; *Rinehart v. Vail* (1885) 108 Ind. 159, 2 N. E. 330; *Webb v. Simpson* (1885) 105 Ind. 327, 4 N. E. 900; *Galentine v. Wood* (1893) 137 Ind. 532, 35 N. E. 901; *Beaty v. Voris* (1894) 138 Ind. 265, 37 N. E. 785; *Harrison Nat. Bank v. Culbertson* (1896) 147 Ind. 611, 45 N. E. 657, 47 N. E. 13; *Chipman v. Wells* (1904) 34 Ind. App. 1, 72 N. E. 172.

While this court has suggested in many of said cases that the object of the General Assembly in said enactments was to hasten the settlement of decedents' estates, it appears to be settled that the test applied in the determination of the question is whether or not the probate jurisdiction of the trial court was involved. In *Koons v. Mellett* (1889) 121 Ind. 585, 23 N. E. 95, 7 L. R. A. 231, this court said: "The rule to be deduced from the decisions upon the subject

is that in all proceedings under the law providing for the settlement of a decedent's estate, where the exercise of the probate jurisdiction of the court is invoked the appeal is governed by sections 2609, 2610, Burns' Ann. St. 1894." *Galentine v. Wood*, supra; *Webb v. Simpson*, supra; *Harrison Nat. Bank v. Culbertson*, supra; *Mason v. Roll*, 130 Ind. 280, 29 N. E. 1135. Did the decision of this cause involve the probate jurisdiction of the trial court? The foundation of the action was the appeal bond, executed by decedent Niblick, as one of the sureties. Section 2828, Burns' Ann. St. 1908, compelled the claimant, in order to recover from the administrator, to file his claim with the clerk of the court having jurisdiction of the estate. Section 2829, Burns' Ann. St. 1908, forbids the bringing of any action by complaint and summons against the administrator and other persons upon any contract jointly, or jointly and severally, executed by decedent and such other persons. Section 2842, Burns' Ann. St. 1908, provides, among other things, that, if it shall be shown to the court that any person is bound with the decedent on any contract which is the foundation of the claim, the court shall direct that the claim be amended by making such person a defendant in the action, and thereafter the action shall be prosecuted against him as a codefendant with the administrator, and judgment shall be rendered accordingly. It thus becomes evident that this proceeding throughout involved the exercise of the probate jurisdiction of the court, and in no other jurisdiction could the claimant have obtained a complete remedy; and, furthermore, it appears that the decedents' estates act embraced provisions for every necessary proceeding had in this case. It is, however, most earnestly contended by counsel for appellant that conceding that this appeal is governed by the decedents' estates act, and not by the Civil Code, nevertheless appellee has waived his right to insist on a dismissal because the motion to dismiss was made after submission, and on the same day that he filed briefs on the merits of the appeal.

Without discussing the question of the waiver of the right to file the petition to dismiss by reason of the failure to file the bond, it is sufficient to say that by the failure to file the transcript within the statutory period of 100 days this court never acquired jurisdiction of the appeal, and in such case it would be the duty of the court on its own motion to order a dismissal. *Flory v. Wilson* (1882) 83 Ind. 391; *Simons v. Simons* (1891) 129 Ind. 248, 28 N. E. 702; *Smythe v. Boswell* (1888) 117 Ind. 365, 20 N. E. 263; *Michigan Mutual Ins. Co. v. Frankel* (1898) 151 Ind. 534, 50 N. E. 304; *Miller, Adm'r, v. Carmichael*, supra; *Nordyke v. Fitzpatrick* (1903) 162 Ind. 663, 71 N. E. 48.

Appeal dismissed.

(47 Ind. A. 35)

**INDIANAPOLIS TRACTION & TERMINAL
CO. et al. v. SPRINGER.
(No. 6,970.)**

(Appellate Court of Indiana, Division No. 2.
Jan. 26, 1911.)

**1. STREET RAILROADS (§ 111*)—INJURIES TO
TRAVELER—NEGLIGENCE—COMPLAINT.**

A complaint which alleges that a street railway company negligently permitted a hole to remain between its track, with knowledge thereof, and negligently failed to repair and guard it, that plaintiff while riding a bicycle ran into the hole, and was thrown on the track, and that while lying on the track the company and its servants negligently ran a car over him, inflicting injuries, charges negligence in permitting the hole to remain unguarded, and also charges negligence in the operation of the car, but neither act of negligence is dependent on the other, and proof of either supports a verdict for damages.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 225, 226; Dec. Dig. § 111.*]

2. MUNICIPAL CORPORATIONS (§ 757*)—DEFECTIVE STREETS—LIABILITY.

A city must maintain in a reasonably safe manner a street on which street cars are operated, notwithstanding the duty of the street railway company to keep in repair a part of the street, and the city is liable for negligently failing to repair a defect within the part of the street required to be kept in repair by the company.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1593; Dec. Dig. § 757.*]

3. STREET RAILROADS (§ 86*)—PAVING STREET—STATUTORY DUTY.

Under Burns' Ann. St. 1908, § 5649, providing that every street railway franchise shall require the company to pave the space occupied by and between the tracks and for a space of eighteen inches on the outside thereof, and to keep the same in repair, the failure of a street railway company to repair the street within its tracks is a violation of a statutory duty, and it is liable for resulting injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 173, 183-187; Dec. Dig. § 86.*]

4. STREET RAILROADS (§ 78*)—FAILURE TO REPAIR STREETS—LIABILITY—TRACKS.

The agreement in a lease by a street railway company of its franchise, executed as authorized by Burns' Ann. St. 1908, §§ 5651, 5652, 5654, providing that as a part of the consideration the lessee assumes and agrees to pay all claims against the street railway company arising out of contract or tort, is for the benefit of one injured through the negligence of the company, and he may sue the lessee thereon, and the company is not a necessary party to an action by him.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 168, 169; Dec. Dig. § 78.*]

5. STREET RAILROADS (§ 102*)—INJURIES TO PEDESTRIAN—PROXIMATE CAUSE.

A bicycle rider fell into a hole between street car tracks on a street, and was thrown onto the track. While he lay there a car ran over him. The company was guilty of negligence in permitting the hole to remain in the street. *Held*, that the proximate cause of the accident was the hole in the street; and the fact that the company was not guilty of negli-

gence in the operation of its car did not prevent a recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 186; Dec. Dig. § 102.*]

6. NEGLIGENCE (§ 56*)—"PROXIMATE CAUSE."

"Proximate cause" is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which that result would not have occurred. By "proximate cause" is intended an act which directly produced or concurred directly to produce the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

7. TRIAL (§ 295*)—INSTRUCTIONS—OBJECTIONS.

Where an objection is made to the giving of several instructions on the court's own motion, the instructions must be considered together to determine whether they correctly state the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

8. MUNICIPAL CORPORATIONS (§ 800*)—DEFECTIVE STREETS—NEGLIGENCE—PROXIMATE CAUSE.

A bicycle rider fell into a hole between street car tracks on a street, and while he lay on the tracks a car negligently operated ran over him. The city was guilty of negligence in permitting the hole to remain in the street. *Held*, that the city was liable for the injuries received, for the efficient cause of the injury was the defective hole.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.*]

9. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE—INTERVENING AGENCY.

Intervening agencies to interrupt the current of responsible connection between negligent acts and injuries must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such character that they could not have been foreseen or anticipated by the original wrongdoer, and where it required both agencies to produce the result, or where both contributed thereto as concurrent forces, the presence of one would not exculpate the other, because it would still be an efficient cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

10. MUNICIPAL CORPORATIONS (§ 800*)—DEFECTIVE STREETS—NEGLIGENCE—LIABILITY—PROXIMATE CAUSE.

Where an injury to a person caused by a hole in a street between a street car track was caused by the negligence of the city and of the street railway company failing to repair or guard the defect, the city would not be relieved from liability because the company was guilty of negligence; the person injured not being responsible for either of the causes and being free from fault.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.*]

11. TRIAL (§ 295*)—INSTRUCTIONS—REQUISITES.

An instruction is not objectionable as omitting essential elements, where such elements are contained in another instruction, since the instructions must be read together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

12. TRIAL (§ 359*) — VERDICT — SPECIAL VERDICT.

Where the answers to the interrogatories in a special verdict and the general verdict are not inconsistent, the general verdict must stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Action by William N. Springer by Anna Hewitt, his next friend, against the Indianapolis Traction & Terminal Company, and the city of Indianapolis. From a judgment for plaintiff, defendants appeal. Affirmed.

F. Winter, W. H. Latta, Cook & Cook, F. E. Matson, and C. D. Bowen, for appellants. P. W. Bartholomew, Uriah S. Jackson, and Earl Sample, for appellee.

IBACH, J. Appellee, by his next friend, brought this action in the Marion superior court against the appellants to recover damages for personal injuries alleged to have been received by him through their negligence. The venue was afterwards changed to the Hancock circuit court.

The complaint is in two paragraphs. The negligence charged in the first paragraph is that the Indianapolis Street Railway Company carelessly and negligently permitted a hole, eight inches deep, three feet long, and one foot wide, to exist and remain unrepaired, between its tracks at a point on Massachusetts avenue in the city of Indianapolis and in its right of way, with knowledge thereof; that said hole was carelessly and negligently permitted to remain unguarded and unrepaired for a long time prior to the date of the injury complained of; that on April 11, 1902, appellee was riding a bicycle southwest on said avenue; that said bicycle ran and fell into said hole and threw appellee prostrate in and upon the said railway company's tracks; that while he lay there in plain view the said railway company and its servants carelessly and negligently ran one of its said cars against and over and upon said appellee, inflicting the injuries for which he sues. Said paragraph also avers that since April 11, 1902, the Indianapolis Street Railway Company has leased to appellant company all its rights, privileges, and franchise in and to and over the tracks and right of way as set forth in the complaint that as a part consideration for said lease appellant company assumed and agreed to pay all claims against the lessor arising out of contract or tort. The second paragraph alleges substantially the same facts as to the railway company as are charged in the first paragraph, and, in addition, charges that the city of Indianapolis had during the year 1902 complete control and supervision of all the streets and highways situated within its limits; that Massachusetts avenue is a public street situated within said city, and that the said railway com-

pany and said city carelessly and negligently maintained a hole open and unguarded between the tracks of said railway company, etc.

Appellant company answered by general denial. A demurrer to the second paragraph was filed by appellant city, which was overruled, and an answer filed in general denial. A trial was had by jury, resulting in a verdict against appellant company on both paragraphs, and the appellant city on the second paragraph. With the general verdict the jury returned answers to interrogatories. Over appellant's separate motions for judgment on the answers to interrogatories, judgment was rendered on the verdict in favor of the appellee against the appellants jointly.

Appellants' separate motions for a new trial were overruled, and these rulings are assigned as error. The first point argued by appellant company is that the trial court erred in overruling its motion for judgment in its favor upon the interrogatories, and answers thereto returned by the jury, notwithstanding the general verdict. It is insisted in the presentation of this point that the only charge of actionable negligence against the appellant company is that the Indianapolis Street Railway Company, its predecessor, after plaintiff had fallen upon its track, in the path of its incoming car, negligently and carelessly ran its car over the plaintiff. We cannot agree with counsel in their contention. It is true that the complaint charges negligence on the part of said railway company as above set out, but it also charges that the Indianapolis Street Railway Company negligently and carelessly maintained and negligently and carelessly permitted a certain hole to exist and remain unrepaired between its tracks, and in its right of way, with knowledge thereof, and carelessly and negligently failed to repair the same, and permitted said hole to remain unguarded for about two months prior to the date of the injury. The fact that the complaint also charges said railway company with negligence in the manner in which it operated its car does not in any way add to or detract from the remaining averments of the complaint. The negligent act alleged in the running of the car is only one of the acts of negligence described. Neither of said acts of negligence is dependent upon the other, and the proof of either would support a verdict for damages. It is shown by the evidence that Massachusetts avenue is one of the public streets in the city of Indianapolis; that a hole was permitted to remain therein for a long time, both defendants having knowledge of said defect; that said hole or defect was within that portion of the street required to be paved and kept in repair by said railway company. It was the duty of said city to maintain said street in a reasonably safe condition for ordinary travel, and a like duty

rested upon the Indianapolis Street Railway Company as to that portion of the street between its tracks. *Knouff v. City of Logansport*, 26 Ind. App. 206, 59 N. E. 347, 84 Am. St. Rep. 292; *Elliott on Roads and Streets* (2d Ed.) art. 772. The duty on the part of the railway company to repair the street in question was one imposed by law, and a failure so to do rendered said railway company liable for any injury resulting therefrom. *Burns' Ann. St. 1908*, § 5649.

It is insisted that it appears from the complaint that the appellant company is operating under a lease from the Indianapolis Street Railway Company, and that the old company was still in existence at the time this action was begun, and was within the jurisdiction of the court, and should have been made a party to this action, and that there is no privity of contract between him and either party to the contract. The lease in question does not enumerate any particular person or persons or form of claims, but included all persons coming within the scope of its provisions. It leaves the character of the claim, the amount due, and the person to whom it is due all for future consideration. Such an agreement must be construed to be for all intents and purposes an agreement for the benefit of this plaintiff and other claimants, and such doubtless was the intention of the parties to the contract. *Am. & Eng. Enc. of Law* (2d Ed.) 180, and authorities cited; *Beach on Railroads*, § 553; *Cleveland, etc., Railway Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367. Authority is given to sell the franchise and properties of street railway companies and to lease the same. *Burns' Ann. St. 1908*, §§ 5651, 5652, 5654. It appears, also, from the record in this case that an agreement was made when the cause was tried in the court below that the Indianapolis Traction & Terminal Company was the successor of the Indianapolis Street Railway Company. It also appears from the portion of the lease in evidence that the lessee was to pay, as and when they became due and payable, all debts and obligations of and rightful claims and demands against the lessor, existing at the commencement of the term of the lease, and whether arising out of contract or tort; and in receiving the properties and the rights and tracks, etc., of the Indianapolis Street Railway Company, as a part of the consideration of the lease, it cannot be now heard to say that it is not liable to any third party, in whose interest and for whose benefit the contract was made. The Indianapolis Street Railway was not a necessary party to a complete determination of the action. *Jeffersonville, etc., Railway Co. v. Hendricks*, 41 Ind. 60; *U. S. Capsule Company v. Isaacs*, 23 Ind. App. 533, 55 N. E. 832; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 723, 16 N. W. 331; *Wabash Ry. Co. v. Stewart*, 41 Ill. App. 640; *Hanlon v. Smith* (C. C.) 175 Fed. 198; *Gray v. Grand Trunk Ry. Co.*, 156 Fed. 745, 84 C. C. A. 392; *Thomp-*

son v. Northern Pac. R. Co., 93 Fed. 384, 35 C. C. A. 357. In their answers to interrogatories numbered 38 to 42, the jury found there was a defect in the pavement south of the north rail of the south track, about four inches deep, six inches wide, and from three to four feet long, and by their answer to interrogatory No. 9, they found that the hole caused the plaintiff to fall. Conceding, as is insisted by counsel for appellant company, that the jury found by their answers to interrogatories that the railway company was not guilty of negligence in the operation of its car, this would not necessarily render said answers in irreconcilable conflict with the general verdict. Appellee was riding in a place where he had a right to be, and if it had not been for the hole in the street, as alleged in plaintiff's complaint, he would not have been injured. The presence of the hole in the street was the proximate cause of the injury. "Proximate cause" may be defined as "that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which that result would not have occurred." "By 'proximate cause' is intended an act which directly produced or concurred directly to produce the injury." The hole in the street into which appellee's bicycle ran, and threw him on the track of the street railway company, causing him to be run over by one of the cars of said company, was the proximate cause of the injury complained of by this appellee.

Objection is made on behalf of appellant company to certain instructions given. The first objection is the court erred in giving to the jury the second instruction asked by plaintiff. The same objection is made to the giving of instruction No. 1, requested by plaintiff. These objections are based upon the ground that the railway company owed no duty to keep that portion of the street occupied by its tracks in a reasonably safe condition for travel, and that there was no statute law imposing a duty not to permit the pavement in the street occupied by it to become defective, nor imposing upon it the duty to guard or repair the street. In our view of the case, such objections are not tenable. The statute seems to be plain. The defective condition of the street and the length of time it was allowed to remain in such defective condition and the failure to guard such defect were material points at issue in the case, and the court rightfully instructed the jury upon this feature, and he committed no error in giving the instructions which he did, because they clearly stated the law applicable to the case made by the evidence. Objection was also made to the giving of instructions numbered 4, 5, 6, and 7 on the court's own motion. These instructions must all be considered together, and, when so considered, we conclude that the court below instructed the jury clearly upon the law applicable to the case. Google

The appellant city insists that, when the appellee was thrown into the street, the negligence of the city had spent itself, and appellee was uninjured, and he was thereafter injured by an independent agency, and this independent agency became the proximate cause of the injury. Our attention has not been directed to an instance where the law has been applied upon that theory under such circumstances as are revealed in this case. It has been held repeatedly that "intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such results, must entirely supercede the original culpable act, and be in themselves responsible for the injury, and must be of such character that they could not have been foreseen or anticipated by the original wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and existence of one will not exculpate the other, because it would still be an efficient cause of the injury." *White Sewing Machine Co. v. Richter*, 2 Ind. App. 334, 28 N. E. 446.

It is insisted by the appellant city that the court erred in giving to the jury instructions Nos. 1 and 2, requested by the plaintiff, but that it ignores the requirement that, before plaintiff can recover against the city, he must prove not only negligence on its part, but that such negligence was the proximate cause of the injury. These instructions must be taken in connection with all the other instructions given to the jury, and, when so considered, the appellant's claim cannot be allowed.

It is also insisted that the court erred in giving instruction No. 4, requested by the plaintiff, which reads as follows: "If two or more causes combine to produce an injury, a person who is responsible for only one of such causes will not be relieved from liability when the person injured was not responsible for either of the causes, and was free from fault." The theory of plaintiff's second paragraph of complaint is that the defective place in the street was caused by the negligence of both the defendant city and the defendant company, and, if the hole was caused by such negligence as charged, then the defendant city would not be excused or relieved from liability, because the Indianapolis Street Railway Company was likewise guilty of carelessness and negligence, and therefore the instruction upon this branch of the case was proper.

Objections are also made to instructions Nos. 5 and 7 given by the court on its own motion, for the reason that they omit essential elements, but these objections are not well taken, for the reason that the elements alleged to be omitted in these instructions were contained in and covered by other in-

structions given. The answers to the interrogatories show that appellant company was guilty of maintaining the hole in the street, as charged in the complaint, and they do not show that appellee was guilty of contributory negligence, or that he was not rightfully upon said avenue, and we are unable to see anything in the answers to the interrogatories inconsistent or which is irreconcilable with the general verdict. Where the answers to the interrogatories and the general verdict are not inconsistent, the general verdict must stand. *Adams v. Cosby*, 48 Ind. 153; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

We find no error in the record. Judgment affirmed.

(47 Ind. A. 16)

MOREY et al. v. TERRE HAUTE TRACTION & LIGHT CO. et al. (No. 7,228.)

(Appellate Court of Indiana, Division No. 1. Jan. 25, 1911.)

1. CONTRACTS (§ 153*)—CONSTRUCTION.

Where possible, effect should be given to all the words in a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

2. CONTRACTS (§ 147*)—CONSTRUCTION.

In the absence of a showing of mistake in the language of a contract, the intent as gathered therefrom will be enforced.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

3. CONTRACTS (§ 153*)—CONSTRUCTION.

Sentences in a contract should be construed together to make the whole consistent.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 734; Dec. Dig. § 153.*]

4. STREET RAILROADS (§ 48*)—FRANCHISES—CONSTRUCTION.

An assignment of a franchise to operate a street railway within C., a city, recited, as a consideration, that the assignees would construct an electric line to, within, and into contiguous territory beyond C., and also a line connecting T. and C. It further recited an "intention" of the assignees to construct another interurban line. *Held*, that the assignees are not required to build the line recited as "intended" to be built.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 123, 124; Dec. Dig. § 48.*]

5. SPECIFIC PERFORMANCE (§ 1*)—NATURE.

"Specific performance" contemplates that the party, against whom such relief is sought, has, by his contract and covenant, agreed to do some certain specific thing which the court can order.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6604, 6605.]

6. SPECIFIC PERFORMANCE (§ 28*)—SUBJECTS OF RELIEF—INDEFINITE CONTRACTS.

An obligation of assignees of a street railway franchise to build "into contiguous territory beyond" a city is too indefinite to be specifically performed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

7. APPEAL AND ERROR (§ 721*)—EXCEPTIONS—NATURE—JOINT ASSIGNMENT.

A statement that plaintiffs severally and separately except shows separate exceptions, and will not support a joint assignment of error. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2985-2989; Dec. Dig. § 721.*]

8. APPEAL AND ERROR (§ 721*)—ASSIGNMENTS OF ERROR—REQUISITES.

Assignments of error must be joint or several, depending on whether the exception to the ruling relied on was joint or separate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2985-2989; Dec. Dig. § 721.*]

Appeal from Circuit Court, Vermillion County; G. G. Rhuby, Judge.

Action by William L. Morey and others against the Terre Haute Traction & Light Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Jump & Bogart and F. R. Miller, for appellants. Lamb, Beasley & Sawyer, for appellees.

HOTTEL, J. This was an action instituted by the appellants in the Vermillion circuit court to procure an order or decree of the court against appellees, and each of them, commanding and directing them to specifically carry out and perform certain covenants and agreements which the appellants in their complaint allege are contained in a certain instrument of assignment, in which all the appellants, except said city of Clinton, assigned certain franchise rights which had been conferred upon them by their coappellant, the said city of Clinton. The theory of the complaint, and the contention of appellants' counsel, is that the covenants contained in the contract of assignment are binding upon and should be enforced against the appellees. The complaint is in four paragraphs. To each of the paragraphs of the complaint each of the defendants (appellees) filed their separate and several demurrers. The court sustained the separate and several demurrers of each defendant (appellee) to each paragraph of the complaint, to which rulings of the court, and each of the same, the appellants, and each of them, at the time severally and separately excepted. The appellants declined to plead further, and elected to stand upon their complaint, and the court rendered judgment on said rulings and on each of them for the defendants (appellees) as on default, and adjudged that the appellants recover nothing from the appellees by reason of their action, and that the appellees recover of appellants the costs of the action. From this judgment the appeal is taken, and the appellants jointly assign errors as follows: "The appellants, William L. Morey, Frank Swinehart, William Kelley, David McBeth, Samuel J. Hall, John Harlan, James Osborn, and the city of Clinton, in the state

of Indiana, plaintiffs below, say that there is manifest error in the judgment and proceedings of the Vermillion circuit court, in the state of Indiana, in this cause, in this:

(1) The court erred in sustaining the demurrer of the appellee Terre Haute Traction & Light Company to the first paragraph of the plaintiff's complaint. (2) The court erred in sustaining the demurrer of the appellee Terre Haute Traction & Light Company to the second paragraph of the plaintiff's complaint. (3) The court erred in sustaining the demurrer of the appellee Terre Haute Traction & Light Company to the third paragraph of the plaintiff's complaint. (4) The court erred in sustaining the demurrer of the appellee Terre Haute Traction & Light Company to the fourth paragraph of the plaintiff's complaint. (5) The court erred in sustaining the demurrer of the appellee Terre Haute, Indianapolis & Eastern Traction Company to the first paragraph of the plaintiff's complaint. (6) The court erred in sustaining the demurrer of the appellee Terre Haute, Indianapolis & Eastern Traction Company to the second paragraph of the plaintiff's complaint. (7) The court erred in sustaining the demurrer of the appellee Terre Haute, Indianapolis & Eastern Traction Company to the third paragraph of the plaintiff's complaint. (8) The court erred in sustaining the demurrer of the appellee Terre Haute, Indianapolis & Eastern Traction Company to the fourth paragraph of the plaintiff's complaint."

The sufficiency of the complaint to withstand demurrer for want of facts is the only question presented by this appeal. The complaint and the instrument of assignment upon which each of the several paragraphs are based are lengthy, and counsel for appellant in their brief have made, we think, a fair and concise statement of the facts common to and contained in each of the several paragraphs, which counsel for appellee admit to be correct and we adopt the same for the purpose of this opinion.

The statement of the facts is as follows:

"(1) On the 21st day of July, 1902, the common counsel of the city of Clinton, in the state of Indiana, passed an ordinance granting to William L. Morey, Frank L. Swinehart, William Kelley, David McBeth, Samuel J. Hall, John Harlan, and James Osborn (the first four of whom reside in the city of Clinton, and the last three of whom reside in or near the town of Dana, in Vermillion county, Ind.) a franchise to construct, maintain, and operate an electric railway in certain streets of the city of Clinton. * * * This ordinance is made a part of each paragraph of the complaint as 'Exhibit A.' * * *

"(2) That on the 26th day of August, 1902, the plaintiffs (appellants) Morey, Swinehart, Kelley, McBeth, Hall, Harlan, and Osborn by

a certain instrument in writing which is made a part of each paragraph of the complaint as 'Exhibit B' * * * sold and transferred all the rights conferred upon them by such ordinance to Charles A. Stone and Edwin S. Webster, their successors, grantees, and assigns. That the instrument or contract of assignment contained, after the granting clause, the following provision, to wit: 'In consideration of the foregoing sale, transfer, assignment, and conveyance, the buyers agree that they, their successors, grantees and assigns, will, within the time prescribed by such ordinance [within 24 months from July 21, 1902] construct an electric street railroad line to, within and into, contiguous territory beyond said city of Clinton, and also an electric interurban railroad between and connecting the city of Terre Haute and the said city of Clinton. And it is the intention of the said buyers to construct an electric railway line from said city of Clinton, north and northwest, toward the city of Danville, Illinois, to and through the town of Dana, in said Vermillion county. * * *

"(3) That said Charles A. Stone and Edwin S. Webster, by an instrument in writing, subsequently transferred and assigned all said franchise rights to one George E. Bruorton, * * * and that said Bruorton, his wife joining him, by an instrument in writing subsequently transferred said rights to the Terre Haute Electric Traction Company, an Indiana corporation, * * * which company, by proper proceedings, later changes its name to Terre Haute Traction & Light Company, one of the appellees in this cause. * * *

"(4) That said Terre Haute Traction & Light Company by an instrument in writing subsequently leased and assigned to the defendant (appellee) Terre Haute, Indianapolis & Eastern Traction Company for 999 years all the rights, franchises, etc., given and granted by said city of Clinton by ordinance as aforesaid, in which instrument of lease and assignment said Terre Haute, Indianapolis & Eastern Traction Company agreed and covenanted to assume and fulfill all obligations and contract obligatory and binding on said Terre Haute Traction & Light Company. * * *

"(5) That the plaintiffs Morey, Kelley, Swinehart, and McBeth reside in and own real estate and other property in the city of Clinton, Ind., the value of which would be materially increased and benefited by the performance of the covenants and agreements contained in said transfer and assignment to said Stone and Webster, and are otherwise peculiarly interested in the fulfillment of the covenants and agreements contained in said contract of assignment by them and others to said Stone and Webster. That the plaintiffs, Hall, Harlan, and Osborn reside in or near and own real estate in or near said town of Dana, in Vermillion county, Ind.,

the value of which would be materially increased and benefited by the performance of the covenants and agreements contained in said transfer and assignment to said Stone and Webster, and are otherwise peculiarly interested in the fulfillment of the covenants and agreements contained in said contract of assignment to said Stone and Webster. That the city of Clinton, an appellee herein, is greatly and peculiarly interested in, and would be greatly and peculiarly benefited by, the performance of the covenants and agreements contained in said contract of assignment to said Stone and Webster. * * *

It will be observed that the above statement contains but one provision of the instrument of assignment, but, inasmuch as it is conceded that this provision above copied is the only one involved in determining the question raised upon the demurrer to the several paragraphs of complaint, it will be unnecessary to copy further from this assignment.

We think, however, that one paragraph of the ordinance passed by the city of Clinton, made part of each paragraph of complaint and marked "Exhibit A," is necessary to a perfect understanding and interpretation of this assignment, and we therefore quote section 3 of the ordinance, which is as follows: "The term of this grant, franchise and the authority to use said streets shall be for a period of fifty (50) years from the passage of this ordinance, provided that the construction of said street railroad line in said city shall be commenced within twelve (12) months from the date of the passage of this ordinance and the same shall be completed and in operation within twenty-four (24) months from the passage of this ordinance, otherwise this grant, authority and franchise shall become and be void and of no effect whatever."

We have above quoted from appellant's brief the facts common to and stated in each of the several paragraphs of complaint. It is also conceded that the several paragraphs differ in respect to the facts alleged therein and the respective theories upon which they are predicated, as follows: "The first paragraph is based upon the theory that the covenant and agreement of Stone and Webster, hereinabove set out in paragraph 2 of this state of facts, is a covenant and agreement to build, within the time specified, an electric railway line from said city of Clinton, north and northwest, toward the city of Danville, Ill., to and through the town of Dana, in Vermillion county, Ind. * * * It further alleges a breach of such covenant on the part of appellees and demands made, * * * and concludes with prayer and that the defendants (appellees) and each of them be ordered by the court to specifically perform such covenants and agreements, and for all other proper relief."

The second paragraph of complaint con-

tains the same allegations as the first, and is substantially identical therewith, except as to the allegations of the covenant and agreement in the contract of assignment relative to the building of the electric line; the theory of the second paragraph being that the covenant and agreement with Stone was that they should "construct an electric railroad line to, within, and into contiguous territory beyond said city of Clinton" and not that they should "construct an electric railway line from said city of Clinton, north and northwest, toward the said city of Danville, Ill., to and through the town of Dana in said Vermillion county," as the first paragraph alleges; and the prayer in said second paragraph is for an order and decree of the court directing the specific performance of said covenant as so set out in said second paragraph.

The third paragraph of the complaint is practically the same as the first, and proceeds upon the same theory as the first, as to the effect of the covenant and agreement, and is in all respects identical with the first, except that it contains additional allegations which charge that "at the time said Stone and Webster received the assignment from Messrs. Morey et al., as aforesaid, at the time they assigned it to said Bruorton and at the time said Bruorton and wife assigned it to the Terre Haute Electric Traction Company, neither said Stone, Webster, Bruorton, or the latter's wife had at any time beneficial interest in the franchise to and rights in said streets of said city of Clinton, but that they and each of them acted wholly as agents for or incorporators of said Terre Haute Electric Traction Company."

The fourth paragraph of the complaint is based upon the same theory as to the effect of the covenant and agreement contained in the instrument of assignment as the second paragraph above mentioned, and in other respects is practically the same and identical with the first, except that it contains the other and further allegations contained in the third paragraph of the complaint as above shown.

Does the first paragraph of complaint state facts sufficient, and is the theory upon which it is based supported by the instrument of assignment made part thereof? Counsel very earnestly insist that this theory of the complaint is consistent with and upheld by the terms of the assignment itself, and that the complaint upon this theory was sufficient, and that the relief therein prayed should have been granted. To support this contention, counsel have cited numerous authorities, which evidence much research upon the questions involved. We are met at the outset with a line of authorities which appellants' counsel themselves cite, which we think controlling, that make impossible the construction placed upon the instrument of assignment contended for by counsel, and

upon which their theory of complaint, as above indicated, is predicated.

The principles declared in this line of authorities are as follows (we quote from appellants' brief):

"(1) Force and effect should be given to all the words employed by the parties in a contract wherever that is possible. 1 Beach on Contracts, § 711; 17 Am. & Eng. Ency. Law (2d Ed.) 7, and cases there cited; Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; Ind., etc., Co. v. Grainer, 33 Ind. App. 559, 70 N. E. 395.

"(2) In the absence of any averment or proof of a mistake in the language of a contract, the intent as gathered from such contract will be enforced. Beard v. Lofton, 102 Ind. 408, 2 N. E. 129; Witty v. Mich. Mut. Life Ins. Co., 123 Ind. 411, 24 N. E. 141, 8 L. R. A. 365, 18 Am. St. Rep. 327; Shenk v. Stahl, 35 Ind. App. 493, 74 N. E. 538.

"(3) A single sentence in a contract or instrument should not be construed alone, but should be construed with reference to the context. The construction should make the whole consistent, giving all parts their due weight. 1 Beach on Contracts, § 711; Cravens v. Eagle C. M. Co., 120 Ind. 600, 21 N. E. 984; Boardman v. Reed, 6 Peters, 238, 345 [8 L. Ed. 415]."

Take this contract of assignment, and standing alone, under "point 1" above, what "force and effect should be given to all the words" in the contract? Under this contract there is a clear expression of a covenant and agreement to build, first, "an electric street railroad line to, within, and into contiguous territory beyond said city of Clinton"; and, second, there is the expression of an intent only on the part of the purchasers of the franchise "to construct an electric railway line from said city of Clinton * * * to and through the town of Dana." There is no averment in the complaint that there was any mistake in the language of the instrument of the assignment and therefore under "point 2," supra, the intent of the contract must be "gathered" from the instrument itself; and under "point 3," supra, each of the above sentences or provisions must be construed together, and with reference to the context, and the construction as a whole should be consistent, "giving all parts due weight." The language of the contract seems plain and simple. One thing, the purchasers not only intended to do, but they were willing to and did bind themselves to do, by a covenant and agreement to that effect. The other thing they had in their mind as an intention only, which intention they were unwilling to bind themselves to carry out, else why did they not include it in their covenant, and not change the language of the instrument from that of an agreement to the expression of an intent only?

In the case of Louisville, etc., Ry. Co. v. Bodenschatz, 141 Ind. 251, at page 263, 89

N. E. 703, at page 707, the Supreme Court of this state said: "It is necessary in order to give a court of equity jurisdiction to enforce specific performance of a contract that the same be complete and certain as well as fair, just, and equal in all its parts, and that it be founded on a valuable consideration. The contract must be capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without adding to its terms. It must appear that the plaintiff has no adequate remedy at law, and that a refusal to perform the contract would be a fraud upon him. The circumstances must be such, when the court is called upon to act, that its enforcement would not be hard or oppressive upon the defendant." The inclusion of the things agreed to be done and performed in the covenant and agreement, by an old and familiar maxim, would exclude the things not mentioned therein; and in the covenant here in question this exclusion of the provision, insisted upon by appellants as being included in the things agreed upon, is emphasized and made certain by including or mentioning it as a thing intended only. Counsel for appellants insist that this expression, "that it was appellees' intention to build the electric railway line from the city of Clinton north and northwest * * * to and through the town of Dana," qualifies and explains the clause above, which binds appellees "to construct an electric street railroad line to, within and into contiguous territory beyond said city of Clinton"; but counsel is not borne out in this contention, either by the language or the punctuation of the preceding clause. The parties to this assignment relied upon in each of the paragraphs of the complaint as evidenced by its language had in mind two kinds of electric railroad lines, viz., an electric street railroad line, and also one or more interurban lines. They agreed and bound themselves to construct the electric street railroad line "to, within and into contiguous territory beyond the city of Clinton," and also an electrical interurban connecting the city of Terre Haute and Clinton. This they bound and obligated themselves to do, and it was the street railroad that was to be extended into territory contiguous to Clinton, and not an interurban line; so that the expression of an intention to construct a line between Clinton and Dana can in no way be said to explain or qualify the agreement to extend the street railroad line to be built within the city of Clinton and into contiguous territory. The clause is a distinct, separate, independent sentence, expressing an intention only to construct another interurban line. The change in the language and meaning of these two sentences with reference to the construction of these lines of road is so marked that to say they would be construed together, and that the latter should take the meaning of

the former would not only be placing a construction on the contract that fails to give all of its parts due weight, according to the rule of law above expressed, but such construction would be at variance with and antagonistic to both the letter and the spirit of one of the clauses of the contract.

We are convinced that the court below committed no error in sustaining the demurrer to this paragraph of the complaint, for the reason above stated, as well as for other reasons which we will further discuss in connection with paragraph No. 2. Did the court below commit error in sustaining the demurrer to the second paragraph of complaint? Numerous authorities are cited by counsel in support of their contention that this second paragraph stated a good cause of action, but most of these authorities relate to the right and duty of the courts, in proper cases, to enforce specific performance of contracts in relation to the sale of real estate or some interest therein, and also on what constitutes an interest in real estate. We think, however, that the serious trouble with this paragraph is that the theory upon which it is based is not in fact supported by the instrument of assignment made part thereof, and the question is not so much whether a specific performance of a contract relating to the subject-matter to which this assignment relates could be enforced, as it is a question whether or not this contract of assignment itself contains any covenant or agreement to do any certain, definite, and specific thing which a court of equity could order performed and done. The very term "specific performance" contemplates that the party against whom such relief is sought has, by his contract and covenant, agreed to do some certain specific thing which the court can order and direct to be done. Much of what we have said as to the rules which obtain in construing a contract in discussing the first paragraph of complaint applies with equal force in the discussion of this paragraph. The theory of this paragraph is that the appellees covenanted and agreed "to construct an electric railroad line into contiguous territory beyond the city of Clinton," and appellants ask an order and decree of the court accordingly.

As stated above, this instrument of assignment makes clear that the parties to it had in mind two kinds of electric lines, viz., the street line to be constructed in the city of Clinton and contiguous territory and interurban lines. It was the street railroad line which the covenant provided should be extended into territory contiguous to the city of Clinton. The covenant that the appellees should build an electric street railroad in the city of Clinton has some of the elements of definiteness and certainty upon which an order for specific performance might be predicated, but it is not a breach of this part of the covenant upon which appellants rely.

They do not allege a breach of the covenant to construct the electric street line within the city, but they rely wholly upon the breach of the covenant to build "into territory contiguous to the city." This clause in and of itself is meaningless. The question naturally arises: Into what territory shall the road be ordered built? A city is surrounded with contiguous territory. Shall the road be built north, south, east, or west; or shall it be at some intermediate point of the compass? If north, south, east, or west, how far shall it be built into the contiguous territory? Shall it be a foot, a rod, a mile, or ten miles? What shall be the limit, or between what termini shall it be ordered built? It will be observed, also, from the contract and agreement of assignment above set out, that the time fixed therein within which the covenants shall be begun and carried out is as follows: "They [the buyers] will, within the time prescribed by such ordinance, construct," etc. The provision in the ordinance above is that "the construction of said street railroad in said city, shall be commenced within twelve (12) months from the date of the passage of this ordinance, and the same shall be completed and in operation within twenty-four (24) months, etc.," and there is no provision in the ordinance at all for the extension of the line into territory contiguous to the city, and of necessity no provision as to the time of such extension. So far as the covenant and agreement relied upon in this paragraph of the complaint shows, the parties have specifically agreed upon none of these essential elements of a contract necessary to the basing of a decree of specific performance. A decree ordering the construction of an electric line into territory "contiguous to the city of Clinton" without specifying the direction, the route, the distance, or the termini between which it should be built would be a meaningless, useless decree. The equity jurisdiction and powers of the court cannot be successfully invoked for such redress or relief.

In the case of Louisville, etc., Ry. Co. v. Bodenschatz, supra, the Supreme Court, quoting from the opinion of Mitchell, J., in the case of Ikred v. Beavers, 106 Ind. 483, 7 N. E. 326, says: "With respect to its essential elements, the qualities of completeness, certainty, and fairness, the contract set out in the complaint does not present the requisites warranting a decree for specific performance. Courts can only proceed in cases like this when the parties have themselves agreed upon all the material and necessary details of their bargain. If any of these are omitted, or left obscure or undefined, so as to leave the intention of the parties uncertain respecting the substantial terms of the contract, the case is not one for specific performance. * * * Without supplying all its essential details, no court could so frame its decree as to afford any adequate protection to the defendant, nor can a judgment be entered which would be a final determination

of the rights of all the parties." To the same effect is the case of Burke v. Mead, 159 Ind. 252, at pages 256 and 257, 64 N. E. 880.

Counsel for appellees insist that the courts will not enforce specific performance of contracts of the character relied upon in the several paragraphs of appellants' complaint. Generally speaking, we think this is true. There seems to be practical unanimity in the holdings of the courts that a court of equity will not enforce specific performance of a contract general in its terms to construct a railroad; but what this court would do in a proper case where the agreement was certain, specific, and complete in all its details, the route and its location accurately defined, described, and agreed upon, we do not feel called upon to decide. We have no such question presented by either paragraph of this complaint. It is enough for the purposes of this case to say that for the reasons above stated we deem neither of the paragraphs of complaint before us sufficient. This conclusion we think is abundantly supported by the following and other authorities from our own state, as well as many others: Louisville, etc., Ry. Co. v. Bodenschatz, supra; Gaslight, etc., Co. v. City of New Albany, 159 Ind. 660, 39 N. E. 462; Burke v. Mead, supra, at pages 256, 257, of 159 Ind., 64 N. E. 880; Theibaud, Trustee, et al. v. Union Furniture Co., 143 Ind. 341, 42 N. E. 741, at pages 344, 345; Ikred v. Beavers, 106 Ind. 483, 7 N. E. 326. But this case could not be reversed for another reason. The exception to the ruling of the court on the demurrer, as evidenced by the record, is as follows: "Come now again the parties, by their attorneys, and the court being advised in the premises sustains each of the defendants' demurrers to the first, second, third, and fourth paragraphs of the petition and complaint herein, to which rulings the court and each of them of the plaintiffs at the time severally and separately excepta, and said plaintiffs now refuse to plead over and stand on the said rulings to each of said demurrers, and now the court renders judgment on said rulings and on each of them for the defendants as on default." The above language of the exception to the ruling of the court on the demurrer makes it an exception by each appellant separately. Doty v. Patterson, 155 Ind. 60-61, 56 N. E. 668; Thornton's Annotated Code, § 462, pp. 997-999. A joint assignment of error in this court by two or more appellees assigning as error a ruling of court to which the appellees separately excepted presents no question in this court. There must be in this court a joint or separate assignment of error depending upon whether the exception to the ruling below relied upon as error was joint or separate. Doty v. Patterson, supra; Burns v. Trustee, etc., 31 Ind. App. 640-641, 68 N. E. 915; Government Building, etc., Inst. v. Richards, 32 Ind. App. 22-24, 68 N. E. 1039; Green v. Heaston, 154 Ind. 127-130, 56 N. E. 87; Hubbard et al. v. Bell et al., 4 Ind. App.

180, 181, 30 N. E. 906; Louisville, etc., Ry. Co. v. Smoot, 135 Ind. 220-222, 33 N. E. 905, 34 N. E. 1002; Town of Ladoga v. Linn, 9 Ind. App. 15-17, 36 N. E. 159; Coy v. Druckamiller, 35 Ind. App. 177, 73 N. E. 195, 921.

Judgment affirmed.

(200 N. Y. 224)

**PORTER et al. v. INTERNATIONAL
BRIDGE CO. et al.**

(Court of Appeals of New York. Dec. 16,
1910.)

**1. EMINENT DOMAIN (§ 20*)—"PUBLIC USE"—
RAILROAD USE.**

A railroad use of land is a public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 59-67; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

**2. DEDICATION (§ 53*)—EXTENT OF EASE-
MENT.**

Owners of land laid it out as an extension to a village, causing a map to be made, upon which they left an open space designated as a "Public Square." The tract so designated was never conveyed by the owners. The land was afterwards incorporated within a city, and the open place was named by the common council, and used as a common. Held, that the effect of the dedication of the land designated as a public square on the map of the proposed extension was to create an easement in the public co-extensive with the purposes to which public squares in such localities are usually applied, the easement vesting in the village and afterwards in the city as its successor, with the naked fee remaining in the original proprietors and their successors in interest, it not being necessary that the fee should vest to secure the easement to the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 96; Dec. Dig. § 53.*]

**3. DEDICATION (§ 47*)—PUBLIC EASEMENT—
PERSONS IN WHOM EASEMENT VESTS.**

Where an easement is created in the public by a dedication and there is a corporation to represent the public and take charge of its interests, the easement vests in such corporation, which becomes the trustee of a use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 118; Dec. Dig. § 47.*]

**4. DEDICATION (§ 64*)—DEDICATION OF PUB-
LIC SQUARE—INCONSISTENT USES.**

The occupation of a public square dedicated to a city for an approach to a bridge and for railroad purposes with the consent of the city is not consistent with the use of such property for the purposes of a public square.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 107-111; Dec. Dig. § 64.*]

**5. EASEMENTS (§ 30*)—DEDICATION (§ 63*)—
ABANDONMENT.**

An easement may be abandoned by unequivocal acts showing a clear intent to abandon or by mere nonuser if continued for a long time, but the acts must show a destruction of the easement, or that its legitimate use has been rendered impossible by act of the owner or some act showing an intent to permanently abandon, and acts of a city sanctioning the permanent occupation of land dedicated as a public square by railroads and a bridge company with a railway passenger platform, railroad tracks, and buildings thereon evidenced an intent of the city

to abandon the easement for use of the premises as a public square.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.* Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

**6. DEDICATION (§ 65*)—PUBLIC EASEMENT—
ABANDONMENT—REVERSION TO DEDICATORS.**

Property dedicated to a public use without any provision for forfeiture reverts to the dedicators upon a misuse thereof when the use contemplated in the dedication becomes impossible, whereupon their rights become precisely what they were prior to dedication, and they or their successors in title may thereafter deal with it as owners in fee simple absolute.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 103; Dec. Dig. § 65.*]

**7. DEDICATION (§ 63*)—ABANDONMENT BY
TRUSTEE OF PUBLIC—ACQUIESCENCE.**

Abandonment of the easement by the city as trustee was acquiesced in by the public as cestui que trust where the Legislature by Laws 1857, c. 753, empowered the bridge company which occupied the land to use any of the streets, squares, or lands in the city owned by the people of the state for erection of the bridge and approaches upon the consent of the common council, and under Laws 1858, c. 294, the question whether the city should guarantee payment of interest on certain capital stock of the bridge company was submitted to the people of the city, and approved.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

**8. APPEAL AND ERROR (§ 1152*)—FORM OF
JUDGMENT—INCORPORATION OF FINDINGS.**

The incorporation of findings in a judgment except by way of recital is not proper practice, and, where such findings are incorporated not in accordance with the directions for judgment given by the judge at the conclusion of the findings as expressly required by Code Civ. Proc. § 1022, the judgment will be modified by striking all the adjudications except those conforming to the directions for judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1152.*]

**Appeal from Supreme Court, Appellate Di-
vision, Fourth Department.**

Action by Peter A. Porter, individually and as grantee of George M. Porter, and others, against the International Bridge Company, the City of Buffalo, and others, impleaded with others. From a judgment of the Appellate Division (131 App. Div. 921, 115 N. Y. Supp. 1141) affirming an interlocutory judgment for plaintiffs, the International Bridge Company and another appeal by permission, certain questions being certified, and the City of Buffalo also appeals. Modified and affirmed.

Appeal by the International Bridge Company and the Grand Trunk Railway of Canada, by permission, from a judgment of the Appellate Division of the Supreme Court in the Fourth judicial department, entered March 3, 1909, affirming an interlocutory judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term; also, appeal by the city of Buffalo from the same judgment of the Appellate Division affirming the same Special Term judgment which is final as to that defendant.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In 1830 the eight owners of a tract of land of 500 acres near the village of Black Rock, known as the Parish tract, laid out the property as an extension of the village and caused a map thereof to be made, which they signed, upon which they left an open space designated as a "Publick Square." The owners subsequently partitioned and conveyed the various lots constituting the tract, with the exception of this public square, which has never since been disposed of by any conveyance or other instrument executed by the owners or their heirs, devisees, or grantees prior to 1889. The tract was afterward incorporated into the village of Black Rock, and still later became, and now is, a part of the city of Buffalo. The public square was partly occupied by a schoolhouse for many years; the schoolhouse being used as a public meeting place by the inhabitants. It was also used as a village common. It was not assessed to the previous owners after 1830, and since 1853 it has been treated as public property in levying assessments, except the portions subsequently occupied by the International Bridge Company as hereinafter stated. In 1860 the common council of Buffalo adopted a resolution that the said "Publick Square" should be known and designated as "Porter Square," and in 1861 a resolution was adopted to the effect that the expense of maintaining, improving, and embellishing said square should be assessed upon neighboring property. From 1860 Porter Square continued to be vacant land and to be used as a common by the inhabitants of the city until 1870, when the common council consented that the International Bridge Company might use the streets and public squares of the city for the erection, maintenance, and operation of approaches to a bridge which it proposed to build across the Niagara river. By subsequent resolutions of the common council adopted pursuant to legislative authority between 1873 and 1882, inclusive, permission has been given to the International Bridge Company and the Grand Trunk Railway of Canada to erect railway passenger platforms on the premises and place 12 railway tracks and erect buildings and a passenger depot thereon. The property has been occupied by these corporations to this extent and for these purposes ever since. The present action is brought by the representatives in interest of the eight owners of the Parish tract in 1830. In 1890, before commencing suit, the plaintiff demanded of the International Bridge Company and the Grand Trunk Railway of Canada that they cease their occupation of the premises, or compensate him for his loss and take a deed thereof, which demand was refused. Upon a previous appeal the complaint was characterized as setting forth "a cause of action in equity to determine and enforce the rights of the various parties to the property, which is the subject of the action." *Porter v. Interna-*

tional Bridge Co., 163 N. Y. 79, 86, 57 N. E. 174, 175.

The trial court determined that the plaintiff and the defendants other than the appellants were the owners in fee simple of certain specified proportionate shares of the property in controversy; that the original owners by making and signing the map of 1830 and by their subsequent conveyances with reference to the same intended to allow the public in general and each and every member of the community the full and unrestricted use and enjoyment of the land marked "Publick Square" and every part thereof for the purposes of a public square; that the city of Buffalo intended to receive the property for the purposes of the general public for use as a public square and did not receive or at any time acquire the fee; and that under the resolutions of the common council which have been mentioned the city relinquished all the rights of the public to use the premises in question as a public square and abandoned the same for such purposes. The judgment provides that if within 90 days from the date thereof neither the International Bridge Company nor the Grand Trunk Railway Company shall have instituted proceedings to condemn the premises in question, or agreed with the plaintiffs as to their value and the plaintiffs' damages, or if, having instituted condemnation proceedings, they do not prosecute the same with due diligence, the plaintiffs may apply to the court for final judgment determining the value of the premises and the damages sustained because of the withholding of possession thereof, and enjoining the defendants from further operating any cars or engines across the premises or maintaining any structure thereon.

This judgment has been affirmed by the Appellate Division. In allowing the International Bridge Company and the Grand Trunk Railway Company of Canada to appeal to this court, the Appellate Division has certified the following questions:

"(1) Upon the facts found can Peter A. Porter, individually and as grantee, maintain this action for the recovery of his interest in the premises in question?

"(2) Is the use of the premises in question by the International Bridge Company and the Grand Trunk Railway Company of Canada a public use or consistent with their use as a public square?

"(3) Has the city of Buffalo abandoned the premises in question as a public square?

"(4) Have either of the defendants acquired prescriptive rights to the premises in question or any part thereof?"

Adelbert Moot and Henry W. Sprague, for appellants International Bridge Co., and others. Clark H. Hammond, Corp. Counsel (George E. Pierce, of counsel), for appellant City of Buffalo. Charles P. Norton, for respondents.

WILLARD BARTLETT, J. (after stating the facts as above). In the consideration of this appeal I think it is essential at the outset to ascertain precisely what is the character of the action. The case has already been before this court twice: First, on an appeal from a judgment affirming an interlocutory judgment overruling a demurrer to the complaint for misjoinder of causes of action (163 N. Y. 79, 57 N. E. 174); and, secondly, on an appeal from an order reversing an order directing a jury trial of the issues involved in the action (175 N. Y. 467, 67 N. E. 1089). Upon the first appeal, Judge Martin, speaking for the court, said: "After a careful examination of the complaint, we are of the opinion that it is not to be regarded as stating more than one cause of action, viz., a cause of action in equity to determine and enforce the rights of the various parties to the property, which is the subject of the action, and that all the rights sought to be established and enforced arose out of the same transaction or transactions connected with the same subject of action, and their joinder in the same complaint was justified by the provisions of section 484." Page 86, 163 N. Y., 57 N. E. 175. The view that the action is purely equitable in its nature was emphasized on the second appeal, where this court held that the defendants did not have a constitutional right to a trial by jury. It being thus settled that the case is one of equitable cognizance, in what category of equity jurisprudence does it fall? The statement of Judge Martin that it is brought to determine and enforce the rights of the various parties to the property which is the subject of the action is quite general, and does not help us much in the matter of classification. It is not an action to compel the determination of a claim to real property under the Code of Civil Procedure, for in such an action the complaint must set forth facts showing that the property at the commencement of the action was, and for the one year next preceding has been, in the possession of the plaintiff or in the possession of himself and those from whom he derives his title, either as sole or joint tenant or tenant in common with others. It is not a suit to remove a cloud upon title. There are no allegations in the complaint appropriate to a suit for such relief. The general rule is that a plaintiff out of possession holding the legal title will be left to his remedy by ejectment. 3 Pomeroy's Eq. Juris. (1st Ed.) § 1399n. I think in view of our previous adjudications herein that it must be regarded as a suit to enjoin a continuing trespass, i. e., the occupation of Porter Square by the bridge and railroad companies, on the theory that, by reason of the abandonment of the premises by the city of Buffalo as a public square, the easement of the public therein has ceased, and all the rights of the original proprietors as owners of the fee before the dedication have been re-

stored to the plaintiffs. To this extent and in this sense it is a suit "to determine and enforce the rights of the various parties to the property which is the subject of the action," as was suggested by this court upon the first appeal.

It will be most conducive to clearness to consider the questions submitted to us in a different order from that in which they have been certified. The second and third questions are closely related to one another. "(2) Is the use of the premises in question by the International Bridge Company and the Grand Trunk Railway Company of Canada a public use or consistent with their use as a public square? (3) Has the city of Buffalo abandoned the premises in question as a public square?" The word "or" was probably inserted in the second question through inadvertence. That a railroad use is a public use is no longer seriously to be doubted. 1 Lewis on Eminent Domain (3d Ed.) § 263; Buffalo & N. Y. City R. R. Co. v. Brainard, 9 N. Y. 100; Rensselaer & Saratoga R. Co. v. Davis, 43 N. Y. 137; Erie R. Co. v. Steward, 170 N. Y. 172, 178, 63 N. E. 118. The proposition under the fourth point of the respondent's brief that a railroad use is not a public use is obviously unsound. The argument by which it is sought to be supported is really directed toward showing that a railroad use is not such a public use as is consistent with the devotion of the land to the purposes of a public square, which is quite a different thing. The correctness of the latter proposition is what we understand to have been submitted for our determination by the certification of the second question in this record.

The effect of the dedication of the land designated as a public square on the map of the proposed extension of the village of Black Rock in 1830 was to create an easement in favor of the public, coextensive with the purposes to which public squares in such localities are usually applied. In the case of such a dedication, as was well said by Selden, J., in *Anderson v. Rochester, L. & N. F. R. Co.*, 9 How. Prac. 553, 559, "where there is a corporation to represent the public, and take charge of its interests, the easement vests in such corporation, which thus becomes the trustee of a use." Here the easement vested first in the village of Black Rock and afterward in the city of Buffalo as its successor. It was not necessary that the fee of the land should pass in order to secure the easement to the public. *City of Cincinnati v. White's Lessee*, 6 Pet. 431, 8 L. Ed. 452. The naked fee remained in the original proprietors and their successors in interest. This is not like a case where the acquisition of a fee is essential to carry out the purpose which the parties making the dedication had in view, or where land is taken in the exercise of the power of eminent domain under a statute which obviously

contemplates obtaining the largest title possible. Such a case was *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70, where it was held that the act of the Legislature authorizing the city of Brooklyn to take lands for a public park was so worded that in condemnation proceedings thereunder the city acquired an absolute estate in the land taken under the statute, and not merely an easement, and that its title was free from any legally recognizable reversionary right in the former owners. Here the dedication did not deprive the original proprietors of their title any more than would the dedication of land for a highway, evidenced by throwing it open and its acceptance by the public authorities, in which case it is well settled that the owner does not part with his title, "but only with the right to possession for the purpose of a highway." *City of Cohoes v. D. & H. C. Co.*, 134 N. Y. 397, 31 N. E. 887. In the early case of *Pearsall v. Post*, 20 Wend. 111, 136, Cowen, J., intimated that the doctrine of dedication applicable to streets and ways did not extend to public squares in cities or villages; but, when the case reached the Court of Errors, a contrary view was expressed by Chancellor Walworth, who said that in ancient times in England the law of dedication, which was applicable to thoroughfares, was properly applicable to market places and promenades, although they were not highways in the ordinary sense of the term. *Post v. Pearsall*, 22 Wend. 425, 433. "It is now generally admitted," says Mr. Justice Holmes in *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143, "that open squares in towns are as much within the principle referred to as highways, and it has been held in numerous decisions that such squares may be dedicated to public uses."

A case which corresponds closely with the present case in the circumstances of the dedication is *Trustees of M. E. Church of Hoboken v. Mayor, etc., of Hoboken*, 33 N. J. Law, 13, 97 Am. Dec. 696. There the dedication was effected by the making of a map of the well-known Stevens tract in Hoboken on which the property in controversy was designated simply by the word "Square," and the owner subsequently executed conveyances referring to this map. The court discusses the meaning of "square" as thus used, saying: "The word 'square' on this plot of ground, indicated a public use, either for purposes of a free passage, or to be ornamented and improved for grounds of pleasure, amusement, recreation or health. This is the proper and natural meaning of the term and its ordinary and usual signification. * * * The word 'square' as a term of dedication imported a complete and unrestricted abandonment to the public uses above indicated." In *Cady v. Conger*, 19 N. Y. 256, the land was dedicated for a village green or public common; and this court in

discussing the uses to which the premises might properly be put under such a dedication mentioned that every part of this open space was used as a common passageway for foot passengers and teams passing from one road to another, and as a place for military parades and ball playing and other amusements. It appeared, however, that a part of it was used for storing lumber while a plankroad was being built along one of the adjoining highways; and Chief Judge Johnson said that this could hardly be supposed to be a rightful use, although it was temporary in its nature, and acquiesced in from a general desire to facilitate the making of the plankroad. Far less is the occupation of Porter Square, in the city of Buffalo, by the approach to the International bridge and the other structures placed and maintained there by the bridge and railroad companies with the sanction of the municipality consistent with the use of the property thus occupied for the purposes of a public square. However desirable this occupation may be even in the public interest—and the trial court has expressly found that the premises in question are a necessary approach to the International bridge—it is incompatible with what may be termed a public square use, which imports more openness and a greater freedom from obstruction than is permitted by the presence of a railroad bridge and depot.

This view requires a negative answer to the second question regarding the word "or" as omitted therefrom, so as to make it read: "Is the use of the premises in question by the International Bridge Company and the Grand Trunk Railway Company of Canada a public use [or] consistent with their use as a public square?"

The third question, "Has the city of Buffalo abandoned the premises in question as a public square?" has been answered affirmatively by the trial judge in the thirty-fifth finding as a question of fact. In framing the question, however, we assume that it was the intention of the Appellate Division to ask whether the conduct of the city in sanctioning the permanent occupation of the dedicated property by the structures of the other defendants did not amount in law to an abandonment of the easement which had vested in the municipality as the trustee of a use, by reason of the dedication. As thus construed, it seems clear that the question must be answered in the affirmative. "An easement may be abandoned," said Earl, J., in *Roby v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 176, 181, 36 N. E. 1053, 1055, "by unequivocal acts showing a clear intention to abandon, or by mere nonuser, if continued for a long time"; and, citing numerous cases, he continued: "Under these authorities, the acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been

rendered impossible by some act of the owner thereof, or some other unequivocal act showing an intention to permanently abandon and give up the easement." In *Campbell v. City of Kansas*, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593, a square was marked "donated for graveyard" on an original plat filed with the recorder of titles by one of the proprietors of the town site, who subsequently used the plat at a public sale of lots. From this fact and the acquiescence of the other proprietors in the plat and the use of the square for interments a dedication was inferred. This dedication was held to have been abandoned by the action of the municipality in passing an ordinance vacating the land for graveyard purposes and changing it into a park with the acquiescence of the public. It was further held that the land thereupon reverted to the donor who might recover in ejectment against the municipality.

The acts evidencing an intention to abandon the easement for use of the premises as a public square could hardly be more unequivocal or conclusive than they are shown to be in this case. There is an express finding that the premises in question are a necessary approach to the International bridge. This fact, in addition to the permanent character of the structures thereon, shows that the property thus occupied has been diverted from the purposes of the dedication beyond any prospect or hope of restoration. The public may not enjoy the land for the uses which the original owners contemplated, and the bridge and railroad company have taken it without making compensation therefor. The condition of things is precisely as though the original owners had said to the city, "We will give you this property in trust to use in a particular way for the benefit of the public"; and the city, having accepted it for that particular purpose, turns it over to two transportation companies to be employed for all time for a wholly different purpose. It is argued in behalf of the city that, even so, the dedicated land does not revert to the original owners, but the only remedy is a suit in equity to compel the removal of the obstructions and the execution of the trust, citing 2 Dillon on Municipal Corporations (4th Ed.) § 633, *Barclay v. Howell's Lessee*, 6 Pet. 498, 8 L. Ed. 477, and *Goode v. City of St. Louis*, 113 Mo. 257, 20 S. W. 1048. The authorities relied upon, however, to sustain this proposition concede that property dedicated to a public use without any provision for forfeiture reverts to the dedicators upon a misuse thereof, when the use contemplated in the dedication becomes impossible. See, also, *Williams v. First Presbyterian Society in Cincinnati*, 1 Ohio St. 478. Such is the case here. If the existing occupation is necessary for the approach to the International bridge, as has been found by the trial court and as seems to be undisputed, it is prac-

tically impossible ever to apply the land again to use for the purposes of a public square. It is further argued in behalf of the appellants other than the city that no sound reason exists for holding that there has been a reversion because the plaintiffs are not abutting owners, and, assuming that they have a naked fee, the evidence shows that the fee is worth more and not less by reason of the erection of the bridge upon the premises. I have already tried to show how the plaintiffs, as representatives of the original owners, have suffered damage. The original owners gave an easement to the city. The city has abandoned that easement, and turned the property over to third parties. When the easement was thus effectually abandoned, the rights of the original owners became precisely what they were prior to the dedication. They or their successors in title could thereafter deal with it as owners in fee simple absolute, and they were damaged by the gratuitous occupation of the premises by the bridge and railroad company. They seek in effect by means of this action to put an end to the continuing trespass unless the trespassers will acquire their title at a fair price. It is objected that, inasmuch as the easement dedicated was for the benefit of the public, the city of Buffalo, as trustee of the easement, could not by any alleged acts of abandonment destroy the public right; and reference is made to the case of *Board of Commissioners v. Young*, 59 Fed. 96, 107, 8 C. C. A. 27, 38, where Lurton, J., writing for the United States Circuit Court of Appeals, in discussing the alleged abandonment of an easement dedicated to the village of Youngstown, said: "The council of the village of Youngstown were the trustees holding the legal title and protecting the use. The people of Youngstown were the beneficiaries under the trust. The council, in their character as trustees, could do no act to defeat the beneficial interest of the public. A court of equity would take cognizance, and restrain any act calculated to defeat the use. As trustees the council could not, without the voluntary acquiescence of the cestui que trust abandon the use or defeat the estate." In the present case, however, the acquiescence of the public in the acts of the city of Buffalo constituting the abandonment was expressed by the Legislature by the enactment of chapter 753 of the Laws of 1857, which in terms empowered the International Bridge Company "to use any of the streets, squares, lanes or alleys of the city of Buffalo, or lands in said city, owned by the people of the state of New York, for the erection of such bridge and the works or approaches thereto appertaining, provided the consent of the common council of the said city of Buffalo shall first be obtained." Section 20. Under an act passed in the following year (chapter 294 of the Laws of 1858) the question whether the city should guaran-

tee the payment of interest on \$2,500,000 capital stock of the bridge company to which this power to occupy the public streets and squares had been given was submitted to the people of Buffalo and such guaranty was approved by a vote of 5,128 in the affirmative to 3,375 in the negative. These circumstances establish the acquiescence of the public in the abandonment of the easement in such portion of Porter Square as the common council consented should be occupied by the bridge company and any railroad operated over the bridge.

The first and fourth certified questions remain to be considered.

"(1) Upon the facts found, can Peter A. Porter individually and as grantee maintain this action for the recovery of his interest in the premises in question?" This question cannot be answered categorically in view of the character of the action as construed by this court upon the second appeal. It is not an action "for the recovery of his interest" or it would have been triable by a jury, and we held that it was not. It is, however, a suit in equity which Peter A. Porter may maintain.

"(4) Have either of said defendants acquired prescriptive rights to the premises in question or any part thereof?" By said defendants is meant the International Bridge Company and the Grand Trunk Railway Company of Canada. As to this question, it is enough to say that neither the evidence nor the findings suffice to warrant the conclusion that either of these defendants has acquired a title by prescription against the plaintiffs.

As is apparent from what has been said, we are satisfied that the result reached by the learned judge at Special Term is substantially correct. The form of the judgment, however, requires amendment. Every one of the findings has been incorporated in the judgment, not simply by way of recital, but preceded in each instance by the words, "It is ordered, adjudged and decreed that," etc. This is not proper practice, nor is it in accord with the direction for judgment given by the trial judge himself at the conclusion of the findings, in compliance with section 1022 of the Code of Civil Procedure, that he shall "direct the judgment to be entered thereon." The judgment must therefore be modified by striking therefrom all the adjudications except those which conform to the five directions for judgment given by the trial judge at the end of the decision. As thus modified, it should be affirmed, with costs to respondents. The answer to the first question is that Peter A. Porter individually and as grantee can maintain this action. The answer to the second question is that the use of the premises by the International Bridge Company and the Grand Trunk Railway Company of Canada is not a public use

consistent with their use as a public square. The third question is answered in the affirmative, and the fourth question in the negative.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment accordingly.

(248 Ill. 147)

PEOPLE v. FIELD'S ESTATE et al.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 9, 1911.)

TAXATION (§ 878*)—INHERITANCE TAX—PROPERTY LIABLE—PAYMENT IN LIEU OF DOWER.

An antenuptial contract between a man and woman recited that marriage was contemplated between them and that they contracted to settle their respective rights in the property of each. It was agreed that each should retain control of his or her separate property, and that, if the prospective wife should survive her husband, she should have out of his property a stipulated sum, which should be received by her in lieu of, and in full satisfaction of, all claims, rights, and interests which she might have or claim in the husband's property as his widow. Held, that payment under the agreement to the prospective wife, being conditional upon her surviving her husband as his widow, was intended as a substitute for or in lieu of dower, and is taxable under the inheritance tax law the same as dower would be, and is not to be deemed an indebtedness to be deducted from the market value of the estate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1700, 1701; Dec. Dig. § 878.*]

Appeal from Cook County Court; Lewis Rinaker, Judge.

Action by the People against the Estate of Marshall Field and others. From the judgment, the People appeal. Reversed and remanded, with directions.

W. H. Stead, Atty. Gen., and Roy Wright (Walter K. Lincoln, of counsel), for the People. Wilson, Moore & McIlvaine, for appellees.

FARMER, J. This is an appeal by the people from the judgment of the county court of Cook county in an inheritance tax proceeding in the estate of Marshall Field. The county court held that \$1,000,000 paid to his widow, Della S. Field, according to the provisions of an antenuptial contract, was not subject to an inheritance tax, and that amount was deducted from the value of the estate before fixing the inheritance tax.

Marshall Field and Della S. Caton were married September 5, 1905. Prior to their marriage, and in contemplation thereof, they entered into an antenuptial contract, by which it was agreed, among other things, that if Mrs. Field survived her husband she should receive \$1,000,000 out of the property and estate of Marshall Field, in satisfaction of all claims, demands, and rights which she might otherwise have in and to the property

or estate of her husband as his widow. Marshall Field died in January, 1906, leaving Della S. Field surviving him as his widow. She presented a claim in the probate court for \$1,000,000 based on the antenuptial agreement, which was allowed and paid to her by the executors of the estate of Marshall Field.

Counsel for the appellant contend that "the antenuptial contract was a method of admeasurement of dower, substituted by the parties for the method provided by law for determining the same, and said \$1,000,000 was paid to and received by Della S. Field, widow, as the full amount of her dower and other rights of inheritance." Counsel for the appellees contend that the right of Mrs. Field to the \$1,000,000 did not vest in her by virtue of the intestate laws of the state of Illinois, but "was a legal debt due to her under a valid contract made upon a valuable consideration and was not an inheritance."

Whatever may have been decided in other jurisdictions, it is settled in this state that dower, less the exemption provided by statute, is subject to the inheritance tax. *Billings v. People*, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807. It would seem logically to follow that, if the provision made for Mrs. Field in the antenuptial contract was in lieu of and a substitute for her dower and other rights she would have had in the estate of Marshall Field as his widow, it would also be subject to the inheritance tax. This court said in *Billings v. People*, supra: "It will be noticed that neither dower, nor any provision made in lieu of dower, is exempted."

In *Long v. Barton*, 236 Ill. 551, 86 N. E. 127, 19 L. R. A. (N. S.) 384, the court had under consideration a claim filed by the divorced wife on an antenuptial contract against the estate of her former husband, who died testate. By the antenuptial contract Philip H. Barton agreed that Tonie Long, with whom he contemplated marriage, should upon his death receive out of his estate, in lieu of dower, the sum of \$5,000, and Tonie Long agreed to accept that sum and relinquish all her dower rights in the estate of Barton that might accrue to her, by reason of marriage, under the laws of the state of Illinois. The parties married, but afterwards the wife procured a divorce from her husband on the charge of extreme and repeated cruelty. In the divorce case she was awarded \$2,000 in lieu of and in full satisfaction of her contingent right of dower and of other rights in the estate of her husband. The \$2,000 was paid to her, and afterwards Barton died testate. The divorced wife filed a claim against his estate for \$5,000 mentioned in the antenuptial contract. This court held she was not entitled to an allowance of the claim, and said (236 Ill. 553, 86 N. E. 128 [19 L. R. A. (N. S.) 384]): "The antenuptial contract is not an unconditional promise to pay \$5,000, but it is to be paid

in lieu of dower. If appellant had died before her husband, all rights under the antenuptial contract would have been extinguished. The effect of the antenuptial contract was to substitute a sum of money for appellant's right of dower in her husband's land. Anything that would extinguish her right of dower would extinguish that which by agreement was substituted in its place."

The antenuptial contract before us was not an unconditional promise to pay Mrs. Field \$1,000,000 in consideration of her marrying Marshall Field. The contract recites that marriage was contemplated between the parties, and they, being desirous of making a settlement of their respective rights in the property of each other, entered into a contract for that purpose. It was agreed that each would retain control of his or her separate property, or property that they should acquire, respectively, after the marriage, and the contract provides that if Mrs. Field should survive her husband she should have and receive out of his property and estate \$1,000,000, "which shall be received by her in lieu of and in full satisfaction of any and all claims, rights, and interests and demands which she might have or claim in and to the property and estate of the said party of the first part [Marshall Field] under or by virtue of the laws of the state of Illinois or of any other state or country; it being agreed between the parties hereto that the said sum so agreed to be paid to the said party of the second part out of the property and estate of the said party of the first part shall satisfy all the claims, demands, and rights which the said party of the second part might otherwise have in and to any of the property or estate of the said party of the first part as his widow." By the plain language of the contract the \$1,000,000 was to be paid to and accepted by Mrs. Field, if she survived her husband as his widow, as a substitute for and in lieu of dower and all other rights she would be entitled to, as widow, under the law. Its payment to her was conditional upon her surviving her husband as his widow. If she had died before her husband, the liability of his estate upon the antenuptial contract would have been extinguished; or if the marriage had been dissolved by divorce for her fault, her right under the antenuptial contract would have been terminated. *Clarke v. Lott*, 11 Ill. 105; *Jordan v. Clark*, 81 Ill. 465.

In the last cited case *Clark* entered into an antenuptial contract with Mary Jordan, by which she was to receive out of his personal estate \$2,000 in lieu of all dower, distributive share, and allowances of all kinds out of his estate, and she relinquished all right of dower and distributive share in *Clark's* estate. The marriage was subsequently consummated, and the parties lived together about two years, when the wife left

her husband, and he afterwards obtained a divorce from her on the ground of desertion. Upon his death the divorced wife filed a claim against his estate for the \$2,000 mentioned in the antenuptial contract. The claim was disallowed, and she brought the case to this court by appeal. The judgment of the lower court was affirmed; this court holding that the contract was to be treated as a provision made for the wife as a substitute or equivalent for dower. The court said (81 Ill. 467): "The argument is, the divorce operates only upon those rights and obligations created by law and given to or cast upon the parties by law in consequence of the assumption of the relation of husband and wife, and hence has no effect whatever upon the rights and obligations created by or dependent upon a contract of the parties. The difficulty is not so much in the logic of the argument as in the want of application to this case. The error consists in the assumption the husband by the contract took upon himself the relation and obligation of a debtor to his intended wife. The contract will not admit of this construction."

It appears to us that no reasonable construction can be placed upon the language of the antenuptial contract in this case other than that the \$1,000,000 for Mrs. Field, if she survived her husband as his widow, was a substitution for her dower and all other rights she would otherwise have been entitled to in his estate. That it was competent for the parties, by contract, to agree upon an amount the widow should receive in lieu of the right she was entitled to under the law, is not the subject of controversy, and that such an agreement constitutes a liability of the estate cannot be denied; but, when so made as a substitution for and in lieu of dower and other rights, it must, for the purpose of the inheritance tax, be treated the same as dower would be, and is not to be considered as an indebtedness, to be deducted from the market value of the estate. In the Billings Case the widow renounced the provisions made for her in the will of her husband and elected to take under the statute. It was there contended that the inheritance tax act, which is the same act that governs this case, did not apply to property that passed to the widow as dower; but the court held that neither dower, nor any provision made in lieu of it, could be exempted from the market value of the estate in fixing and determining the inheritance tax.

If we are correct in the construction we have placed on the antenuptial agreement, it necessarily follows, then, that the \$1,000,000 received by Mrs. Field is not exempt. Illustration is not necessary to show that any other rule would enable parties desiring to do so to in a measure defeat the object and purpose of the statute.

In our opinion the county court erred in deducting the \$1,000,000 provided for in the antenuptial contract from the market value of the estate in fixing and determining the tax. The judgment is therefore reversed, and the cause remanded, with directions to the county court to proceed and render judgment in accordance with the views herein expressed.

Reversed and remanded, with directions.

(248 Ill. 154)

PEOPLE ex rel. SEEGERs v. DUNLAP
et al., School Trustees.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 9, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 42*)—
CREATION OF HIGH SCHOOL DISTRICTS —
ELECTION.

Hurd's Rev. St. 1909, c. 122, §§ 85, 86, providing for the establishment of high schools in single townships embracing all the territory of such township on petition of 50 or more legal voters of such township and by holding an election therein, and providing that, if a majority of the voters favor the establishment of such high school, it shall be the duty of the trustees, to call a special election for the election of a board of education for such high school. Section 87 provides for the organization of high schools by two or more adjoining townships or two or more adjoining school districts on petition of 50 or more legal voters in each of the townships or school districts, and on an affirmative vote in each township or district at an election held in the manner provided by section 85. Held, that adjoining school districts in the same township, in order to establish a common high school for the two districts, must proceed under section 87, and a single election held by the voters of both districts did not authorize the organization of the district; the proper method being to hold a separate election in each district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.*]

2. MANDAMUS (§ 74*)—CONTEST OF ELECTION.
Mandamus is not the proper remedy to contest an election.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.*]

3. MANDAMUS (§ 180*)—EXISTENCE OF LEGAL RIGHT.

A peremptory writ of mandamus will not issue, unless it is made to appear that there is a clear legal duty owing from defendants to petitioner.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 401-405; Dec. Dig. § 180.*]

4. MANDAMUS (§ 74*)—ESTABLISHMENT OF
HIGH SCHOOL—CALLING ELECTION.

Mandamus will not issue to compel the trustees of schools in a township to call a special election to elect a board of education for a high school district composed of two adjoining districts, where the petition for the writ shows on its face that a single election for the creation of the high school district was held in the two districts, instead of a separate election in each district, as required by Hurd's Rev. St. 1909, c. 122, §§ 85-87.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.*]

Appeal from Circuit Court, Cook County;
Mazzini Slusser, Judge.

Mandamus by the People, on the relation of Louis Seegers, against Burielgh A. Dunlap and others, Trustees of Schools. From a judgment of dismissal, petitioner appeals. Affirmed.

F. J. Griffen, for appellant. Bradley, Harper & Eheim (Samuel A. Harper, of counsel), for appellees.

VICKERS, C. J. This is a proceeding in mandamus for the purpose of compelling trustees of schools in township 39, range 12, Cook county, Ill., to call a special election for the purpose of electing a township high school board of education. A demurrer, both general and special, was interposed to the petition in the circuit court of Cook county, which was sustained, and the petition dismissed. The appellant has prosecuted an appeal from that judgment.

School districts Nos. 92 and 93, in township 39, range 12, in Cook county, are adjoining districts. A petition was signed by the requisite number of legal voters of said districts for the purpose of obtaining a vote upon the proposition to establish a township high school for said school districts. The petition shows that in pursuance of a notice an election was held for both districts at Thiele's Hall, and that the voters of the two districts interested were notified that an election would be held at said hall for the purpose of voting upon the question of establishing a high school for said districts. As a result of said election the trustees declared the proposition had carried for the establishment of such high school. The petition shows that a demand was then made upon the trustees to call an election for the election of a board of education for such high school district, and that said trustees refused to call such election. The prayer of the petition is for a writ of mandamus to compel them to call such election. The controlling question involved in the controversy is whether the vote taken was such as to require the trustees to proceed to call an election for the high school board of education.

Section 87 of chapter 122 of Hurd's Revised Statutes of 1900 provides as follows: "Two or more adjoining townships, or two or more adjoining school districts, whether in the same or different townships, may, upon petition of at least fifty legal voters in each of the townships or school districts, or if a school district contains fewer than one hundred and fifty voters, then by at least one-third of the legal voters of such district, and upon an affirmative vote in each of such townships or districts, at an election held pursuant to the provisions of section 85 of this act, establish and maintain in the manner provided for township high schools, a high school for the benefit of the inhabitants of the territory described in such petition."

In the case at bar but one petition was presented and but one election was held. The voters in the school district other than the

district in which Thiele's Hall is located were required to go out of their district for the purpose of casting their votes at said election. Manifestly, the trustees refused to proceed further with the organization of said high school district for the reason that an election should have been held in each of said districts and a majority of the votes in each district should have been cast for the proposition. An examination of sections 85, 86, and 87 of the school law will show that a township high school may be established in a single township, embracing all of the territory of such township, upon the petition of 50 or more legal voters of such school township, and by holding an election in such township at which the voters will vote for or against the proposition of establishing a township high school, and if a majority of the votes cast shall be in favor of establishing such high school, then it shall be the duty of the trustees to call a special election for the election of a board of education, to consist of five members. But under section 87 a township high school may be organized by two or more adjoining townships, or two or more adjoining school districts, and when the attempt is made to organize under section 87, it is clearly the intention of the Legislature that there should be two or more petitions, one for each township or school district, as the case may be, and that there should be an election held in each township or district, and that a majority of the votes in each township or district should be in favor of the establishment of such high school. In the case at bar the attempt was made to organize a township high school under section 87; but the election was held under sections 85 and 86, which have no application to the organization of township high schools under section 87.

Appellant contends that the validity of this election cannot be inquired into in this proceeding. While it is true that mandamus is not a proper remedy for the purpose of contesting an election, still it is a well-established rule of law that before a court will award a peremptory mandamus it must be made to appear that there is a clear legal duty existing which it is sought to enforce. In the case at bar it cannot be said that it was the duty of the trustees to call another election for the purpose of electing a board of education, simply because a majority of the voters at an election illegally held had declared in favor of the establishment of such high school. In *People v. Forquer, Breese*, 104, this court held that a mandamus would not be granted to compel a person to do an act, where it is doubtful whether he has the right, by law, to do such act or not. In *People v. Town of Oldtown*, 83 Ill. 202, this court held that where a railway charter provided that, when 10 legal voters of any city, county, or town should present to the clerk thereof a written application requesting an election to determine whether a subscription or dona-

tion should be made to the company, such clerk should receive and file the application and call an election, that a written application signed by legal voters was necessary to the validity of any election held under such charter, and that without proof that such application was delivered to the clerk and was signed by 10 legal voters no subscription could be legally made, nor could the municipality be compelled to issue its bonds in pursuance of such vote, and that mandamus would not issue without proof that the preliminary requirement had been complied with. This case, and other cases in line with it, simply announces the well-established doctrine that, before a writ of mandamus will be awarded, the party seeking such mandate must show a clear legal right to the writ. The petition, on its face, in the case at bar, shows that the election was illegally held, and that it imposed no duty on the trustees to proceed further in the organization of such high school district. The demurrer was properly sustained.

The judgment below will accordingly be affirmed.

Judgment affirmed.

(248 Ill. 136)

PEOPLE v. VAN BEVER et al.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 8, 1911.)

1. STATUTES (§ 138*)—ENACTMENT—AMENDMENTS.

Const. art. 4, § 13, providing that no law shall be amended by reference to its title only, does not forbid every enactment which in any degree may affect prior laws on a given subject without embodying such prior laws, but an act which is complete in itself, and which shows by itself just what it is, does not contravene the Constitution, though it affects prior laws.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.*]

2. STATUTES (§ 138*)—CRIMINAL LAW (§ 1206*)—MISDEMEANORS—SENTENCE—STATUTES.

Cr. Code, §§ 168a, 168b (Hurd's Rev. St. 1909, c. 38), authorizing the court, instead of committing to jail a person convicted of a misdemeanor punishable by imprisonment in the county jail, to sentence him to labor in the workhouse, and authorizing the court to require one convicted of a misdemeanor punishable by fine to work out the fine in the workhouse at a specified rate per day, do not repeal by implication the sections of the Criminal Code providing for the punishment of misdemeanors, but at most they only modify such sections, and the paragraphs are not in conflict with Const. art. 4, § 13, providing that no law shall be amended by reference to its title only.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.* Criminal Law, Dec. Dig. § 1206.*]

3. STATUTES (§ 137*)—TITLE—SUFFICIENCY—"CRIMINAL CODE"—"CRIMINAL JURISPRUDENCE."

Under the rule that the title of an amendatory act which expresses the legislative purpose intelligently is sufficient, and that an amendatory act is valid though there is a mistake in the title, the title of an act entitled "An act to amend the Criminal Code to change the punish-

ment of persons convicted of misdemeanors" is sufficient, though the principal act (Hurd's Rev. St. 1909, c. 38), commonly known as "Criminal Code," is an act to revise the law in relation to "criminal jurisprudence"; the words "criminal code" in the title of the amendatory act being synonymous with "criminal jurisprudence."

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 137.*]

For other definitions, see Words and Phrases, vol. 2, p. 1745.]

4. INDICTMENT AND INFORMATION (§ 174*)—PARTIES—OFFENSES—ACCESSORY BEFORE THE FACT.

Under Cr. Code, §§ 274, 275 (Hurd's Rev. St. 1909, c. 38), providing that an accessory before the fact may be indicted and punished as principal, an information charging a violation of the pandering act (Laws 1909, p. 180), by one employing others to induce a female to go into a house of ill fame, may charge him with procuring a female inmate and thus charge him as principal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 540-543; Dec. Dig. § 174.*]

5. PROSTITUTION (§ 1*)—OFFENSES—EVIDENCE—"PROCURE."

One agreeing to give money to others to procure a female to enter the state for immoral purposes, and actively urging, advising, and assisting in having the female brought to his house of ill fame as an inmate, violates the pandering act (Laws 1909, p. 180), punishing any person who shall "procure" a female inmate for a house of ill fame, for the word "procure" means to begin proceedings; to cause a thing to be done.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 2; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5652, 5653.]

Error to the Municipal Court of Chicago; Edwin K. Walker, Judge.

Maurice Van Bever and another were convicted of crime under separate informations, and they bring error. Affirmed.

Charles E. Erbsteln and Louis Greenberg, for plaintiffs in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and Roy Wright (Charles V. Barrett, of counsel), for the People.

CARTER, J. Two informations, one against each of the plaintiffs in error, were filed in the municipal court of Chicago, but as the legal questions raised are the same, the cases have been consolidated in this court. The plaintiffs in error were each found guilty in said municipal court of violating the pandering act (Laws 1909, p. 180), and sentenced to the house of correction for one year and each fined \$1,000, and, in default of such payment, at the expiration of the original term of imprisonment to stand committed to the house of correction until such fine, together with costs, had been worked out at the rate of \$1.50 per day. From those judgments writs of error were sued out, and the cases brought here for review.

Plaintiffs in error first contend that the

sentences of the court were based, in part at least, upon paragraphs 168a and 168b of the Criminal Code (Hurd's St. 1909, p. 785) and that the act of which these paragraphs are a part was passed in violation of the constitutional provision (article 4, § 13) that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." No question seems to be raised as to that part of the sentence providing for the fine and imprisonment, but only as to that part which provides for working out the fine at the rate of \$1.50 per day. Said paragraphs 168a and 168b are a part of an act passed in 1879, entitled "An act to amend the Criminal Code to change the punishment of persons convicted of the crime of petit larceny and misdemeanors, and to repeal an act entitled 'An act to amend section 168 of an act entitled 'An act to revise the law in relation to criminal jurisprudence,' approved March 27, 1874,' approved April 10, 1877, in force July 1, 1877," approved May 28, 1879, in force July 1, 1879. Laws 1879, p. 117. Section 1 of this act relates solely to the punishment for larceny, and is not claimed to be involved in this discussion. Sections 2 and 3 of the act are said paragraphs 168a and 168b heretofore referred to, and read as follows:

"Sec. 2. That hereafter any person convicted in any court of record of any misdemeanor under the Criminal Code of this state the punishment of which in whole or in part now is, or hereafter may be imprisonment in the county jail, the court in which such conviction is had, may in its discretion, instead of committing to jail, sentence such person to labor in the work house of any city, town or county, where the conviction is had. * * *

"Sec. 3. That any person convicted of petit larceny, or any misdemeanor punishable under the laws of this state, in whole, or in part, by fine may be required * * * to work out such fine and all costs, in the workhouse of the city * * * under the proper person in charge of such workhouse, * * * at the rate of one dollar and fifty one hundredths dollars (\$1.50) per day for each day's work."

It is urged that these sections, in effect, amend the other sections of the Criminal Code which have reference to the punishment of misdemeanors, and while it is conceded that they do not in any way refer to such other sections, it is claimed that these later sections are unconstitutional because such other sections so claimed to be amended are not inserted at length in this new act. The rule has long been established in this state that this clause of the Constitution was not intended to forbid every enactment which in any degree, however remotely, might affect prior laws on a given subject; that to so hold would bring about a far

greater evil than the one sought to be obviated. If the act questioned is complete in itself and intelligible, showing, by itself, just what it is, it will not be held to contravene the constitutional provision in question. "A subsequent act may have the practical effect of amending a prior one, or it may be substituted for it without violating the Constitution." *People v. Election Com'rs*, 221 Ill. 9, 77 N. E. 321; *Badenoch v. City of Chicago*, 222 Ill. 71, 78 N. E. 31; 1 *Lewis' Sutherland* on Stat. Const. § 239. The following decisions are a few among the many decided by this court that uphold the above conclusions: *People v. Wright*, 70 Ill. 388; *Timm v. Harrison*, 109 Ill. 593; *School Directors v. School Directors*, 135 Ill. 464, 28 N. E. 49; *People v. Loeffler*, 175 Ill. 585, 51 N. E. 7; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Erford v. City of Peoria*, 229 Ill. 546, 82 N. E. 374; *People v. Jones*, 242 Ill. 138, 89 N. E. 711. Manifestly, said paragraphs 168a and 168b are intelligible, and show on their face just what the Legislature intended. They do not repeal, even by implication, the sections of the Criminal Code that provide for the punishment of misdemeanors. At the most they only modify them to the extent that it is discretionary with the trial court, instead of committing to jail, to sentence the person to labor in the workhouse or upon the streets and alleys of the city or town. The sections in question are not unconstitutional.

It is further insisted that the act is unconstitutional because of its title, in this: that it attempts to amend the "Criminal Code," when, as a matter of fact, we have no Criminal Code in this state, the principal act as to criminal matters being entitled one "to revise the law in relation to criminal jurisprudence." The rule for the guidance of courts in these matters is to ascertain the intention of the Legislature, and not its mistakes, either as to law or fact. The only question is, Has the Legislature expressed its purpose intelligibly? If it has, the act is valid and must be upheld. *Patton v. People*, 229 Ill. 512, 82 N. E. 386; 1 *Lewis' Sutherland* on Stat. Const. (2d Ed.) § 233. Chapter 38 of our Revised Statutes has long been known as the "Criminal Code." The title to this amendatory act uses the phrase "criminal code" as synonymous with "criminal jurisprudence." The intention of the Legislature as set forth in this title is clear and intelligible, and the objection on this point is without force.

Plaintiffs in error further insist that the proof in each of these cases failed to sustain the allegations of the information; that the information in each case charged the defendant with procuring a female inmate for a house of prostitution, while the proof showed that the defendants did not directly induce the girl in question to go into a house of prostitution, but employed others to per-

suaue her to do so. Under sections 274 and 275 of the Criminal Code (Hurd's St. 1909, p. 811) an accessory before the fact may be indicted and punished as principal. Indeed, it is the ordinary practice to indict as principal an accessory before the fact. Although under the authorities in this state the pleader may, if he chooses, state the circumstances of the offense in an indictment against an accessory before the fact, yet the indictment must contain an allegation charging the defendant as principal. *Fixmer v. People*, 153 Ill. 123, 38 N. E. 667; *Burnett v. People*, 204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304, 98 Am. St. Rep. 206; *People v. Lucas*, 244 Ill. 603, 91 N. E. 659. The informations properly charged the plaintiffs in error as principals, and the proof sustained the charge.

What we have just said disposes also of the argument of counsel that the proof shows that plaintiffs in error were guilty of another offense than that charged in the information—that is, that they agreed to give money to others to procure the female in question to come into the state for the purpose of prostitution. The word "procure" means to begin proceedings; to cause a thing to be done. There can be no question, under the proof, that the plaintiffs in error caused others to bring the female, Sarah Joseph, into this state for the purpose of prostitution. The evidence showed, practically without contradiction, that both plaintiffs in error were actively urging, advising, and assisting in having the girl brought to their house of prostitution as an inmate.

We find no error in either record. The judgment of the municipal court in each case, therefore, will be affirmed.

Judgment affirmed.

(248 Ill. 124)

PEOPLE ex rel. AMES v. RAYMOND et al.
(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

MUNICIPAL CORPORATIONS (§§ 488, 489*)—SPECIAL ASSESSMENTS—VOLUNTARY PAYMENT OF INSTALLMENTS—EFFECT ON SUBSEQUENT INSTALLMENTS.

The voluntary payment of one installment of a special assessment or the rendition of judgment upon one installment precludes the property owner from questioning the validity of the subsequent installments of the assessment, under Local Improvement Act (Hurd's Rev. St. 1909, c. 24) § 66.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.*]

Appeal from Lake County Court; De Witt L. Jones, Judge.

Proceedings by the People on the relation of Fred E. Ames, to subject property for the payment of special assessments. Judgment for plaintiff, and defendants appeal. Affirmed.

George W. Wilbur, for appellants. David H. Jackson, for appellee.

PER CURIAM. This was an application in the county court of Lake county for judgment and order of sale to satisfy the fifth, sixth, and seventh installments of a special assessment levied upon lots 304 and 305, in the city of Lake Forest, to pay for paving certain streets in said city. The appellants appeared and filed objections to judgment and order of sale, which were overruled, and judgment and order of sale were entered, and an appeal has been prosecuted to this court.

The objections were that the contract under which the improvement was put in was void for the following reasons: (1) The contract was made prior to the confirmation of the assessment; (2) the contract price was increased from \$11,459.25 to \$14,500, without a readvertisement and a reletting; and (3) the contract contained a provision fixing the rate to be paid laborers and teams, and provided that the labor should be performed by persons who were residents of the city of Lake Forest.

It appears that the first, second, and third installments of the assessment were voluntarily paid, and that objections were filed against judgment and order of sale upon the fourth installment, which were overruled, and after judgment and order of sale were entered the fourth installment was paid. The objection urged against judgment and order of sale on the fifth, sixth, and seventh installments of the assessment could have been urged against judgment and order of sale upon the fourth installment, and the first, second, and third installments were voluntarily paid. The law is well settled in this state that the voluntary payment of one installment of a special assessment, or the rendition of judgment upon one installment of a special assessment, precludes the property owner from questioning the validity of the subsequent installments of the assessment. Section 66 of the local improvement act (Hurd's Rev. St. 1909, c. 24) and the following adjudications are decisive of this case: *Gross v. People*, 193 Ill. 260, 61 N. E. 1012, 86 Am. St. Rep. 322; *Downey v. People*, 205 Ill. 230, 68 N. E. 807; *McDonald v. People*, 206 Ill. 624, 69 N. E. 509.

The judgment of the county court will be affirmed.

Judgment affirmed.

(248 Ill. 255)

SMITH et al. v. CLARK et al.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 9, 1911.)

1. PARTITION (§ 64*)—SUFFICIENCY OF BILL.

A bill for partition of land was properly dismissed as to a portion of the land, where it

appeared neither by allegation nor evidence that complainants were the owners of it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 186, 187; Dec. Dig. § 64.*]

2. LIMITATION OF ACTIONS (§ 19*)—SCOPE OF STATUTE.

The bar of the statute of limitations relating to real actions is not confined to the action of ejectment, but applies also to a bill for partition, in equity as well as at law.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 77; Dec. Dig. § 19.*]

3. LIMITATION OF ACTIONS (§ 100*)—FRAUD—CONCEALMENT.

Where the owner of land devised it to his wife for life, and then to his son for life, with remainder to his son's children in fee, and the son, as executor, conveyed part of the land by deed purporting to be made in pursuance of a decree authorizing the sale for payment of debts of the deceased owner, and by mesne conveyances certain persons came into possession of the land, holding it by themselves and their grantors for longer than the statutory period, the bar of the statute would not be removed, nor the delay of the children of the original owner's son in asserting their right to the land be excused, by the fact that they had no knowledge of their grandfather's will or his ownership of any land until the year in which the bill was filed for partition by them, or knowledge of any fact to put them upon inquiry, that their grandfather had died before they were born, and that their father had concealed the fact, and caused the land to be fraudulently sold under a pretended decree of court to his attorney, who also fraudulently concealed the fact from complainants, where their grandfather's title to the land was a matter of record, and his will was recorded in the county in which he had lived and the executor's deed was recorded, and no fraudulent concealment of the facts appeared, except that the sale was made to the executor's attorney; title having passed from the attorney to innocent third parties, holding the lands in good faith upon the validity of the title they had received.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 480-493; Dec. Dig. § 100.*]

Appeal from Circuit Court, Pope County; W. W. Duncan, Judge.

Bill by Sarah A. Smith and others against Edward B. Clark and others. Decree of dismissal, and complainants appeal. Affirmed.

Morris & Hayes, for appellants. John W. Browning, for appellees.

DUNN, J. The appellants filed a bill for partition in the circuit court of Pope county, to which the appellees were made parties upon the allegation that they were in possession of the premises, claiming to own them, but that they had no interest in them. After a hearing upon an amended bill, answer, replication, and evidence, the court dismissed the bill for want of equity, and the complainants have appealed.

Alexander Blair, the grandfather of the appellants, died in 1842, leaving a will, which was admitted to probate in the county court of Pope county on June 20, 1842. By it he devised to his wife for life, and after her death to his son, Robert R. Blair, for life, and after his death to the children of Robert R. Blair in fee, the N. $\frac{1}{2}$ of the S. E.

$\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 27, and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 24, all in township 13 S., range 6 E. of the third principal meridian, in Pope county. Robert R. Blair was named as executor of the will, and on August 24, 1850, as such executor, executed a deed purporting to convey to Wesley Sloan the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 27, the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 34, all in township 13 S., range 6 E. This deed purported to be made in pursuance of a decree of the circuit court of Pope county, made at the May term, 1850, authorizing the sale, for the payment of debts, of certain real estate of which Alexander Blair died seised which decree was recited in *hac verba*. Appellees claim title from the grantee in this deed through mesne conveyances of the land described in it.

The bill avers that the appellants are the devisees and owners of the land devised in section 27 and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 34. Title was proved in Alexander Blair to those lands. Robert R. Blair died in 1870. This bill was filed in 1908. There is no evidence in the record in regard to the title to the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 24, though the bill alleges that the testator did not own it, but did own the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 34, and that the number "24" was inserted in the will by the mistake of the scrivener. The bill was therefore properly dismissed as to the land in section 34, since neither by allegation nor evidence does it appear that the complainants were the owners of it.

The appellee Edward B. Clark by his answer claims to be the owner of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 27, and the appellee Sophia Rehfeldt claims to be the owner of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27; and each sets up, by way of defense, the statutes of limitations of 7 years and of 20 years and the laches of the complainants. To meet these defenses the appellants by their amended bill aver that they had no knowledge or means of knowledge, until February, 1908, of the will of their grandfather or his ownership of any land, or of any fact or circumstance to put them upon inquiry in regard to either of those matters; that their grandfather died before they were born; that their father never mentioned the matter of their grandfather's will or his ownership of the land to them, or any member of the family, but concealed the facts, and caused the land to be fraudulently sold, under a pretended decree of the circuit court, to his attorney, Wesley Sloan, who also fraudulently concealed the facts from complainants; and that they learned of the existence of the will for the first time in the winter of 1908, by being told that one Spencer Belford had the will of their grandfather, and by thereupon causing search to be

made for it in the court records of Pope county. The appellees Edward B. Clark and Sophia Rehfeldt proved a connected chain of title from Wesley Sloan, the grantee in the executor's deed, to them, of the lands claimed by them, respectively, and possession by them and their grantors for a period greater than that required by the statute of limitations. The bar of that statute is not confined to the action of ejectment, but applies also to a bill for partition, in equity as well as at law. *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367.

The appellants insist that the circumstances set up in the amended bill in regard to their ignorance of their rights and of their grandfather's will, their lack of means of acquiring information, and the execution of the executor's deed, are sufficient to excuse their delay and remove the bar of the statute. Alexander Blair's title to the land was a matter of record, his will was recorded in the county in which he had lived, the executor's deed was recorded, and no legal reason is shown for appellants' failure to ascertain their rights. *Mason v. Odum*, 210 Ill. 471, 71 N. E. 386, 102 Am. St. Rep. 180. Although it is alleged that there was fraudulent concealment of the facts, no circumstance of fraud or concealment appears, except the fact that the sale was made to the executor's attorney. This might be a sufficient reason for granting relief if the title were still held by the grantee in the executor's deed or his heirs. But the title has passed from that grantee to innocent third parties, who have had possession of the land for many years, in good faith relying upon the validity of the title they have received. The facts stated in the amended bill are not sufficient to remove the bar of the statute of limitations.

The decree is affirmed.

Decree affirmed.

(248 Ill. 218)

CITY OF PARIS v. CAIRO, V. & C. RY. CO. et al.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 8, 1911.)

1. EMINENT DOMAIN (§ 68*)—PUBLIC NECESSITY—NATURE OF QUESTION.

While courts may determine whether the use for which property is proposed to be condemned is public or private in its nature, yet when the use is public, as to extend a city street across a railroad, they cannot inquire into the propriety of exercising the right of eminent domain, and an ordinance passed by the city providing for the extension of such street is decisive of the question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

2. JUDGMENT (§ 715*)—CONDEMNATION PROCEEDINGS—RES JUDICATA.

Where a railroad company, in its suit in the United States court to enjoin a city from extending a street over its tracks, contended that the street had never been so laid out, and that

the public had been allowed by mere license to cross the right of way by an overhead bridge, and the decree found such to be the facts, the railroad company, in subsequent proceedings by the city to condemn an extension of the street across the right of way, could not contend that the city was merely attempting to change the grade of the street which already existed as an overhead crossing, and that therefore, having once extended the street by contract across the right of way, the city had exhausted its power and was estopped to extend it in any manner, nor could it contend that the decree in the former case was res judicata, that decree having found that the street never had existed across the right of way, while, in the subsequent case, the city was endeavoring by condemnation to extend the street across the right of way where the former decree had held that it never had been extended.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 715.*]

3. EVIDENCE (§ 474*)—CONDEMNATION PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

In a condemnation suit by a city to acquire a right of way for a street over a railroad track, that witnesses were not familiar with the method of conducting railroads would not render incompetent their testimony whether the location of the street across the right of way would result in damages to the use of the property of the railroad to be occupied by the street.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 474.*]

4. EMINENT DOMAIN (§ 95*)—CONDEMNATION PROCEEDINGS—ELEMENTS OF DAMAGE.

In proceedings by a city to condemn a right of way for a street over a railroad track, a question asked witnesses what in their judgment would be the decrease in the value of defendant's property for railroad purposes, which would be caused by the use of the strip in question for street purposes, such use for street purposes being subject to use by defendant of the strip for railroad purposes, eliminating the cost of grading the approaches or of changing the tracks to conform to the grade of the street or planking between the rails, the making of gates or hiring of flagmen, stoppage or slow movement of trains, increased danger of accident, and cutting of trains over crossing, was objectionable as excluding from consideration of the witness as an element of damages those resulting from the change of the railroad tracks to conform to the street grade, but otherwise embraced every element of damage proper to be considered.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 95.*]

5. EMINENT DOMAIN (§ 107*)—CONDEMNATION PROCEEDINGS—ELEMENTS OF DAMAGE.

A question asked witnesses as to damages which eliminated from their consideration, the loss to defendant of the use of a portion of the proposed street as a place for standing or storing cars, was erroneous since, if any of the tracks of defendants' railway at the point of the proposed intersection of the street, were used as a place for storage of cars, the opening of the street would necessarily deprive defendants of that use, and the loss of the storage room would be a proper element of damage.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 107.*]

6. EMINENT DOMAIN (§ 195*)—CONDEMNATION PROCEEDINGS—ISSUES AND PROOF.

Defendants having filed a cross-petition for the ascertainment of damages to property not taken, they were entitled to prove any damage sustained to property not taken, and it was error to confine such proof to switch yards of

defendants in the immediate vicinity of the land being condemned.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 195.*]

7. EMINENT DOMAIN (§ 195*)—CONDEMNATION PROCEEDINGS—COMPENSATION—ISSUES AND PROOF.

If the extension of the street would necessarily require excavation or removal by defendants of any quantity of earth for the proper operation of their railway, they would be entitled, under their cross-petition for ascertainment of damages to property not taken, to prove such fact as an element of damage.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 195.*]

8. EMINENT DOMAIN (§ 107*)—CONDEMNATION—ELEMENTS OF COMPENSATION—COST OF OBSERVING POLICE REGULATIONS.

A railroad company takes a right of way subject to the right of the public to extend streets across it, and, when a street is so extended, the railroad company is not entitled to such damages as result from its compliance with the police regulations of the state, and hence a railroad company, over whose right of way a street is sought to be extended at grade by condemnation, is not entitled to recover compensation for the value of time which would be lost in switching operations in switch yards because of the establishment of the crossing made necessary by the observance of the police regulations of the state.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 107.*]

Appeal from Circuit Court, Edgar County; W. B. Scholfeld, Judge.

Action by the City of Paris against the Cairo, Vincennes & Chicago Railway Company and others. From the judgment, defendants appeal. Reversed and remanded.

George B. Gillespie (L. J. Hackney, Shepherd & Trogdon, and Gillespie & Fitzgerald, of counsel), for appellants. Wilber H. Hickman, Henry S. Tanner, and Joseph E. Dyas, for appellee.

COOKE, J. The appellee, the city of Paris, filed a petition in the circuit court of Edgar county to extend, by condemnation, Buena Vista street across a certain railroad right of way owned by the appellant the Cairo, Vincennes & Chicago Railway Company, but used exclusively by the appellant the Cleveland, Cincinnati, Chicago & St. Louis Railway Company as lessee. Appellants filed a motion to dismiss the petition, which, after a hearing thereon before the court, was denied. The appellants then filed a cross-petition for the ascertainment of damages to property not taken. By agreement the hearing was had before the court without a jury, and resulted in a judgment assessing the just compensation to be paid for the land proposed to be taken at \$150, and authorizing the city to enter upon, use, occupy, and control the same for the purposes of a street upon payment of that amount. Appellants have prosecuted this appeal from that judgment, and assign various grounds for reversal.

The line of railway owned by appellants was constructed in 1853 or 1854, and extended east and west through what was then the village of Paris. The village had about 500 inhabitants and did not include the proposed crossing. Afterwards the village was organized as a city, the limits were extended so as to embrace the land in question, and Buena Vista street was laid out south of the railroad right of way. Subsequently, during the year 1884, that portion of Buena Vista street north of the right of way was laid out, and by agreement between the city and the railroad company then owning the right of way, the railroad company constructed a bridge over the railroad tracks on a line with Buena Vista street and the city constructed dirt approaches on both sides of the right of way from the street to the bridge, thus furnishing a continuous passageway for travelers upon the street. This bridge, and the approaches thereto, have been used by the public from 1884 to the present time, the railroad companies owning the right of way having kept the bridge in repair. Paris is now a city of about 10,000 inhabitants, and that portion of the city in the vicinity of the proposed crossing is being built up with residences. Appellants' line of railway over which it is sought to extend Buena Vista street is known as the main line, and extends from the city of Indianapolis, in the state of Indiana, to the city of St. Louis, in the state of Missouri. Appellants have another line extending from the city of Danville to the city of Cairo, in this state. It forms a junction with the main line at Paris, and extends south through the city, crossing the main line a considerable distance west of Buena Vista street. A large quantity of freight is transferred at this junction. The first grade crossing east of Buena Vista street is 1,000 feet distant and the first grade crossing west of that street is about 1,700 feet distant. The yards, switches and commercial tracks, as well as the passenger and freight depots and the transfer platform, are located between the bridge above mentioned and the first grade crossing west thereof. Four tracks and a switch point leading to eight tracks in the railroad yards immediately west of Buena Vista street are located under the bridge, and in switching cars to and from and in the railroad yards it is necessary to pass under the bridge. The stock yards are immediately east of the bridge and on the north side of the right of way. The north track is used principally for loading and unloading stock at these yards, and that portion of the track under the bridge is frequently used for storing cars. The railroad at the proposed crossing runs in a cut about eight feet below the natural surface of the land.

On July 20, 1906, the city council of the city of Paris passed an ordinance changing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and establishing the grade of Buena Vista street for a distance of 250 feet north and 500 feet south of the appellants' main track, the established grade at the main track being the present grade of that track. A resolution was adopted at the same meeting providing for service of notice upon the appellant the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to conform its right of way to the grade established by the ordinance. The city soon afterwards entered into a contract with a contractor for the removal of the approaches to the bridge and the reduction of the grade of the street in accordance with the ordinance. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, being a foreign corporation, at once filed a bill in the United States Circuit Court for the Eastern District of Illinois to restrain the city of Paris, the city council, and the contractor from carrying out this contract, and from destroying, removing, or interfering with the abutments and the bridge, and from attempting to change the grade of the street or otherwise interfering with the property of the railway company. The defendants to the bill were duly served with process, but failed to appear in the cause, and a decree pro confesso was entered in accordance with the prayer of the bill. The findings of the decree, so far as necessary to be here shown, were substantially the same as the facts hereinbefore recited, and in addition thereto, that the overhead bridge had been in use for more than 25 years, and that the city had a right of way over said bridge by user or prescription; that the railway company had ever been willing to maintain and renew the bridge with safe, sufficient, and suitable materials for the accommodation of the public; that there was no public necessity requiring the reduction of the bridge and the establishment of a grade crossing; that the city of Paris was not acting from public motives nor for the public welfare, but at the instance and in the interest of one Hardy and contrary to the welfare of the public, and that it was to the interest and for the welfare of the city that said overhead crossing should be maintained as the railway company proposed to maintain it. Thereafter, on December 7, 1908, the city council of the city of Paris passed an ordinance providing that Buena Vista street be opened by condemnation, and that the land involved in this suit, being a strip 51 feet wide and 305 feet long, across the right of way of appellants, be taken for such street purposes, and directing the city attorney to institute the necessary legal proceedings for the condemnation of the same. This proceeding was thereafter, on February 15, 1909, begun by the filing of the petition in the circuit court of Edgar county, and resulted in a judgment assessing \$150 as the compensation to be paid appellants for the use of the crossing as a street by the city.

Appellants first urge that the petition should have been dismissed for the reason that there was no necessity for the opening of a street at this place; that the proceeding is a mere attempt to change the grade and not to extend the street across the right of way, as the city already has a right of way over the railway by user, and that the decree of the United States Circuit Court is res judicata as to all the matters presented by the petition.

The appellant companies hold their right of way subject to the right of the public to extend highways, streets, and alleys across the same. Buena Vista street has never been laid out across the appellants' right of way. Whether there exists a public necessity for the extension of this street across appellants' right of way is purely a legislative question, and the ordinance passed by the city council of Paris providing for the extension of the street is decisive of that question. Courts have the right to determine whether the use for which property is proposed to be taken is public or private in its nature, but when the use is public, as in this case, courts cannot inquire into the necessity or propriety of exercising the right of eminent domain. Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake, 71 Ill. 333; Illinois Central Railroad Co. v. City of Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Chicago & Alton Railroad Co. v. City of Pontiac, 169 Ill. 155, 48 N. E. 485. In the case last cited, as well as in Chicago & Northwestern Railway Co. v. City of Morrison, 195 Ill. 271, 63 N. E. 96, it was intimated that the courts might interfere in an extreme case of oppression or outrage, but the situation here is not such as would warrant us in taking any cognizance of the question of the necessity or expediency of the extension of Buena Vista street across the right of way of appellants.

As to the other grounds urged as to why the petition should be dismissed, the lessee railway company contended in the United States Circuit Court that Buena Vista street had never been extended or laid out across the right of way, and that the public had been allowed by mere license to travel across the railway right of way by means of the overhead bridge, and the decree of the United States court found such to be the fact. That decree found that Buena Vista street had never been extended, and did not exist, over and across the railway right of way, and that the right of the public to pass over the right of way of the appellants by means of the overhead bridge was a mere license. That having been the contention of the lessee railway company in the United States court as well as the finding and decree of that court, appellants are in no position now either to say here that this is not an attempt on the part of the city of Paris to extend Buena Vista street across its right of way, but a mere attempt to change the grade of

that street, or that the decree of the United States court is *res judicata* as to the matters in issue here. If, as the court decreed in the case in the United States court, Buena Vista street did not exist and never had existed across the railway right of way, appellants cannot now, in attempting to avail themselves of the advantage secured by reason of that decree, contend here that as a matter of fact a street did exist by way of an overhead crossing, and that therefore, having once extended the street by contract across appellants' right of way in that manner, the city has exhausted its power, and is now estopped to extend it in any other manner. Neither can they successfully contend that the decree of the United States court is *res judicata* as to the matters involved here, as that decree found that Buena Vista street never had existed or been extended across the right of way of appellants, whereas in this proceeding appellee is endeavoring by condemnation proceedings to extend that street across such right of way at the point where the United States court held it never had been extended. The motion to dismiss was properly denied.

Appellants contend that the court erred in the exclusion of testimony offered in their behalf on the hearing, and also in passing upon certain propositions of law submitted. The evidence offered by petitioner was wholly confined to the question whether the location of Buena Vista street across the right of way of appellants would result in damages to the use of the property of appellants to be occupied by Buena Vista street. This proof was made by various citizens of Paris. Propositions of law were submitted by appellants touching the qualifications of the witnesses to testify as to such damages, the theory being that only such witnesses as were shown to have had special and practical knowledge and experience in matters pertaining to the operation of a railroad were qualified to express any opinion as to the damages sustained. The witnesses called on the part of the appellee testified, in answer to preliminary questions, as to their means of knowledge and that they were thoroughly familiar with the use of this property by appellants, and were therefore qualified to give their opinion on the question of damages. The fact that they were not familiar with the methods of conducting railroads does not necessarily render their testimony incompetent. *Illinois Central Railroad Co. v. City of Chicago*, 169 Ill. 329, 48 N. E. 492.

Appellants objected to the question put to each of the witnesses for appellee as to the amount of damages sustained by appellants by reason of the taking of the strip of land in question for the purposes of a street. The question so asked of a number of the witnesses for the appellee was substantially as follows: "Eliminating the cost of grading the approaches, or of changing the tracks to conform to the grade of the street, or planking between the rails, the making of gates or

hiring of flagmen, stoppage or slow movement of trains, increased danger of accident, cutting of trains over crossings, what, in your judgment, would be the amount of decrease in the value of defendants' property for railroad purposes which would be caused by the use of the strip in question for the purposes of a street, such use for the purposes of a street being subject to the use by the defendants of said strip for railroad purposes?" This question was objected to upon the ground that it excluded from the consideration of the witness elements of damage which should properly be considered, and for which appellants were entitled to receive compensation for damages to the use of their property as railway property. This objection should have been sustained. If the laying out of this street would make it necessary for appellants to change the tracks of the railway to conform to the grade of the street, that was a proper element of damages, and should not have been eliminated. The remainder of the question was proper and did not eliminate any element of damage which was proper to be considered. *Chicago & Northwestern Railway Co. v. City of Chicago*, 140 Ill. 809, 29 N. E. 1109; *Lake Shore & Michigan Southern Railway Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88; *Chicago & Northwestern Railway Co. v. City of Morrison*, *supra*. The same question was asked the other witnesses for petitioner, except that it also eliminated from the consideration of the witnesses the loss to appellants of the use of a portion of the proposed street as a place for standing or storing cars as an element of damage. The objection to this question, which was the same as that made to the other question noted, should also have been sustained for the additional reason that if any of the tracks of appellants' railway at the point of the proposed intersection of the street were used as a place for the storage of cars, the opening of the street would necessarily deprive appellants of that use, and the loss of the storage room was a proper element of damage. *Chicago & Northwestern Railway Co. v. City of Chicago*, 151 Ill. 348, 37 N. E. 842; *Chicago & Northwestern Railway Co. v. City of Morrison*, *supra*.

On the question of consequential damages, or the damages which the appellants would sustain to the property not actually taken for the street, the court expressly confined the proof to the switch yards of appellants in the immediate vicinity of the lands being condemned, and, upon objection, excluded all proof of damages to any of the property of appellants not taken, other than that contained in said switch yards. Under their cross-petition appellants were entitled to prove any damage sustained to property not taken, and we are unable to see upon what theory the court confined this proof to the switch yards alone. If appellants would sustain any damage to their railway aside from the property actually taken and aside

from the damage to the switch yards, if any, they were entitled, under the cross-petition, to prove it, and it was error for the court to exclude this testimony. *Lake Shore & Michigan Southern Railway Co. v. City of Chicago*, 151 Ill. 359, 37 N. E. 880; *Chicago, Burlington & Quincy Railroad Co. v. City of Naperville*, 166 Ill. 87, 47 N. E. 734. The court, in passing upon the written propositions of law submitted by appellants, held the law to be that the defendants were entitled to recover their just compensation, not merely for the strip of land taken for the purposes of Buena Vista street, but, in addition, such further sum as the evidence might show would justly compensate them for damages to their property not taken. This holding as to the law was inconsistent with the ruling of the court upon the admissibility of the testimony. The law is properly stated in the propositions so held by the court, and proof as to all damages to the property of the railroad not taken, occasioned by the extension of this street, should be admitted, except such as would be occasioned by the enforcement of police regulations, or by delay rendered necessary by the common-law duty of appellants to operate and manage their engines and trains with due care and caution on approaching and passing over said street.

Appellants attempted to prove that the extension of this street as proposed would necessitate the excavation of a considerable amount of earth in the vicinity of the proposed crossing, but outside of the street lines, in order to effect a proper operation of the railway. This testimony was excluded, an objection having been sustained to each question asked along this line. It does not appear from the record where it is claimed this excavation would become necessary or why it would become necessary. If the extension of this street would necessarily require the excavation or the removal by the appellants of any quantity of earth for the proper operation of their railway, they would be entitled, under their cross-petition, to prove that as one element of damage, and appellants should have been permitted to show whether or not they would necessarily be put to this expense.

Appellants complain of the action of the court in disregarding practically all of the testimony offered in their behalf as to the damages to the switch yards occasioned by the extension of this street. The damages to the switch yards testified to by the witnesses for the appellants ranged from \$20,000 to \$30,000, and were based almost wholly upon the value of the time which would be lost in the switching operation and movements of trains by reason of the establishment of a grade crossing at this point. The lost time testified to was that which would be occasioned by the observance of the police regulations of the state, and was not such an element of

damage as appellants were entitled to recover. Appellants are subject to the police power of the state, and are not entitled to recover damages on account of having to stop their trains at any crossing in order to comply with the statute. Every railroad company takes its right of way subject to the right of the public to extend streets across it, and when any street is so extended across the right of way, the railroad company is not entitled to compensation for such damages as result from its compliance with the police regulations of the state. *Chicago & Alton Railroad Co. v. Joliet, Lockport & Aurora Railway Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Chicago & Northwestern Railway Co. v. City of Chicago*, supra; *Lake Shore & Michigan Southern Railway Co. v. City of Chicago*, 148 Ill. 509, 37 N. E. 88.

For the error of the court in excluding testimony on the question of damages to the property of appellants not taken, the judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

(343 Ill. 232)

MOORE et al. v. BRANDENBERG et al.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 8, 1911.)

1. EQUITY (§ 22*)—JURISDICTION—PROCEEDINGS FOR DISTRIBUTION OF ESTATE.

A court of equity, will not, as a rule, assume jurisdiction of the distribution of an estate; special circumstances being required to give it jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 51-62; Dec. Dig. § 22.*]

2. EXECUTORS AND ADMINISTRATORS (§ 43*)—PERSONALTY—TITLE OF ADMINISTRATOR.

While the naked legal title to the personality of an intestate vests in the administrator, it is held in trust by him for the payment of debts, and the equitable interest vests in the heirs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 279, 280; Dec. Dig. § 43.*]

3. EXECUTORS AND ADMINISTRATORS (§ 3*)—NECESSITY FOR ADMINISTRATION—RIGHTS OF ACTION BY HEIRS—PROPRIETY.

While, as a rule, the administrator is entitled to take possession of intestate's personality, and distribute the remainder after discharging the debts, to the heirs, and the heirs are not entitled to sue for property belonging to, or on demands due, intestate, where there are no claims against the estate, so that an administrator is unnecessary, the heirs may maintain necessary actions to reduce the property to possession for distribution without the appointment of an administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 3.*]

4. EQUITY (§ 239*)—PLEADING—DEMURRER—EFFECT.

The allegations of the bill are admitted as true by a demurrer thereto.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. § 239.*]

5. EQUITY (§ 39*)—PROCEEDINGS TO DISTRIBUTE ESTATE—JURISDICTION.

The complaint in a suit by heirs to set aside gifts by intestate during his lifetime, alleged that defendant fraudulently induced such gifts, by exercising undue influence, upon intestate while he was infirm; that decedent left no debts, and that no administrator had been appointed, and that the funeral expenses had been paid, and prayed that the gifts be set aside, for an accounting, and that the rights of the parties to the property be determined. *Held* that, since equity had jurisdiction to determine the title to the property claimed to have been fraudulently obtained by defendant, it would retain jurisdiction to distribute the property to the heirs upon setting aside the gifts, the appointment of an administrator, and a summary proceeding under Administration Act (Hurd's Rev. St. 1909, c. 3, §§ 80, 81) §§ 81, 82, for the discovery of concealed assets not being an adequate remedy so as to deprive equity of jurisdiction, since the question of title to property as between an administrator and others cannot be tried in such proceedings, and also in view of the prayer for an accounting.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.*]

6. CANCELLATION OF INSTRUMENTS (§ 57*)—ADDITIONAL RELIEF.

Where a court of equity obtains jurisdiction to set aside conveyances as fraudulent, it will, upon setting them aside, retain jurisdiction to adjust all the rights of the parties, though, in doing so, it may, in part, administer legal remedies.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 114-118; Dec. Dig. § 57.*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Suit by Caroline Moore and others against Catherine Brandenburg and others. Judgment of the Appellate Court affirming a judgment dismissing the bill on demurrer, and complainants bring error. Reversed and remanded, with directions.

This is a bill in equity brought by plaintiffs in error Caroline Moore, Frank Brandenburg, George Brandenburg, and Mary Jones, against defendants in error Catherine Brandenburg, Christian Brandenburg, Ruby Brandenburg, and Raymond Brandenburg, in the circuit court of La Salle county, to cancel and set aside certain gifts, transfers, and assignments of money, and other personal property made to the defendants in error by Peter Brandenburg, now deceased, and for an accounting.

The bill alleges that Peter Brandenburg departed this life at Serena, La Salle county, on August 16, 1907; that he left surviving Catherine Brandenburg, his widow, and Christian Brandenburg and plaintiffs in error, his children and only heirs at law; that at the time of his death he possessed personal property, consisting of moneys, notes, mortgages, securities, bank accounts and other goods and chattels, to the value of \$40,000; that no administrator had been appointed, and there had been no settlement of his estate; that he left no debts, and his

funeral and other burial expenses had been paid; that for a long time prior to his death he was old and infirm in body and of unsound mind; that he was wholly incapable of transacting his business affairs or of making disposition of his property; that the defendants in error Catherine Brandenburg and Christian Brandenburg for a long period of time prior to the death of the said Peter Brandenburg assumed the control and management of his property and business interests, and retained exclusive control and management of the same to the time of his death; that, knowing his mental and physical condition, they took advantage of the trust and confidence growing out of their management of his property, and by fraudulent representation as to the nature and effect of said gifts and transfers induced the said Peter Brandenburg to make them certain gifts of money and property, as follows: To Catherine Brandenburg money and property to the value of \$20,000, to Christian Brandenburg money and property to the value of \$10,000, and to Ruby Brandenburg and Raymond Brandenburg, each, money and property to the value of \$2,000; that said gifts and transfers of money and property were made without consideration, and at the request and solicitation of defendants in error; that said gifts and transfers of money and property were fraudulently obtained, and that said Peter Brandenburg was induced to make said gifts and transfers without at the time knowing or understanding the nature and effect thereof or the kind or amount of property so transferred. The bill alleges that the said defendants in error Catherine Brandenburg and Christian Brandenburg resorted to fraudulent practices and to falsehood and misrepresentation to induce the said Peter Brandenburg to make and execute the said pretended gifts, transfers and assignments of money and property, and that in making them the said Peter Brandenburg was under improper restraint and undue influence of the said Catherine Brandenburg and Christian Brandenburg. The bill further alleges that while having charge and control of the property, business interests, and effects of the said Peter Brandenburg, said Catherine Brandenburg and Christian Brandenburg received, collected, and drew from various banks large sums of money belonging to said Peter Brandenburg and to his estate, and that they have retained the same and refuse to account for it or any part thereof. The bill prays that the pretended gifts and transfers be set aside and for an accounting, and that the rights and interests of the parties to the suit may be determined by the court.

An answer was filed by the guardian ad litem of Ruby Brandenburg and Raymond Brandenburg, minor defendants. The defendants Catherine Brandenburg and Christian Brandenburg demurred to the bill. The

demurrer was sustained, and the bill dismissed for want of equity. The case was appealed to the Appellate Court for the Second District, which affirmed the decree of the circuit court, and the case has been brought to this court by writ of certiorari.

C. A. Darnell and L. B. Olmstead, for plaintiffs in error. Butters & Armstrong, for defendants in error.

FARMER, J. (after stating the facts as above). Two questions are involved in this litigation: First, do the heirs of an intestate, where there is no administration and no debts, take such title to the personal estate as will enable them to maintain a bill to procure their distributive share of the estate? Second, have the plaintiffs in error an adequate remedy at law for the relief asked? As an incident to the first contention it is also insisted that a court of equity will not, unless the circumstances be unusual, assume jurisdiction to administer an estate. It is undoubtedly true that a court of equity will not ordinarily take jurisdiction of the distribution of an estate among the heirs of an intestate. This will only be done under circumstances extraordinary or unusual in character, and in the decision of this case we are called upon to determine whether the case made by the bill is one justifying the exercise of equitable jurisdiction.

The contention of defendants in error that no title to personal property of an intestate vests in the heirs without administration, and they cannot therefore maintain a bill in equity to procure their distributive share of the estate, is true only in a modified degree. While the naked legal title to the personal property of an intestate vests in the administrator, the equitable interests vests in the heirs and the administrator holds the property in trust for the payment of debts. The residue after the payment of debts belongs to the distributees. *People v. Brooks*, 123 Ill. 246, 14 N. E. 39. The general rule is that the administrator represents the deceased as to the personal estate and is entitled to take possession of it, and when the liabilities are discharged distribute the residue to the heirs according to the laws of descent, and where there is an administrator the heirs are not entitled to sue for and recover property belonging to or demands due the intestate. There is, however, an exception to the general rule where there are no debts or claims of any kind against the estate, and nothing for an administrator to do, if one should be appointed, except to distribute the personal estate to those entitled to it by law. In such cases, although the authorities are not in entire harmony, the weight of them is that it is unnecessary to go through the legal form of having an administrator appointed for the sole purpose of distributing the personal estate, but the heirs may maintain necessary actions for the purpose of reducing property to possession in order that it may be distrib-

uted. In *McCleary v. Menke*, 109 Ill. 294, and *Lynch v. Rotan*, 39 Ill. 14, it was held that where there are no debts of the intestate, and no administration upon the estate, the heirs are entitled to the property and may maintain an action therefor in their own names.

In *People v. Abbott*, 105 Ill. 588, the sole heir of an intestate took possession of the personal property, and after the payment of all debts and liabilities appropriated and disposed of the personal estate. Part of the property thus disposed of consisted of notes due the intestate, which the sole heir indorsed, transferred, and delivered to another. The transferee died testate, and her executor took possession of and inventoried the notes as assets of her estate. Afterwards an administrator of the sole heir's intestate was appointed and endeavored to cause the notes, or the proceeds thereof, to be delivered to him by a citation under sections 81 and 82 of the administration act (*Hurd's Rev. St. 1909*, c. 3, §§ 80, 81). The title of the assignee of the notes was sustained. This court said (page 595 of 105 Ill.): "If the notes be delivered to the administrator he has only the duty of paying the proceeds to Lee (the heir), but Lee not being entitled to them equitably he could be made, by the decree of a court of chancery, to pay them over to appellees." Here the bill alleges that no administrator has been appointed; that the deceased left no debts; that his funeral and other burial expenses have been fully paid; and that there is no property or effects belonging to the estate other than as mentioned in the bill. These allegations are admitted by the demurrer to be true. There is no dispute as to who are the heirs of Peter Brandenburg and as to their distributive shares in his personal estate, if he left any such estate. No one but the widow and heirs have any interest in the personal property or are entitled to share in its distribution. The equitable title is in them. The disagreement is not as to the right of any of the parties to share in the distribution of the personal property of the intestate, but is as to the title of the intestate to the property at the time of his death, and that must be determined before there can be any distribution. If the allegations of the bill are true—and they are admitted to be true by the demurrer—then the defendants in error are not the owners of the property but it belongs to the heirs of Peter Brandenburg, and, there being no creditors, the heirs may sue for and recover the property. There can be no doubt that under the allegations of the bill a court of equity has jurisdiction to hear and determine the validity of the title to the property claimed by the defendants in error, and we see no reason why a court of equity cannot distribute the property, if it is determined there is any to distribute, as fairly and justly as the probate court. The respective shares of all the parties are fixed by statute,

except the amount of the widow's award, and there is no insurmountable difficulty in the way of a court of equity fairly and justly fixing that.

In *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621, an heir of an intestate filed a bill in chancery to set aside conveyances of real and personal property made by him during his lifetime. The bill alleged he was not possessed of sufficient mental capacity to make disposition of his property, and that he was unduly influenced by those to whom the property was given. It was held the allegations of the bill were sustained by the proofs, and a decree was entered setting aside the conveyances and transfers of the property. It does not appear that the right of the heir to maintain the bill in her own name was questioned in that case, but this court affirmed the decree of the circuit court, and held that that court had full power to render the decree it did.

That cases where there are no debts of the intestate and no administration of the estate form an exception to the rule that heirs cannot sue for and recover property of the estate in their own right has been held, we believe, by a majority of the courts of last resort in other states where the question has been presented and passed upon. Some of the decisions so holding are: *Ferguson v. Barnes*, 58 Ind. 169; *Giddings v. Steele*, 28 Tex. 733, 91 Am. Dec. 336; *Magel v. Milligan*, 150 Ind. 582, 50 N. E. 564, 65 Am. St. Rep. 382, and cases cited in note; *Teal v. Chancellor*, 117 Ala. 612, 23 South. 651. The author of the chapter on Descent and Distribution in 14 Cyc. in discussing this subject says (page 109): "According to the weight of authority, however, where there are no debts and no letters of administration have been granted, the heirs or distributees may take or divide and enforce choses in action of the intestate or receive payment of and discharge the same." And on page 157: "An heir or distributee may maintain a bill in equity against his coheirs or codistributees for an accounting or for the purpose of obtaining his distributive share of an estate where the administration has been closed, or where there has been no administration and there are no creditors, or where there has been a mistake as to the value of the property of decedent or fraud in settling the estate."

In our opinion, if there were an administrator appointed under the facts alleged in the bill in this case, he would be required to resort to a court of equity to have the title to the property in dispute determined. The only parties having any interest in the property in dispute are parties to this litigation, and the bill makes a case for the exercise of equitable jurisdiction. A court of equity having been properly appealed to for relief, will not, if the bill is sustained by the proof, stop with merely declaring the title of defendants in error to be invalid, but

will retain jurisdiction for the purpose of adjusting all the rights of the parties, even though in doing this it may be, in part, administering purely legal remedies. In discussing the right of an heir to the personal property of an intestate without administration, where there were no debts, this court, in *Lewis v. Lyons*, 13 Ill. 117, 121, used language that seems pertinent to this case. The court said: "It would be a mockery of justice for a court of chancery to require the heir to pay over the money to the administrator when he has no debts to pay and no legitimate use for it, merely for the purpose of allowing him to retain and use it for perhaps two years, and then to pay it back to the heir, retaining his costs and commissions—costs uselessly made and commissions earned by no beneficial services, but in a business which he seeks through an expensive suit in chancery and which can benefit himself alone."

We conclude that under the allegations of the bill in this case neither reason nor justice requires a dismissal of this proceeding and the appointment of an administrator to do the same thing that may be as fully and completely done by a court of chancery in this case, and, while this conclusion is not sustained by all the authorities, it is by a very large number, and, we believe, by a much greater weight of them.

Defendants in error contend that the demurrer was properly sustained because plaintiffs in error have a complete and adequate remedy at law. The remedy pointed out is the appointment of an administrator, and a proceeding, under sections 81 and 82 of the administration act, by citation against defendants in error. Those sections have been frequently before this court, and as understood and construed were not designed to apply to a case like this. In the case of *Dinsmoor v. Bressler*, 164 Ill. 211, 221, 45 N. E. 1086, 1090, the court said: "The summary proceeding in the probate court to compel the production and delivery of property 'is not the proper remedy * * * to try contested rights and title to property between the executor and others.' 2 Woerner's Am. Law of Administration, § 825, p. 681. 'Nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute.' 1 Woerner's Am. Law of Administration, § 151, p. 347; Schouler on Executors and Administrators, § 270. If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial." This case was cited with approval in *Martin v. Martin*, 170 Ill. 18, 28, 48 N. E. 694, 698, where the court said: "The statute is not

designed to afford the means of collecting debts due to estates (*Williams v. Conley*, 20 Ill. 648), nor to try contested rights and title to property between the executors and others (*Dinsmoor v. Bressler*, *supra*). The mere fact that one party to the controversy is an executor will not justify depriving the other party of a trial by jury or authorize his imprisonment, but in a proper case the court may order the property or effects to be delivered up, or the proceeds or value thereof in case the same has been converted."

Statutes authorizing a summary proceeding in the probate court for the discovery of concealed assets of an estate exist in many states of the Union. Some of them are similar to ours, and some do not confer as much power on the probate court as our statute. The construction we have given our statute is in harmony with that given similar statutes in other states. *Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095, 115 Am. St. Rep. 204, where an exhaustive note will be found. Furthermore, the bill in this case prays for an accounting by defendants in error for portions of the property converted and disposed of by them, and it certainly could not be contended that such relief could be granted by the probate court in a proceeding by citation under sections 81 and 82. In our opinion, whether the case made by the bill is one for the exclusive jurisdiction of a court of equity or not, it is a proper case for equitable jurisdiction, and the demurrer to the bill should have been overruled.

The judgment of the Appellate Court and the decree of the circuit court are reversed, and the cause remanded to the circuit court, with directions to overrule the demurrer.

Reversed and remanded, with directions.

(248 Ill. 251)

HOWARD v. BOYLE et al.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS OF COURT.

Error of the court in finding, without any evidence, on a decree for partition, that a certain amount had been paid by the parties, from the rents and profits of the property, on the indebtedness secured by trust deed on the property, was not harmless, by reason of a reference to a master to take an accounting between the parties; the decree by its own terms precluding the taking of an account as to such payment, or the funds from which the money therefor was derived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

2. EQUITY (§ 325*) — EVIDENCE — PROOF OF AVERMENT OF BILL NOT ADMITTED.

A material averment in a bill in chancery, not being admitted, though not denied, must be proved.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647; Dec. Dig. § 325.*]

Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Suit by Michael J. Howard against Guy L. Boyle and others. Decree for plaintiff. Defendants appeal. Reversed and remanded.

Bowersock & Stillwell and Caswell & Healy, for appellants. Flynn & Lyon, for appellee.

COOKE, J. This was a bill for partition, filed by appellee in the superior court of Cook county. The bill alleged that appellee and the appellant Guy L. Boyle were the owners, as tenants in common, of real estate, and improvements thereon, at the northwest corner of Harrison street and Albany avenue, in the city of Chicago; that the legal title to said real estate, until about December 10, 1908, was held by said Boyle for the use of himself and appellee; that shortly prior to that date, in order to assist Boyle in negotiating a loan on the premises, appellee executed a written statement that Boyle was the sole owner of the premises in question, upon the promise of Boyle that he would return the same to appellee after the loan had been negotiated, or would execute some appropriate instrument vesting in appellee an undivided one-half of the premises; and that thereafter Boyle borrowed \$500 from the appellant Viola K. Farrell, to secure the payment of which he executed and delivered to her a warranty deed to the premises. The bill further alleged that, while the deed to Mrs. Farrell purported to convey title in fee simple, it is, in fact, a deed to secure to her the payment of the said sum of \$500 so borrowed from her by Boyle, and that Mrs. Farrell gave no other consideration for the conveyance, and that Boyle, when requested, failed and refused to convey the undivided one-half of said premises to appellee. The bill prays for partition and for an accounting. Boyle and Mrs. Farrell answered jointly. By their answer they admit that Boyle conveyed to Mrs. Farrell the premises in question by warranty deed, but deny that the \$500 loaned by Mrs. Farrell, as alleged in the bill, was the sole consideration for such conveyance. Upon a hearing before the chancellor a decree was entered finding the equities with the complainant; that appellee and Boyle are the equitable owners each of an undivided one-half interest in said premises after deducting from the value thereof such moneys, if any, as have been advanced by appellants, or either of them, on behalf of Boyle; that the interest accruing from time to time, on bonds aggregating \$22,500 and secured by trust deed upon the property in question, and the sum of \$5,000 on the principal of that indebtedness, have been paid by appellee and Boyle out of the rents and profits derived from the building upon the premises; and that the warranty deed from Boyle to Mrs. Farrell, while it purports to convey

title to said property in fee simple, is, in fact, a deed to secure to the grantee thereof the repayment of money advanced by her to Boyle for and on account of himself and appellee. Partition was decreed, and the cause referred to the master in chancery to take proofs and report his conclusions on the matter of accounting between appellee and appellants, and the rights of the parties to further relief was reserved for further consideration until the coming in and presentation of the report of the master. This appeal is from that decree, and appellants make various assignments of error, but one of which it will be necessary to consider, namely, that the decree is contrary to the law and the evidence.

Upon the hearing the testimony of but two witnesses was heard—that of appellee in behalf of himself, and that of Boyle on behalf of the appellants. There was no proof whatever as to what amount, if any, had been paid on the interest and the principal of the indebtedness secured by the trust deed on the property in question, or upon the question of what consideration, if any, was paid by Mrs. Farrell for the conveyance of the premises to her by Boyle; nor was there any proof showing that the conveyance to Mrs. Farrell was made to secure the repayment of money to her. It was error for the court, in the absence of any proof, to make a finding that any sum had been paid upon the interest and principal indebtedness of the amount secured by the trust deed. Appellee contends that this is harmless, for the reason that the cause was referred to the master in chancery to take an accounting between the parties, which would necessarily involve a hearing upon the question of the payments made on this indebtedness and the funds from which the payments were made. This contention is not sound, for the reason that the decree referring the cause to the master by its own terms precludes him from taking any account of the payments made on the indebtedness secured by the trust deed or the funds from which the money was derived for the making of such payments.

It was also error for the court to decree that the warranty deed by Boyle to Mrs. Farrell was not a conveyance of the property in fee simple, but was, in fact, a deed to secure to Mrs. Farrell the payment of money advanced by her to Boyle, in the absence of proof of the circumstances under which the conveyance was made and the consideration thereof. Appellee suggests that the court was warranted in so finding, for the reason that the failure of the appellants, in their answer, to deny the allegations of the bill that the deed was made to secure a loan of \$500, constitutes an admission that the deed from Boyle to Mrs. Farrell was, in fact, a mortgage. This position is not tenable. The allegation in the bill that the deed to Mrs.

Farrell was, in fact, but a mortgage to secure the payment of a loan was a material allegation, and the fact that it was not denied in the answer did not relieve appellee of the burden of supporting it by testimony. If a material averment in a bill in chancery is neither admitted nor denied, it must be supported by proof. *Wilson v. Augur*, 176 Ill. 561, 52 N. E. 289; *Davis Paint Co. v. Metzger Oil Co.*, 188 Ill. 295, 58 N. E. 940; *Gloss v. Cratty*, 196 Ill. 193, 63 N. E. 690; *Shuld v. Wilson*, 225 Ill. 336, 80 N. E. 259.

Other grounds for reversal are urged, bearing upon the weight of the testimony; but, as the decree must be reversed for the reasons assigned, it will not be necessary to discuss them.

For the errors indicated, the decree of the superior court is reversed, and the cause remanded.

Reversed and remanded.

(248 Ill. 123)

MURPHY v. SCHNELL.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. PAYMENT (§ 38*)—APPLICATION—APPROPRIATION BY DEBTOR.

Where a debtor is indebted upon several obligations, it is his privilege to apply a payment upon any one of them.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 99; Dec. Dig. § 38.*]

2. EQUITY (§ 401*)—TRIAL—MASTER'S REPORT.

It is error to have one master in chancery report conclusions of law and fact upon evidence taken before another.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 401.*]

3. VENDOR AND PURCHASER (§ 68*) — CONSTRUCTION — SUBJECT-MATTER — EXTENT OF OBLIGATION.

Where a contract recites the payment of \$10 in hand and that defendant agreed to sell his undivided one-fifth part of Schnell's First addition, etc., with a further provision that all moneys due him from the addition syndicate should be paid, etc., there was no ambiguity in that statement, and it could refer only to real estate, and did not include notes and cash, the proceeds of prior sales of land in the addition.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 68.*]

4. EVIDENCE (§ 442*)—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

Parol evidence of prior negotiations or agreements is not admissible to vary a written contract, except that a separate parol agreement, not inconsistent with the terms or legal effect of the instrument, and as to which it is silent, may be shown, when it appears that the instrument was not intended to be a complete final settlement of the entire transaction.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1874-1899; Dec. Dig. § 442.*]

5. SPECIFIC PERFORMANCE (§ 94*)—NATURE OF REMEDY—PERSONS ENTITLED.

A party to a contract which provided that, in consideration of \$10, the defendant would sell his undivided one-half of a certain addition, with the further provision that all moneys due him from the addition syndicate should be paid, and that no deed should be given un-

til all claims for moneys on account of the syndicate were fully settled without loss to him, is not entitled to specific performance, unless she has protected him with regard to the claims, etc.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249-257; Dec. Dig. § 94.*]

Appeal from Circuit Court, Rock Island County; F. D. Ramsay, Judge.

Suit for specific performance by Anastasia Murphy against Matthias Schnell. From a judgment for complainant, defendant appeals. Reversed and remanded.

Joseph L. Haas (H. E. Tinsman, of counsel), for appellant. Walker, Ingram & Sweeney, for appellee.

DUNN, J. This is an appeal from a decree of the circuit court of Rock Island county for the specific performance of a contract. In 1891 a tract of 16 acres of land in the city of Rock Island was bought in the name of the appellant, Matthias Schnell. A partnership, including the appellant and appellee, known as the "Schnell Syndicate," was formed for the purpose of improving and selling this land. There were six partners, four having an interest of one-fifth each, and two of one-tenth each; the appellant and the appellee each having one-fifth. The title was taken in the appellant's name, and \$8,200, a part of the purchase price, was paid by the partners in proportion to their respective interests. A promissory note, signed by all the partners, was executed for \$8,000, the remainder of the purchase money. M. J. Murphy, the appellee's husband, was appointed agent of the syndicate, to have the land platted, make improvements, and sell lots. The land was subdivided, and a plat of it made and recorded. The subdivision was known as Schnell's addition to the city of Rock Island, and consisted of 4 blocks, divided into 79 lots. Lots were sold for cash and on credit, and on some lots houses were built, and the houses and lots sold. On March 25, 1893, 19 lots had been sold, and on that date the following contract, on which the decree of the circuit court is based, was entered into by the appellant and the appellee:

"Rock Island, Ill., March 25, 1893.

"For and in consideration of ten dollars in hand, the receipt of which is hereby acknowledged, I agree to sell to Anastasia Murphy my undivided one-fifth (1/5) part of Schnell's First addition to the city of Rock Island, county of Rock Island, and state of Illinois, for the sum of two thousand dollars (\$2,000), the balance, nineteen hundred and ninety dollars, to be paid on or before the 1st day of May, 1893. All moneys due me by the Schnell syndicate on said property to be paid me at same time or this agreement to be void.

Matthias Schnell.

"No deed to be given by said Schnell until

all claims for moneys or indorsements on account of Schnell syndicate are fully satisfied without loss to him.

"Anastasia Murphy,

"Per M. J. Murphy.

"M. Schnell."

At the date of this contract the appellant held two promissory notes of the appellee—one for \$1,000, dated January 24, 1890, and one for \$500, dated June 2, 1890—each bearing 6 per cent. interest and due in one year after date. On April 29, 1893, the appellee's husband deposited \$1,000 to the appellant's credit in the Rock Island National Bank. The testimony is contradictory as to the conversation between appellant and Murphy about this deposit. Murphy testified that he told the appellant that he had made the deposit on the contract, and asked the appellant whether he wanted the balance on the first, and that the appellant told him that any time within a week would do; that Murphy then asked the appellant if there was anything due him from the syndicate, and the appellant answered that the syndicate did not owe him anything. The appellant testified that, when Murphy told him he had deposited \$1,000 as part payment on the lots, he told Murphy that would not do; that Murphy owed appellant that money on the notes, which he had agreed to pay first; and that appellant would have to give him credit on the notes before he could give him any credit on the contract. Murphy is corroborated by his brother, who was present, and in any case the appellee, and not the appellant, had the right to determine the application of the payment. Afterward, on December 22, 1894, nearly 20 months later, the appellee presented to the appellant a quit-claim deed conveying to her the appellant's interest in the lots in the subdivision, and demanded that he execute it.

Upon his refusal the bill in this case was filed, on December 28, 1894. The suit was pending in the circuit court more than 15 years. It was put at issue by the filing of a replication on June 4, 1895, and was referred to the master at the May term, 1896. Thereafter evidence was taken in the cause at intervals, and was all reported to the court in May, 1900. No step was taken in the cause until January 3, 1905, when the cause was referred to another special master to report his conclusions of law and fact from the evidence reported, who in April, 1906, reported recommending that the bill be dismissed. The reference to a master to report conclusions of law and fact upon the evidence taken before another master was erroneous; but no objection was made to it, or to his report, on that ground. However, some three years later, on July 3, 1909, the court disregarded the master's findings, found that the appellee was entitled to a specific performance, referred the cause to another

special master to ascertain the amount due from the syndicate to Schnell, and finally, on May 18, 1910, entered a decree in favor of the appellee.

The parties differ as to what was the subject-matter of the contract. The appellee insists that the appellant by the contract sold to her, not only all his interest in Schnell's addition to the city of Rock Island, but also all his interest in the property of the Schnell syndicate, including the notes, mortgages, and choses in action derived from the sale of the 19 lots sold before the date of the contract. The language of the contract is plain enough. Its meaning is not ambiguous. By it the appellant agreed to sell his undivided one-fifth part of Schnell's First addition to the city of Rock Island. There is no doubt or ambiguity in that expression. It can refer to nothing but real estate. Much oral evidence was introduced for the purpose of showing a different intention of the parties, but it was all incompetent. Evidence of prior or contemporaneous negotiations leading up to the consummation of a contract, or of conversations or declarations at the time it was completed, or afterwards, is always rejected, subject to the qualification that a separate parol agreement as to any matters not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, when it appears that the written instrument, was not intended to be a complete and final statement of the whole transaction between the parties. *Fuchs & Lang Co. v. Kittredge & Co.*, 242 Ill. 88, 89 N. E. 723.

The contract was dictated by the appellant and written by M. J. Murphy, who executed it on behalf of his wife. There is no allegation in the bill or claim advanced in argument of any fraud, misrepresentation, accident, or mistake occurring in the negotiation or execution of the contract. The bill does not ask for a reformation of the contract, but for an enforcement of it according to its terms. The decree was based on the theory of appellee, and required the appellant, not only to convey to the appellee his interest in Schnell's addition, but also to account to her for all his interest in the Schnell syndicate, including notes and cash arising out of the transactions of the syndicate prior to the contract between the appellant and the appellee, amounting to more than \$3,000. This was erroneous.

Moreover, the evidence shows that the appellee never complied with the contract on her part, and was never in a position to demand performance of the appellant. By the terms of the contract the appellant was not required to make a deed until all claims for money or indorsements on account of the Schnell syndicate were fully satisfied, without loss to him. At the time this contract was made the \$3,000 note given for the pur-

chase money had been renewed, and would fall due in the following September. It was not paid when due, but various payments were made on it out of the funds of the syndicate. The appellee, as one of the partners in the syndicate, had signed this note, and on August 18, 1894, she paid on it \$913.56, which was her proportionate share, as a maker, of the amount then remaining due. The note was subsequently paid, the appellant paying his proportionate share, which was the same as appellee's. The appellee has never repaid or offered to repay this amount. This note was money on account of the Schnell syndicate which the appellant was bound for, and until it was satisfied without loss to him he was under no obligation to make a deed to the appellee.

The decree will be reversed, and the cause remanded to the circuit court, with directions to dismiss the bill.

Reversed and remanded, with directions.

(248 Ill. 285.)

STURGES & BURN MFG. CO. v. GREAT WESTERN SMELTING & REFINING CO.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. TRIAL (§ 139*)—DIRECTED VERDICT.

Where there was evidence fairly tending to support plaintiff's cause of action, it was not error to refuse to direct a verdict for defendant. [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-341; Dec. Dig. § 139.*]

2. APPEAL AND ERROR (§ 1094*)—QUESTIONS OF FACT—MATTERS REVIEWABLE.

In an action to recover for the sale of tin dross, the questions as to whether the contract was executory or executed, whether there was a warranty, or the merchandise was of the quality represented, or whether the contract was rescinded, being controverted questions of fact, settled in the trial court and affirmed in the Appellate Court, were not reviewable in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; John W. Houston, Judge.

Action by the Sturges & Burn Manufacturing Company against the Great Western Smelting & Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed by Appellate Court, and defendant again appeals. Affirmed.

Eastman, Eastman & White, for appellant. Bulkley, Gray & More, for appellee.

CARTER, J. Appellee sued appellant in the municipal court of Chicago, and recovered on a trial before a jury a judgment for \$850.35, the purchase price of 5,436 pounds of tin dross at 12 cents a pound and 2,829 pounds of terne (solder) dross at 7 cents a pound. The case was taken to the Appel-

late Court for the First District for review, and the judgment of the trial court there affirmed. The Appellate Court granted a certificate of importance, and the case is here by appeal.

Appellee is in the business of manufacturing sheet metal ware, and in the course of its operations accumulates, from time to time, quantities of skimmings rising from the molten metal and known as "dross." Appellant is in the business of buying old metal. Its purchasing agent called at the premises of appellee in March, 1908, and was taken by the latter's superintendent into the tin house, where the dross was kept, and shown both kinds, which he examined. The evidence tends to show that he was asked if he wanted samples, and replied, "No, I am satisfied; I will give you a price right now," and thereupon named the price given above, which was accepted, and a request made that the purchase be confirmed by letter. The next day, March 17th, the purchase was so confirmed, and appellant sent its wagon to the appellee's place of business and obtained the dross, for which the teamster receipted. The day following, a collector who presented appellant a bill for the goods was told to come around in the afternoon and a check would then be given. A check was requested again the same evening, and the response was that the dross had not yet been weighed—to come around in the morning. The evidence shows that when the dross reached the place of business of appellant it was unloaded and examined by three of its representatives, including the purchasing agent. Two or three days after the delivery one of appellant's representatives—not the purchasing agent—went to appellee's factory and stated to a representative of appellee (Mr. Burn) that the material was not such as the appellant had purchased, and Mr. Burn stated that he was not familiar with the matter and would look it up and let him know in a day or two. Six days after the delivery of the material appellant wrote appellee that it could not accept the dross, as it was not like the samples its purchasing agent had seen, and that accordingly it rejected the entire lot and was holding it subject to appellee's orders. The next day this suit was brought. It appears that at or about this time the dross was stored by appellant in Sibley's warehouse. No warehouse receipt was tendered to appellee, and apparently the material was stored in the name of appellant.

It is first urged that the court erred in refusing to take the case from the jury at the close of appellee's evidence, and likewise in refusing to instruct the jury to find for appellant at the close of all the evidence. There was evidence in the record which fairly tended to support appellee's cause of action. Therefore the court did not err in refusing to take the case from the jury.

The chief contention of appellant, however, is that the contract was executory, and not executed. This was a controverted question of fact, as were the questions whether there was warranty, whether the merchandise was of the quality represented, and whether, on this record, appellant rescinded the contract. These controverted questions of fact having been settled against appellant in the trial court, and its judgment affirmed in the Appellate Court, they cannot be reviewed here. The law on this point is so well settled that it is unnecessary to cite authorities.

We find no other questions raised that require our consideration. The judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

(248 Ill. 158)

PEOPLE v. FAULKNER.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—NEW TRIAL.

The sufficiency of the evidence to support the verdict of conviction will not be considered on appeal, unless the motion for a new trial and the ruling of the court thereon are included in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2804; Dec. Dig. § 1090.*]

2. CRIMINAL LAW (§ 1090*)—APPEAL—NECESSITY OF BILL OF EXCEPTIONS—SUBSTITUTE.

A recital in the judgment prepared by the clerk of the denial of the motion for a new trial and the exception of the defendant thereto does not excuse the incorporation of such motion and the ruling thereon in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2804; Dec. Dig. § 1090.*]

3. CRIMINAL LAW (§ 1032*)—APPEAL—OBJECTIONS IN TRIAL COURT—VARIANCE.

The objection that there is a variance between the indictment and the proof cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2842; Dec. Dig. § 1032.*]

4. CRIMINAL LAW (§ 1122*)—APPEAL—RECORD—MATTERS PRESENTED—INSTRUCTION.

Instructions cannot be reviewed on appeal, where the abstract, though containing a list of the instructions, fails to state on whose behalf the instructions were requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2945; Dec. Dig. § 1122.*]

5. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD—SHOWING OBJECTIONS.

Instructions will not be reviewed on appeal, where the record fails to show any exception to the giving or refusing of the instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2767; Dec. Dig. § 1086.*]

6. CRIMINAL LAW (§ 1090*)—APPEAL—NECESSITY OF BILL OF EXCEPTIONS—EVIDENCE.

When exceptions are presented to rulings on the admission of evidence, such rulings will be reviewed on appeal, though no motion for new trial, with the ruling thereon, is incorporated in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2804; Dec. Dig. § 1090.*]

7. CRIMINAL LAW (§ 1166½*)—APPEAL—HARMLESS ERROR—CONDUCT OF JUDGE.

In a prosecution for obtaining money by the confidence game, in which the evidence clearly showed that the accused had admitted that letters used in the fraudulent scheme were not genuine, and the evidence was sufficient to sustain a conviction, the act of the court in asking a witness, who was the stenographer who wrote the letters, "Did it strike you as being rather strange that the same man was writing all these letters on different letter heads of various hotels?" was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3119, 3125; Dec. Dig. § 1166½.*]

8. CRIMINAL LAW (§ 1119*)—APPEAL—RECORD—MATTERS PRESENTED FOR REVIEW.

Alleged improper remarks by the court will not be considered on appeal, where such remarks are nowhere presented in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2928; Dec. Dig. § 1119.*]

Error to Criminal Court, Cook County; Richard S. Tuthill, Judge.

Lloyd M. Faulkner was convicted of obtaining money by means of the confidence game, and brings error. Affirmed.

John W. Creekmur and Silas H. Reid, for plaintiff in error. W. H. Stead, Atty. Gen., John E. W. Wayman, State's Atty., and Joel C. Fitch (Robert E. Crow, of counsel), for the People.

COOKE, J. The plaintiff in error was indicted and convicted, in the criminal court of Cook county, for the crime of obtaining money from one Stephen G. Skinner by means of the confidence game. He did not offer any testimony in his own behalf on the trial, and the case was given to the jury upon the evidence offered upon behalf of the people. The evidence of the people proved that plaintiff in error, by means of letters which he had written himself and to which he had signed the name of F. A. Andrews, a fictitious person whom he represented to be a man of large means who lived in the city of New York, procured from Charles H. Aldrich, of Chicago, who was interested in an irrigation project on the San Rafael river, in Idaho, a contract whereby Aldrich agreed to pay to plaintiff in error one-fifth of all profits which Aldrich would receive if the plaintiff in error should within 30 days secure the capital to finance the irrigation project. By means of the same fictitious letters, together with the Aldrich contract, plaintiff in error induced Skinner to agree to join with him in the organization of a corporation for the purpose of engaging in the brokerage business, by the terms of which agreement Skinner was to advance the sum of \$1,500, and plaintiff in error was to assign to the corporation the Aldrich contract and devote his time to the securing of the necessary capital to finance the irrigation project, which he represented could be secured from the fictitious personage, An-

draws, and the profits arising from the deal were to be equally divided between plaintiff in error and Skinner. The incorporation of the company, although attempted, was never effected; but Skinner deposited in a bank in Chicago the sum of \$1,500 to the credit of Faulkner & Skinner, to be used as expense money in procuring Andrews to finance the San Rafael irrigation scheme. This money, together with as much more which had been deposited from time to time by Skinner on the representations of the plaintiff in error that the matter of closing up the deal with Andrews was progressing nicely and that the money was needed for expenses, was all drawn out of the bank by plaintiff in error and appropriated by him to his own use. In the meantime, by clever manipulation of fictitious letters and telegrams, plaintiff in error had secured an extension of his contract with Aldrich, and upon Aldrich finally becoming suspicious and starting an investigation as to the genuineness of one of the telegrams which plaintiff in error represented had been received from Monterey, N. M., plaintiff in error confessed to Aldrich and Skinner that no such person as Andrews existed and that his whole scheme had been fraudulent. He has sued out a writ of error for the purpose of having the record of the criminal court reviewed, and contends that the evidence is not sufficient to support the verdict, that there is a variance between the indictment and the proof, and that the court erred in refusing to give certain of the instructions offered on the part of the plaintiff in error.

Counsel for the defendant in error say that the question whether the evidence is sufficient to support the verdict is not open for review here, for the reason that no motion for a new trial appears in the bill of exceptions, and that there is not preserved in the bill of exceptions an exception to the action of the court in denying the motion for a new trial. We cannot consider the question of the sufficiency of the evidence to support the verdict, except when the motion for a new trial, the ruling of the court upon the motion, and the exception to the ruling of the court are incorporated in the bill of exceptions. "In order to present to this court the question whether a verdict is against the evidence, it is necessary for the party against whom the verdict passes to make a motion for a new trial, and, upon the motion being overruled, to except to such ruling, and to preserve that exception by the bill of exceptions." *People v. Moritz*, 238 Ill. 494, 87 N. E. 348; *Yarber v. Chicago & Alton Railway Co.*, 235 Ill. 589, 85 N. E. 928. An inspection of the court record discloses that the clerk, in writing up the judgment, recited the denial of a motion for a new trial and the exception of the plaintiff in error to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such denial. Such an exception cannot be made to appear in that manner. It can only be preserved by the bill of exceptions. *People v. Moritz*, supra; *Bruen v. People*, 206 Ill. 417, 69 N. E. 24; *Steffy v. People*, 130 Ill. 98.

As to the question of variance, we find from the record that that question was not raised in the trial court, and therefore could not properly be raised here for the first time, if the record were in other respects sufficient. *Alford v. Dannenberg*, 177 Ill. 831, 52 N. E. 485; *Greene v. People*, 182 Ill. 278, 55 N. E. 341.

The abstract contains a list of instructions, without indicating on whose behalf any of them were asked, and without noting any exception to the giving or refusing of any of them. For this reason we are unable to review the action of the court in refusing to give any instruction asked on the part of plaintiff in error. The questions thus sought to be presented for review can only be considered by us when preserved and presented in the manner required by law. We have, however, examined this record, and find that plaintiff in error had a fair trial, and that the evidence is sufficient to sustain the verdict. We have also examined all the instructions appearing in the abstract and noted as refused, and we find that the same were all properly refused, and we would hold that no error had been committed by the court in refusing any of these instructions, if that matter were properly before us.

Plaintiff in error urges that the trial court erred in admitting certain evidence over his objection. When exceptions are preserved to the rulings of the court on the admission of evidence, such rulings are open for review, although no motion for a new trial and no exception to the ruling of the court on such motion are preserved in the bill of exceptions. *Yarber v. Chicago & Alton Railway Co.*, supra.

It is first contended that the court improperly admitted in evidence certain letters, envelopes, and telegrams, on the ground that they were not identified or marked as exhibits and that they were not competent as evidence. While many of these papers were not marked as exhibits, they all appear in the bill of exceptions as the documents admitted in evidence, and each was identified by various of the witnesses by reference to its contents and the date it bore. As *Skinner* and *Aldrich* testified that the letters and telegrams admitted in evidence were shown them by plaintiff in error, and were used by him in furtherance of his scheme, they were properly admitted in evidence.

It was shown that plaintiff in error had employed various stenographers in Chicago to copy the letters purporting to have been written by *Andrews*, on the letter heads of the leading hotels of New York, Boston, the

city of Mexico, and other cities. These stenographers were called as witnesses, and during the examination of one of them the court asked her, "Did it strike you as being rather strange that the same man was writing all these letters on different letter heads of various hotels?" This question of the court was objected to by plaintiff in error. The objection was overruled, an exception noted, and the witness answered that it did not. This is assigned as error, and it is urged that by asking the question the court conveyed to the jury his opinion that the plaintiff in error was guilty. The question was improper, and the objection to it should have been sustained; but, in view of all the testimony, this action of the court does not constitute reversible error. At most, it only called for the opinion of the witness as to the genuineness of the letters, and it was proven by three other witnesses that plaintiff in error admitted the letters were not genuine.

Plaintiff in error contends that the court made improper remarks during the argument of the case to the jury; but these remarks, if made, are nowhere preserved in the record.

Finding no reversible error in the matters properly presented for review, the judgment of the criminal court is affirmed.

Judgment affirmed.

(243 Ill. 259.)

HAINES v. KNOWLTON DANDERINE CO.
(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. COURTS (§ 190*)—TIME FOR PRESENTING TO THE JUDGE.

Under Municipal Court Act (Laws 1907, p. 244) § 38, providing that in cases of the first class "a bill of exceptions may be tendered to the judge at any time within sixty days after the entry of a final order or judgment, or within such further time thereafter as the court, upon application made therefor within such sixty days, may allow," and, therefore, amending the prior Municipal Court act (Laws 1905, pp. 166, 171, §§ 19, 28), providing that in cases of the first class the practice in the municipal court should be the same as that in the circuit court, there can be but one extension of time for presenting the bill, application for which must be made within 60 days from the entry of final judgment, and the parties cannot dispense with this requirement by stipulation.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 190.*]

2. APPEAL AND ERROR (§ 643*)—BILL OF EXCEPTIONS—RECORD—MATTERS REVIEWABLE.

It was no defense to a motion made in the Appellate Court to strike from the record the bill of exceptions as not having been presented to the trial judge within the proper time that the motion was not made until after joinder in error, as the question as to what is the record may be tried by the record at any time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2791-2794; Dec. Dig. § 643.*]

Appeal from Appellate Court, First District, on Appeal from Municipal Court of Chicago; McKenzie Cleland, Judge.

Action by George B. Haines against the Knowlton Danderine Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Moses, Rosenthal & Kennedy (Joseph W. Moses and Walter Bachrach, of counsel), for appellant. James A. Brady and William English, for appellee.

DUNN, J. The Knowlton Danderine Company appealed to the Appellate Court for the First District from a judgment rendered against it in favor of George B. Haines by the municipal court of Chicago on July 11, 1908. The Appellate Court sustained a motion made by the appellee to strike from the record the bill of exceptions, and, because no error was assigned which appeared otherwise than by the bill of exceptions, the judgment was affirmed. A certificate of importance was granted, and the appellant has brought the record here; the only question presented being as to the action of the Appellate Court in striking the bill of exceptions from the record.

The case in the municipal court was one of the first class. Before the expiration of the period of 60 days within which the municipal court act provides a bill of exceptions may be tendered to the judge—that is, on September 3, 1908—an order was made extending the time for presenting the bill of exceptions to September 30th. On September 30th an order was entered upon the stipulation of the parties for a further extension, and similar orders were afterward entered upon a like stipulation, always before the expiration of the preceding extension. The bill of exceptions was presented on October 10, 1908.

Section 38 of the municipal court act provides that in cases of the first class "a bill of exceptions may be tendered to the judge at any time within sixty days after the entry of a final order or judgment, or within such further time thereafter as the court, upon application made therefor within such sixty days, may allow." Laws 1907, p. 244. The claim is made on behalf of the appellant that the court may grant repeated extensions indefinitely after the expiration of such 60 days, provided, only, that the original extension shall have been granted within such 60 days and the subsequent extensions within the limit of a prior extension and by an agreement of the parties. The bill of exceptions, which was before unknown, had its origin in the statute of Westminster II (13 Edw. I, c. 31), which directed the justices to allow and put their seals to an exception when he that alleges the exception writes the same and requires them to do so. The statute did not appoint the time when the exception should be allowed and sealed; but the practice was, as the nature of the thing

required, that the substance of the exception should be reduced to writing when taken, though it need not then be drawn up in form. 2 Tidd's Pr. 863. By the statute of February 4, 1819 (which is now chapter 28 of the Revised Statutes) this statute became a part of the law of Illinois. Section 19 of the act of January 29, 1827, concerning practice in courts of law, which with slight changes is the first sentence of section 81 of the present practice act (Hurd's Rev. St. 1909, c. 110), introduced no change, but is substantially the same as the statute of Westminster II and is declaratory of the law as it has existed since the state was organized.

It seems never to have been regarded as necessary to reduce the bill of exceptions to form at the trial; but it was sufficient if this was done during the term, though it was essential that the bill should show that the exception was alleged at the trial. *Gibbons v. Johnson*, 8 Scam. 61; *Evans v. Fisher*, 5 Gilman, 453; *Burst v. Wayne*, 18 Ill. 664; *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182; *Ex parte Bradstreet*, 4 Pet. 102, 7 L. Ed. 798. On account of the inconvenience or necessity of the case, the practice seems always to have obtained, in cases where the parties agreed or the court so ordered, to permit the bill of exceptions to be prepared and signed in vacation or at a subsequent term. *Evans v. Fisher*, supra; *Burst v. Wayne*, supra; *Ex parte Bradstreet*, supra. This practice was not founded upon the statute, but grew out of the action of the courts. The opinion in *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676, inadvertently went too far in saying that the bill of exceptions was required to be presented, settled, signed, and sealed before verdict, or before the jury were discharged. Exceptions were required to be taken at the time, but might be reduced to form during the term.

When the municipal court act was adopted, it was provided by sections 19 and 28 that until otherwise provided by the rules of the municipal court, except as in the act otherwise prescribed, cases of the first class should be commenced and prosecuted in the same manner as similar suits or proceedings in the circuit court, and the practice should be the same. Laws 1905, pp. 166, 171. No other provision was made in regard to the time of preparing and filing bills of exceptions, for the sentence quoted above from section 38 of the municipal court act was not contained in that section originally. Bills of exceptions were therefore governed by the practice prevailing in the circuit court; and the municipal court adopted by a rule section 81 of the practice act as applying to the municipal court. The necessity of a formal exception and the seal of the judge was abolished by section 38, and it was only necessary to a review of any ruling of the court that it should appear that such ruling was objected to. Section 21 of the act provided that there should be no stated terms of the municipal

court, but that the court should always be open for the transaction of business.

In 1907 the municipal court act was amended, and the provision in regard to the time within which bills of exception might be presented was added. Before that amendment the municipal court had all the power of the circuit court in regard to fixing the time within which a bill of exceptions might be filed. The amendment could have had no other object than to limit this power. By enacting that the bill of exceptions may be presented within 60 days after the entry of the final order or judgment, or within such further time thereafter as the court, upon application therefor made within such 60 days, may order, the Legislature has effectually denied to the court the power to act at any other time. The expression of one thing is the denial of another. To permit the presentation of the bill under the circumstances of this case would be to entirely ignore the words, "upon application therefor made, within such sixty days," limiting the time within which the court may grant an extension, and would require us to construe the act as if those words were omitted.

We do not see that the agreement of the parties affects the question. They cannot authorize the court to do what the law has denied it the power to do. Arguments based upon the practice in the circuit court are not to the point, because the object of the amendment was to change that practice, so far as the municipal court is concerned, and limit the time within which bills of exceptions must be presented. This case does not differ, in principle, from that of *Lassers v. North-German Lloyd Steamship Co.*, 244 Ill. 570, 91 N. E. 678. One of the objects in creating the municipal court was the disposition of litigation with as little formality and delay as possible. It was probably thought conducive to expedition to require the completion of the record of the trial court as promptly as possible, and that this could be secured by limiting the time within which the bill of exceptions should be presented. Of course, by granting unreasonable extensions, as has been suggested, the judges of the court might thwart this object; but the Legislature would not presume that they would do so.

The appellant contends that the motion in the Appellate Court, because not made until after joinder in error, was too late. The objection was of such a character as could be availed of at any time. The appellant, by its assignment of errors in the Appellate Court, alleged that there was error in the judgment. It referred to the bill of exceptions to show such error, and the appellee answers that the alleged bill of exceptions is no part of the record, for reasons apparent on an inspection of it. The question of what is the record may be tried by the record at any

time. *Wurlitzer Co. v. Dickinson*, 93 N. E. 132.

The Appellate Court did not err in striking the bill of exceptions from the record, and its judgment will be affirmed.

Judgment affirmed.

(248 Ill. 280)

FREESE v. GLOS et al.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. APPEAL AND ERROR (§ 198*)—HEARING BEFORE MASTER—OBJECTIONS—WAIVER.

A defeated party to an action cannot on appeal object to a reference made to the master where both of the parties treated it as a valid order, and he participated in the hearing, and made no objection below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1248-1250; Dec. Dig. § 198.*]

2. APPEAL AND ERROR (§ 226*)—OBJECTIONS NOT MADE BELOW.

The Appellate Court will not reverse a case for the improper allowance of master's fees where that point was not raised in the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1324; Dec. Dig. § 226.*]

3. APPEAL AND ERROR (§ 734*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where appellant desired to assign as error that the court erred in allowing the master stenographer's fees, he should have specifically pointed out such error by an assignment clearly covering that point, and a blanket assignment that the court erred in decreeing that "complainant recover of defendants herein, the sum of \$43.10 as and for costs" is too general to be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 734.*]

4. APPEAL AND ERROR (§ 1171*)—REVIEW—HARMLESS ERROR—TRIVIAL MATTERS.

A decree for the amount of \$480 will not be reviewed because of an error of \$1.28.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Cook County; Adelor J. Petit, Judge.

Suit by Wilhelm C. Freese against Jacob Glos and others to cancel as clouds upon plaintiff's title certain tax deeds. From a decree for plaintiff, defendants appeal. Affirmed.

John R. O'Connor, for appellants. Harry C. Levinson and Enoch J. Price, for appellee.

HAND, J. This was a bill in chancery filed by the appellee, Wilhelm C. Freese, in the circuit court of Cook county, against Jacob Glos, Emma J. Glos, August A. Timke, trustee, and unknown owners, to cancel as clouds upon his title to lot 3 in Garfield Boulevard Syndicate addition (a subdivision of lot 1, block 7, circuit court partition of the W. ¼ of the S. W. ¼ of section 14, township 39 north, range 13 east, of the third principal meridian, in Cook county, Ill.) two tax deeds issued to Jacob Glos by the coun-

ty clerk of Cook county. Answers and replications were filed, and the case was referred to a master to take the proofs and report his conclusions. The master took the proofs and filed a report, in which he found said tax deeds were void, and recommended that they be canceled and set aside as clouds upon the appellee's title, and the court having overruled exceptions to said report entered a decree in accordance with the recommendations of the master. Jacob Glos, Emma J. Glos, and August A. Timke, trustee, have prosecuted an appeal to this court.

The first contention of the appellants is that there was no order of reference entered in the cause which authorized the master to take the proofs and report his conclusions, and that the decree, for want of such order, is void and should be reversed. The record shows that on May 5, 1909, the cause was referred to Roswell B. Mason, one of the masters in chancery of the circuit court of Cook county, to take the proofs and report to the court his conclusions of law and fact, and that on June 29, 1909, on motion of complainant's solicitor, the order of reference entered on the 5th of May was set aside and the unknown owners of said lot 3 were defaulted, and it was "further ordered that the above-entitled cause to Roswell B. Mason, master in chancery of this court." It also appears that Emma J. Glos and August A. Timke appeared by their solicitors before the master in chancery during the taking of the evidence; that Jacob Glos was served with summons and entered his appearance pro se, but the master's report is silent as to whether or not Jacob Glos appeared before the master by his solicitor or in person during the taking of the testimony. It appears, however, from the objections filed by Jacob Glos with the master and renewed as exceptions in the circuit court, "comes now the defendant Jacob Glos and objects to said report for the following reasons: (1) Because the master, upon the hearing before him, received in evidence, over the objections of defendant, the document described in the evidence as the complainant's Exhibit 1, and overruled the objections of this defendant thereto and considered the same in making up his report and based his report, in part, thereon," and said objection is repeated by Jacob Glos in the same form as to Exhibits 2, 3, 4, 5, and 6. The words "be referred" were omitted from the order of July 29th, and the order in that particular was defective. If, however, the parties treated the order as a valid order of reference, as they appear to have done, and appeared before the master and participated in the hearing before the master and made no objection as to the order of reference before the master or in the court below, it is too late for them to raise the question that the order of reference was insufficient after the case has reached this court on appeal. In *Preston v. Hodgen*, 50 Ill. 56, it was held

that when it appears from a decree that the court acted upon a master's report, it will be inferred that an order of reference has been made although no such order appears in the record; and in *Hawley v. Simons*, 157 Ill. 218, 41 N. E. 616, that if a party appears and participates in the taking of evidence before a master without objection he cannot question the authority of the master to act, although no order referring the case to the master had been entered. We are of the opinion the trial court properly acted upon the master's report as against the appellants, although the order of reference was imperfect in form.

It is next contended that the court erred in allowing the master in chancery \$13.05 for stenographer's fees for writing up the testimony in the case taken before him. Attached to the master's report was the following itemized statement of his fees and disbursements:

Master's Fees and Expenses.	
For taking and certifying 35 pages of testimony, 250 words per page, at 15c per 100 words.....	\$13 05
For considering written suggestions filed by counsel, examining authorities and considering questions of law and fact, 3 hours at \$5 per hour.....	15 00
For preparing report.....	10 00
For preparing and serving notice.....	2 00
	<hr/>
	\$40 05
Stenographer's charges—35 pages of testimony, 250 words per page, at 15c per 100 words.....	13 05
	<hr/>
Total	\$53 10
I have deducted \$10 from the above charges, making a total master's fees and expenses, \$43.10. Roswell B. Mason, Master.	

The court made the following finding and order as to the master's fees: "That the master's fees for his services herein be and the same are hereby fixed at the sum of \$43.10, all of which has accrued since said fund was deposited in court, and which sum the court finds has been paid by said complainant and should be repaid to him by said defendants; and it is accordingly ordered and decreed that the complainant recover of the defendants said sum of \$43.10 costs paid by him, and that he have execution for said sum against said defendants."

The statement of the amount claimed by the master for his fees and disbursements, which included the stenographer's fees, was signed by the master, and was attached to his report. The appellants in no way challenged the correctness of that statement in the court below, and this court ought not to reverse the case upon a question which was not brought to the attention of the trial court. Neither have the appellants assigned as error in this court the allowance of said stenographer's fees. Assignment No. 23, the one relied upon by appellants, is that the court erred in "decreeing that the complainant recover of defendants herein the sum of \$43.10 as and for costs." It would seem

that when counsel for appellants has filed an assignment of error for each of the three appellants, which, in the aggregate, covered 16 pages of the record, if he desired to assign as error that the trial court erred in allowing the master stenographer's fees he should have specifically pointed out such error by an assignment which clearly covered that point, and ought not to rely upon the blanket assignment that the court erred in decreeing that the complainant recover of the defendants \$43.10 as costs. It is well settled that, though the record contains error, the same may be waived by a failure to properly assign such error upon the record. *Cochran v. Village of Park Ridge*, 138 Ill. 295, 27 N. E. 939; *McCaleb v. Coon Run Drainage District*, 190 Ill. 549, 60 N. E. 898.

It is further contended that the amount fixed by the decree which the appellee should pay to the appellants as taxes, interest and costs, viz., \$479.46, is \$1.28 less than the amount due them, and that for a failure to fix the amount due the appellants for taxes, interest, and costs at \$480.74 the decree should be reversed. The matter here in difference is so small, being only \$1.28, conceding the figures of appellants to be correct, the maxim de minimis non curat lex should be applied (*Chicago, Wilmington & Vermillion Coal Co. v. City of Streator*, 172 Ill. 435, 50 N. E. 167; *McNutt v. Dickson*, 42 Ill. 499), and the error disregarded.

It is finally contended that the tax deeds canceled by the decree are not the tax deeds described in the bill. While the identical words used in the bill describing the deeds sought to be canceled are not used in the decree, an examination of the bill and the decree leaves no doubt that the decree follows the averments of the bill, and that relief has not been granted by the decree which was not prayed for in the bill.

Finding no reversible error in this record, the decree of the circuit court will be affirmed.

Decree affirmed.

(248 Ill. 163)

CULVER v. WATERS et al.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 10, 1911.)

1. RECORDS (§ 9*)—REGISTRATION OF TITLES TO LAND—CONSTRUCTION OF STATUTE—"CONTIGUOUS."

Hurd's Rev. St. 1909, c. 30, relating to the registration of land titles provides (section 55) that any number of contiguous pieces of land in the same county and owned by the same person and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person, may be included in one application. *Held*, that the ordinary meaning of "contiguous" being "in actual contact" or "touching" a number of lots separated from each other, two lots being the largest number in actual contact,

and some of them being separated by two blocks, are not contiguous within the act.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1495-1497.]

2. RECORDS (§ 9*)—REGISTRATION OF TITLES TO LAND—CONSTRUCTION OF STATUTE—"CHAIN OF TITLE."

It appearing that the chain of title to the several lots was the same from the government down to 1863, at which time the chain was broken, the transfers of property in one subdivision constituting one chain of title and those in another subdivision separated from the first subdivision by a street constituting another chain, the lots did not have the same chain of title within the act, the ordinary meaning of the word "chain" being "identical," and the legislative intent being that the lots sought to be registered should either be one compact piece of property or, if not, that all should have an identical chain of title, to be included in one application.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 2, p. 1041.]

3. STATUTES (§ 188*)—CONSTRUCTION—USE OF WORDS.

In construing statutes, the intent of the Legislature is to be found in the ordinary meaning of the words of the statute, the usual and popular meaning to be given to the words when the sense will bear it, and courts, before denying a word its ordinary meaning, must be sure that they are following the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267; Dec. Dig. § 188.*]

4. RECORDS (§ 9*)—REGISTRATION OF TITLES TO LAND—ADMISSIBILITY OF SECONDARY EVIDENCE OF TITLE—STATUTORY PROVISIONS.

Under Conveyance Act (Hurd's Rev. St. 1909, c. 30) § 35, providing that the certified record of a deed may be admitted in evidence if it shall appear to the satisfaction of the court that the original is lost or not in the power of the party wishing to use it, affidavits offered to lay foundation for such secondary evidence in proceedings to register the title to land need not show that the original document is lost and also out of the power of the party wishing to use it, but it is sufficient if they show that the document is not in the party's power, the statute reading in the alternative.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

5. RECORDS (§ 9*)—REGISTRATION OF TITLES TO LAND—ADMISSIBILITY OF EVIDENCE—ABSTRACT OF TITLE.

Hurd's Rev. St. 1909, c. 30, § 61, relating to proceedings for registration of title to land, provides that the examiner of titles may receive in evidence, any abstract of title made in the ordinary course of business by makers of abstracts. *Held*, that abstracts within the act must be made by the abstracters in the regular course of their business, and abstracts merely shown to have been ordered by the owner of the property in the usual and regular way that abstracts are ordered by such owners are not admissible.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

6. STATUTES (§ 35½*)—ENACTMENT—NECESSITY FOR SUBMISSION TO VOTE OF PEOPLE.

That the original act relating to the registration of titles to land was submitted to the vote of the people of the county and adopted does not require that every amendment made by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Repr. Indexes

the Legislature must also be submitted to the people for their approval, and that section 61 thereof (Hurd's Rev. St. 1909, c. 30), being an amendment relating to the reception in evidence of abstracts of title, was not so submitted does not affect its constitutionality.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 85½.*]

Appeal from Circuit Court, Cook County; Adeler J. Pettit, Judge.

Application by Morton T. Culver against Charles Waters, Jacob Glos, and others for the registration of title to land. From a decree ordering registration of title, Jacob Glos and others appeal. Reversed and remanded, with directions.

John R. O'Connor, for appellants. Morton T. Culver, pro se.

CARTER, J. December 11, 1909, the appellee filed in the office of the clerk of the circuit court of Cook county his application asking to have his title to 12 lots in the village of Glencoe registered pursuant to the act concerning land titles. Hurd's Rev. St. 1909, p. 530. Seven of these lots are in block 2 and two are in block 4, in Hartwell's addition to Glencoe. The two blocks are just across the street from each other. The other three lots are in Culver & Johnson's addition to Glencoe, a subdivision immediately adjoining, on the east, Hartwell's addition, one of the said last mentioned lots being in block 3 and the other two in block 4, these two blocks also being immediately across the street from each other. The plats introduced in evidence show that many of the lots are separated and scattered with regard to each other. Two lots is the largest number in actual contact. The two lots most widely separated are two blocks apart; others have two or three lots between them. It was alleged in the application that the lots are occupied by the applicant as owner, except as to certain lots which are occupied by tenants under the applicant, and that certain other persons claimed some interest or estate in the premises, among them being Jacob Glos and August A. Timke, appellants herein. The last-named persons denied the ownership of applicant and opposed registration. On motion of appellant Glos the matter was referred to the examiner of titles to investigate and report whether said lands were located contiguous to each other or were derived through the same chain of title, so as to entitle them to be registered, under section 12 of said act, in the same proceeding. That section reads: "Any number of contiguous pieces of land in the same county, and owned by the same person, and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person may be included in one application." Hurd's Rev. St. 1909, p. 532. The examiner reported that

while the several lots were not contiguous, the chain of title was substantially the same. Exceptions filed by appellants were overruled and the report approved. The cause was then re-referred to the examiner of titles to investigate and report on the merits. After a hearing he reported that the applicant was the owner of the premises and entitled to have the same registered upon reimbursing said Glos for certain expenditures made by him and for the payment of subsequent taxes, and that said tax titles were void. The objections filed to this report were overruled by the examiner, and by order of the circuit court were allowed to stand as exceptions. These exceptions were thereafter overruled by the court, and a decree entered ordering registration of title. From that decree this appeal has been prayed to this court.

The contention is made on one side and denied on the other that the lots are contiguous, as that term is used in said section 12, and that the applicant obtained all of these lots by the "same chain of title." The first and ordinary meaning of contiguous is, "in actual contact; touching." Webster's New Int. Dict. "Touching; meeting or adjoining at the surface or border." Century Dict. These definitions accord with the meaning generally given to this word. All of the lots here in question cannot be said to be contiguous under this definition.

There is no question as to the chain of title being the same from the government down to the year 1863. At that time the chain was broken. The ordinary meaning of the word "same" is "identical"; "identical in substance or numerically"; "of one nature, degree, or amount." Century Dict.; Webster's New Int. Dict. The intent of the Legislature is to be found in the ordinary meaning of the words of the statute. When the sense will bear it, the usual and popular meaning must be given to the words. *Stuart v. Hamilton*, 66 Ill. 253; *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613. Before denying the word its ordinary meaning the courts must be sure that they are following the legislative intention. 2 Lewis' Sutherland on Stat. Const. (2d Ed.) par. 437. It is conceded that these lots do not all have an identical chain of title. It seems clear that it was the intention of the Legislature that there should either be one compact piece of property, or if the pieces of property were separated, that then all should have an identical chain of title, in order to include the property in one application. To construe the statute otherwise would not be in accordance with the plain and ordinary meaning of the words used. The trial court improperly held that all of these lots were obtained by "the same chain of title."

Appellants further argue that certain affidavits offered in order to permit secondary

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indiana

evidence as to the title to be introduced before the master do not conform to section 35 of the conveyance act which requires that such affidavits must show, to the satisfaction of the court, that such instrument "is lost or not in the power of the party wishing to use it." The affidavits objected to show clearly that the documents in question were not in the power of the party wishing to use them, and are in that regard in conformity with the statute. An affidavit, under said section 35, is not required to show that such documents are lost and also out of the power of the party wishing to use them. The statute reads in the alternative. The objections to the affidavits are not within the reasoning of the authorities cited by appellants.

In introducing abstracts of title to make his "prima facie evidence of title" under said section 18, the applicant testified, under oath, that such abstracts were "ordered in the regular course of business" from the Security Title & Trust Company, a corporation engaged in the making of abstracts for hire in Cook county. This proof does not conform to the requirements of the statute. Section 18 on this point reads: "The examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts." Hurd's Rev. St. 1909, c. 30, § 61. This does not mean abstracts ordered by the owner of the property in the usual and regular way that abstracts are ordered by such owner, but that the abstracts must be made by the abstracters in the regular course of their business. Whether this is a wise provision of the statute is for the Legislature and not for the courts. To construe the language as contended for by counsel for the appellee is not reasonable or natural. To so construe it would do violence to the plain meaning of the words used. We are disposed to hold, also, that the proof on this point was deficient in other respects, under the reasoning of this court in *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974.

It is further argued at length by counsel for appellants, with the citation of many authorities, that section 18 of the said act is unconstitutional. The same argument was made and the same authorities were cited by the same counsel in *Brooke v. Glos*, 243 Ill. 392, 90 N. E. 751, 184 Am. St. Rep. 374. The identical question raised here has been raised and passed upon by this court in *Brooke v. Glos*, supra. Counsel concedes that fact, but insists that that decision is wrong, or, if not wrong, that it does not pass upon one question as to the constitutionality of said section raised in the present brief, namely, that the act originally was adopted by a vote of the people, whereas section 18 as it now stands is a part of the law by amendment passed by the Legislature in 1907; that this

amendment was not submitted to a vote of the people; and that therefore said section 18 is void. There is no basis for this contention. The fact that the original act was adopted by a vote of the people does not require that every amendment made by the Legislature must also be submitted to the people for their approval. We see no reason to change our ruling in *Brooke v. Glos*, supra, as to the constitutionality of this section.

This case will be reversed, and the cause remanded to the circuit court for further proceedings in harmony with the views herein expressed.

Reversed and remanded, with directions.

(248 Ill. 238)

HOLT v. HENDEE, County Clerk, et al.
(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. **DOMICILE (§ 4*) — WHAT CONSTITUTES — "CHANGE OF DOMICILE."**

The term "domicile" in its ordinary acceptance means a place where a person lives or has his home, and in a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. In order to effect a change of domicile, there must be an actual abandonment of the first domicile coupled with an intention not to return thereto, and a new domicile must be acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. §§ 6-23; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 2163-2179; vol. 8, pp. 7641-7642; vol. 8, p. 7599.]

2. **DOMICILE (§ 10*)—CHANGE OF DOMICILE—EVIDENCE.**

Evidence held to require a finding that complainant was a resident of Lake county, Ill., and had not changed his domicile in 1904 to California.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 39; Dec. Dig. § 10.*]

3. **JUDGMENT (§ 707*)—CONCLUSIVENESS—PARTIES.**

A judgment of the superior court of San Diego county, Cal., finding that complainant in 1904 had a residence in California, is not res judicata of that question between complainant and the taxing authorities of Lake county, Ill.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

4. **TAXATION (§ 611*)—ASSESSMENT BY BOARD OF REVIEW—DESCRIPTION OF PROPERTY—"OTHER PROPERTY REQUIRED TO BE LISTED."**

Revenue Act (Hurd's Rev. St. 1909, c. 120) § 25, divides all personal property for assessment purposes into 36 classes, the thirty-sixth being "all other property required to be listed," and requires that the schedule when completed by the assessor shall distinctly show in appropriate columns the value of the property assessed. Held, that though the board of review, in making assessments, is required to make a list of the property assessed, setting down in the proper columns the separate kinds of property and the assessed value thereof, yet,

where an assessment of complainant's property was all placed under the item "all other personal property required to be listed," it would be presumed that the assessment was of property not included in any of the kinds of property enumerated in the preceding classes, so that, in a suit to restrain the collection of taxes extended on such assessment, it was incumbent on complainant to show that he did not own any property within that class, and that the valuation was excessive, fraudulent, and dishonestly made.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 611.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

5. TAXATION (§ 608*)—WRONGFUL ASSESSMENT—INJUNCTION.

An injunction will not lie to restrain the collection of taxes extended on an assessment because the property assessed was not fully identified and described as the law requires, nor unless it clearly appears that the person has been wrongfully assessed and will sustain irreparable injury unless the collection of the tax is enjoined.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

Carter, J., dissenting.

Appeal from Circuit Court, Lake County; Robert W. Wright, Judge.

Bill by George H. Holt against Albert L. Hendee, County Clerk, and others. Decree for defendants, and complainant appeals. Affirmed.

Cooke, Pope & Pope (Frank L. Shepard, of counsel), for appellant. Ralph J. Dady, State's Atty., and David H. Jackson, for appellees.

COOKE, J. Appellant, George H. Holt, filed his bill for injunction in the circuit court of Lake county, seeking to restrain Albert L. Hendee, county clerk of said county, from extending any taxes against him for the year 1909 upon an assessment of personal property made and returned by the board of review. By supplemental bills thereafter filed the town collector of the town of Shields and the county collector of Lake county were made defendants, and an injunction was sought against each, respectively, to restrain the collection of taxes extended upon said assessment. Answers were filed by the defendants and replications thereto by the complainant, and upon the issues thus formed a hearing was had before the chancellor, which resulted in a decree dismissing the bill for want of equity. From that decree appellant has prosecuted an appeal to this court.

The record shows that appellant did not, during the year 1909 or during previous years, list any personal property for taxation in Lake county. At its session in 1909 the board of review caused appellant to appear before it, and upon his refusal to list his personal property made an original assessment of \$75,000 under the item "all other personal property required to be listed," and thereon fixed the assessed value of the ap-

pellant's personal property at \$25,000. The board entered this assessment upon the assessment books of the town of Shields, in the county of Lake, and returned the same to the county clerk as the basis for the extension of taxes for the year 1909. Appellant in his bill charged, as grounds for the relief sought, first, that he was not on April 1, 1909, a resident of the town of Shields or of the state of Illinois, but was at that time a resident of the state of California; and, second, that the board of review made the assessment in a lump sum and did not specify the kind or kinds of property assessed, and here contends that both of those grounds were established by the evidence and require the issuance of the injunction as prayed for in the bill.

The evidence upon the question of the residence of appellant consisted to a large extent of his own testimony; and while he testified that he went to California in 1904 with the intention of making his home in that state, that he had during that year established his residence in San Diego county and had never since changed his residence, and that he is now, and was on April 1, 1909, a resident of that county, we are of the opinion, from a careful consideration of the whole of his testimony and of the testimony of various residents of the town of Shields, that the circuit court was fully justified in reaching the conclusion that appellant was on April 1, 1909, a resident of the town of Shields, in this state.

Appellant is now 57 years of age, and has never been married. He has been, and is now, engaged in various business pursuits in various states of the Union, and, as convenience or necessity required, has declared his legal residence at various places without in any material manner changing his visible mode of living. He was born in the city of Chicago, and when about seven years of age removed with his parents to Lake Forest, which is now a suburb of Chicago and which is located in the town of Shields, in Lake county, Ill., where his parents resided until their respective deaths; his father dying in 1899 and his mother in 1903. In 1874 he went abroad, and spent about two years in travel and study. He then returned to his home at Lake Forest, where he remained until 1878, when he went to the state of Colorado and claims to have been a resident of that state until 1891, although he spent a considerable portion of his time during that period at the family homestead in Lake Forest. He testified that from 1878 to 1885 he spent from six to eight months out of the year in Colorado, but after 1885 he was there only occasionally, about two months at a time. He spent the first part of the year and the summer of 1886 at Lake Forest, taking care of his father, and in October of that year accompanied his eldest

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

brother, who was ill, to San Diego, Cal., where he remained with his brother until June of the following year. From that time until 1891 he traveled back and forth between Illinois, Colorado, and California. His brother having died, he transferred his residence to San Diego county, Cal., in 1891 in order to qualify as administrator of his brother's estate, the law of that state requiring an administrator to be a resident, and, on account of the duties connected with the administration of the estate, he maintained his residence there for several years. During that time he engaged in the business of buying and shipping fruit in San Diego county and operated a vineyard near Elcajon, in that county. He sold the vineyard in 1897, and moved his personal effects to the house of a friend at or near Elcajon, where he claims to have ever since maintained a room, but admits that he has not occupied that room more than a week since 1904. He testified that he retained his residence in California until 1900, but that from 1895 to 1900 he was engaged in business, not only in California, but in Colorado, Minnesota, Wisconsin, and Illinois, spending a portion of his time in each of those states; that he maintained an office in the city of Chicago, and during those years spent, on an average, about five months of each year at Lake Forest. In 1899 he qualified as executor of his father's will, signing a bond in which he described himself as residing in Lake county, Ill., and acted as such executor until November, 1903. In the fall of 1900 he voted at Lake Forest, and has not voted anywhere since. In 1902 he declared his residence at Duluth, Minn., in order to have a boat registered in his name at the United States custom house, but sold the boat in 1903, and claims to have then abandoned his residence at that place. In the spring of 1904 he accompanied a party of relatives and friends, including an unmarried sister who has since the death of their parents had charge of the Lake Forest home and with whom he has resided when in Lake Forest, to the state of California, and, after traveling over the state in search of a location, finally stopped at a hotel in the city of San Diego, where he and his sister remained for some time. Soon after arriving at San Diego, he applied for and received letters of administration upon the estate of his sister-in-law, Lilly Reid Holt, who had died about nine years before. The statute of California, as above stated, does not permit a nonresident to serve as administrator of an estate. The public administrator of San Diego county soon after the appointment petitioned the court out of which the letters of administration had issued, to revoke the same, alleging that appellant was not a resident of the state. The proceedings resulted in a judgment finding that appellant was a resident of California, and had not permanently removed from the state, and denying the prayer of the petition.

Appellant testified that he spent several months at different places in California in 1904; that in 1905 he was in the state for about two months in the fall, spending a portion of that time in San Francisco; that in 1906 he spent three or four months in California, staying in Los Angeles about a month, in San Diego about a month, in Monterey about three weeks, and in San Francisco a month; that he does not know whether or not he was in California in 1907; that he spent the winter of 1907-08 in Chicago; that he left Chicago in February, 1908, and went to Europe, returning the middle of May; that he went to Canada in June and was gone until August; that he spent the time from October, 1908, to May, 1909, in Chicago, where he stayed with a married sister, and then went to Canada and remained there until August, since which time he has been living at the homestead in Lake Forest, and has been prevented since September, 1909, from going to California by litigation in which he has been involved.

Upon the death of appellant's parents, the title to the homestead at Lake Forest vested in him and his brothers and sisters, all of whom are married except appellant and one sister. It appears from appellant's testimony that the general expenses of maintaining the homestead, which appears to be a somewhat pretentious establishment, are paid by all of the heirs, but that the expenses incident to living there and conducting the household are paid by such of the heirs as actually incur those expenses; that one of the rooms in the house has since the death of his parents been assigned to appellant as his private room; and that he and his maiden sister have for several years spent a considerable portion of the time together at the homestead, sharing the living expenses between themselves. It further appears from his testimony that he is president of the Lake Forest Water Company, a resident member of two social clubs at Lake Forest, and was secretary of the Lake Forest University in 1892; that he is a resident member of the Union League Club of Chicago and of the Chicago Club at the same place; that he is the owner of the Manhattan building, a 16-story building on Dearborn street, in Chicago, and maintains his private offices in that building; that his name is in the Chicago directory, showing his office to be in the Manhattan building and his residence at Lake Forest; and that his name appears in the Lake Forest telephone directory as a subscriber to the Lake Forest telephone service. On the other hand, he testified that he maintained no office in San Diego county and did not even have a private desk there, his California business being left in charge of an agent at the city of San Diego; that he had no private residence or room in San Diego, but stopped at the hotel when there; that he kept no room at the hotel when absent from the city, merely registering upon his arrival and

checking out upon his departure; and that he belonged to no clubs in California. He was uncertain whether he claimed his residence at the city of San Diego, where he has always stayed at the hotel when in the city, or at Elcajon, 14 miles distant, where some personal effects were stored at the house of a friend in 1897, and where he has spent in all one week since 1904, but is positive that his legal residence is in San Diego county. He pays no personal taxes in San Diego county and pays none elsewhere, so far as the record in this case discloses. The testimony of other witnesses tends to show that appellant has been in Lake Forest a large portion of the time since 1885; that from 1901 to 1907 he spent at least 75 per cent. of each year in Lake Forest, and was seen upon the streets of Lake Forest the same as other business men having their place of business in Chicago and their residence in Lake Forest; that he has been active in municipal affairs affecting the water-works company of which he is president; that he conducted his business in Chicago and resided in Lake Forest, traveling back and forth on the train, and, according to his own testimony, frequently purchasing and using monthly tickets between Lake Forest and Chicago; that during that period he attended church at Lake Forest 75 per cent. of the Sundays, taking an active interest in the selection of the pastor, and was a regular attendant at the weekly prayer meeting on Wednesday night.

It seems to us, apparent from a consideration of all the evidence that the house at Lake Forest, in which appellant owns an undivided interest, is, and has been for several years at least, his real home, and that he maintains no establishment at any other place, especially in California, which could be considered as such. In *Hayes v. Hayes*, 74 Ill. 312, it is said that, according to authoritative text-writers, the term "domicile," in its ordinary acceptation, means the place where a person lives or has his home, and that in a strict legal sense that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. It is further said in the same case that, in order to effect a change of domicile, there must be an actual abandonment of the first domicile coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction coupled with the intention of making the last acquired residence a permanent home. In order to bring about a change of residence, it is necessary that there be not only an intention to change the residence, but the change must actually be made by abandoning the old and permanently locating in the new place of residence. *People v. Estate of Moir*, 207 Ill. 180, 69 N. E. 905, 99

Am. St. Rep. 205. The intention is not necessarily determined from the statements or declarations of the party but may be inferred from the surrounding circumstances, which may entirely disprove such statements or declarations. On the question of domicile less weight will be given to the party's declaration than to his acts. *Smith v. People*, 44 Ill. 16; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; *People v. Estate of Moir*, supra. Applying these rules to the case at bar, we are of the opinion that the acts of appellant and the circumstances shown by the evidence wholly disprove his statements that he changed his place of residence to San Diego county, Cal., in 1904, and has ever since been a resident of that county. The judgment of the superior court of San Diego county finding that appellant was in 1904 a resident of the state of California is not res judicata as to that question between appellant and the taxing authorities of Lake county, and, in the light of the evidence in this case, cannot control the decision here upon that question.

As to the second ground upon which the injunction was sought, it appeared from the evidence that the assessment of \$75,000, full value of property, was by the board of review placed under the item "all other personal property required to be listed," in the schedule which was filled out by the board, and was placed on the assessment books under the same item. Appellant insists that this is not a sufficient designation of the property assessed, and that the making of an assessment in this manner furnishes sufficient ground for interference by a court of equity by injunction restraining the collection of taxes extended thereon.

Section 25 of the revenue act (Hurd's Rev. St. 1909, c. 120), for the purpose of assessment, divides all personal property into 36 classes, and requires that the schedule, when completed by the assessor, shall truly and distinctly set forth, in appropriate columns, the value of the property assessed. The board of review, in making assessments, is required to proceed as an assessor would, and to make a list of property assessed, setting down in the column opposite the separate kinds of property the assessed value thereof. *Carney v. People*, 210 Ill. 434, 71 N. E. 365. The thirty-sixth class under said section 25 of the revenue act is "all other property required to be listed." The presumption necessarily arises that the assessment by the board of review in this case was an assessment of property not included in any of the kinds of property enumerated in the first 35 classes. In applying to a court of equity to restrain the collection of taxes extended on this assessment, it was incumbent upon appellant to show that he did not own any property falling within the thirty-sixth class, or, if he did own any such property, that the valuation thereof by the board

of review was excessive, and fraudulently and dishonestly made. *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231. The evidence fails to disclose any such situation, and there is therefore nothing in the record to show that appellant will be required to pay any unjust or excessive taxes, or that he will sustain any injury on account of the failure of the board of review to more particularly specify the kind or kinds of property assessed. Moreover, even though the property assessed was not as fully identified and described as the law requires, that fact alone would not furnish a sufficient ground for the issuance of an injunction. In *Williams v. Dutton*, 184 Ill. 608, 56 N. E. 888, and in *Correll v. Smith*, 221 Ill. 149, 77 N. E. 440, the following language from *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561, is quoted with approval: "In no event will an injunction lie unless it is clearly made to appear that the party has been wrongfully assessed and will sustain irreparable injury unless the collection of the tax be enjoined." In *Pratt v. Raymond*, 188 Ill. 469, 59 N. E. 16, it appeared that the board of review had made an original assessment of \$5,000 against Pratt, and had entered the same upon the assessment books without entering the full value, and without specifying any items of property or values of particular kinds of property. Pratt filed his bill to enjoin the collection of the tax, one of the grounds upon which the injunction was sought being that the board of review did not enter on the assessment books the specific items of personal property which were assessed and the value of the same, and did not enter the full value but only the assessed value. The bill was dismissed, and upon appeal to this court we said, concerning the action of the board of review in making the assessment: "While the record should show the kinds of property assessed and the value thereof and the total value, the facts alleged and the objections so urged afford no ground whatever for the exercise of the limited jurisdiction of a court of equity." We consider this case decisive of the question here presented.

Appellant relies chiefly upon *Carney v. People*, supra, and *Weber v. Baird*, supra, as sustaining his contention that the action of the board of review in making the assessment in a lump sum furnishes sufficient ground for the issuance of the injunction. Neither of those cases is in conflict with the views herein expressed, but, on the contrary, both are in harmony with them.

There was no error in the action of the court in dismissing the bill for want of equity, and the decree is therefore affirmed.

Decree affirmed.

CARTER, J., dissents.

(248 Ill. 264)

CITY OF CHICAGO v. M. & M. HOTEL CO.
(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 9, 1911.)

1. CONSTITUTIONAL LAW (§ 26*)—LEGISLATIVE POWERS.

The state Legislature has inherent power to pass any law that it sees fit, unless it contravenes some provision of the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

2. CONSTITUTIONAL LAW (§ 63*)—DELEGATION OF POWERS.

While the Legislature may delegate all or a part of its powers to municipalities, such as the taxing power, the police power, and the power of eminent domain, the mere delegation of such powers does not divest the state of its sovereign right to exercise them for itself or to take them away from municipalities at its pleasure.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

3. CONSTITUTIONAL LAW (§ 63*) — "POLICE POWER"—DELEGATION.

The police power, which, in a general way, is exercised to promote the health, comfort, safety, and general welfare of society, may be delegated by the Legislature to cities and villages.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

4. CONSTITUTIONAL LAW (§ 63*) — POLICE POWER—DELEGATION.

When all or nearly all of the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

5. INNKEEPERS (§ 4*) — POWER TO LICENSE — MUNICIPAL CORPORATIONS.

Under section 62 of the city and village act (Hurd's Rev. St. 1909, c. 24), providing for the incorporation of cities and villages, and delegating to them police powers over a large number of subjects, but not conferring power to regulate and license the occupation of hotel keeping, no such power exists, the general language of clause 66, giving power "to regulate the police of the city or village and to pass and enforce all necessary police ordinances," which clause must be construed in connection with the other clauses, meaning that the power may only be exercised in reference to such subjects and occupations as are enumerated in other specific sections.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 6; Dec. Dig. § 4.*]

6. STATUTES (§ 206*) — CONSTRUCTION — STATUTE AS A WHOLE.

A statute should be so construed as to give every part its appropriate force and meaning, and the maxim ejusdem generis cannot be invoked to nullify or destroy the meaning of general terms or provisions.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

7. MUNICIPAL CORPORATIONS (§ 58*)—GRANT OF POWER—CONSTRUCTION.

Statutes granting powers to municipal corporations are strictly construed, and any fair

and reasonable doubt as to the existence of the power is resolved against the municipality claiming the right to exercise it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 145; Dec. Dig. § 58.*]

Carter, J., dissenting.

Error to Municipal Court of Chicago;
John C. Scovel, Judge.

Action by the City of Chicago against the M. & M. Hotel Company. Judgment for plaintiff, and defendant brings error. Reversed.

Kraus, Alschuler & Holden (Thomas J. Lawless, of counsel), for plaintiff in error. George H. White (Henry M. Seligman, of counsel), for defendant in error.

VICKERS, C. J. The city of Chicago brought an action against the M. & M. Hotel Company, a corporation, in the municipal court of Chicago, to recover a penalty for carrying on and engaging in the business of conducting a hotel, known as the Lexington Hotel at Twenty-Second street and Michigan avenue, without having first obtained a license so to do, contrary to an ordinance passed by the city council January 7, 1907. The hotel company admitted, upon a hearing, that before the beginning of the suit it had been engaged in conducting such hotel business without having a license so to do. The municipal court adjudged the hotel company guilty, and assessed a fine of \$10 and costs against it. The trial judge having made a proper certificate, a writ of error has been sued out from this court to review the judgment below.

The sole question to be determined is whether the ordinance under which the fine was assessed is valid. That ordinance is, in substance, as follows:

Section 1 defines a hotel as "any hotel, inn, rooming house, lodging house, or other public house or place which provides lodging for hire, either with or without board, for the transient accommodation of the public."

Section 2 provides that no person shall keep, conduct, or maintain a hotel unless he be licensed so to do in accordance with provisions of the ordinance, and that every day in which a hotel is kept, conducted, or maintained without such license shall be a separate violation.

Section 3 provides that the mayor shall grant a license to any person of good character who shall apply to him in writing therefor, and who shall not be indebted to the city of Chicago on account of any unpaid fine adjudged against him for the violation of any provision of any ordinance of the city of Chicago relating to the keeping or conducting of a hotel; that the application shall specifically describe the premises, and the number of lodging rooms for guests, in

which it is proposed to conduct such hotel, provides that no license shall be issued to any one other than the proprietor, except in case of a corporation, in which case the license may be issued either to the corporation or to any one designated by such corporation as manager; that, where a corporation is proprietor, the application shall be signed by its president or secretary and shall truly state the names and addresses of all its officers and directors, and that a license to a firm shall be issued in the names of the individual members of the firm, provides that every applicant shall execute to the city a bond, with at least two sureties to be approved by the city collector, in the sum of \$500, conditioned that the applicant will faithfully observe and conform to all ordinances in force at the time of his application or thereafter passed during the period of the license applied for, concerning or in any manner relating to the conduct or management of hotels, and will promptly pay all fines which may be adjudged against him for the violation of any provision of any such ordinance during the period of his license; that no application for license shall be considered until the bond shall have been filed and approved.

Section 4 provides that any person complying with the aforesaid requirements, and upon the payment, in advance, to the city collector of a license fee of \$15, shall receive a license authorizing the person or persons named to keep a hotel at the place and of the number of rooms designated in the license and for the period stated therein; that licenses may be issued for the full license year or any unexpired portion thereof, the fee to be paid for a portion of a year to bear the same ratio to the sum required for the whole year that the number of days in such unexpired portion bears to the whole number of days in the year; and that no license shall extend beyond the 30th day of April next following its issuance.

Section 5 reads: "Every hotel licensed under this ordinance shall at all times keep a book or register wherein shall be entered and registered, at the time and in the proper order, the name of every person becoming a guest of such hotel or an occupant of any room or portion of the premises, except employes of the hotel. Such register shall at all times be open to the inspection of the mayor, the chief of police and the police officers of the city of Chicago and their assistants."

Section 6 reads: "No person keeping or conducting a hotel shall permit the same to be or become a resort of disreputable persons, nor knowingly permit or suffer the same to be used or occupied by persons for immoral purposes."

Section 7 provides that any person violat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing any provision of the ordinance shall be fined in a sum not less than \$10 nor more than \$200 for such offense; that, if any person has been once convicted for violating any provision of the ordinance, the mayor may, in his discretion, revoke the license of such person, if he has one, in addition to the other penalties provided by the ordinance, and for a second conviction the mayor shall revoke his license, and no license shall thereafter be issued to such person until the expiration of two years after the date of judgment of the second conviction.

Section 8 reads: "This ordinance shall not be so construed as to include boarding houses or places where board or lodging alone are furnished exclusively by the week or longer period."

The validity of this ordinance is assailed by plaintiff in error on several grounds, the most important of which, and the only one which we need to consider, is the want of power in the city to pass the ordinance. Defendant in error concedes that there is no express power given it to license hotels or hotel keepers, since the business of hotel keeping is not enumerated among the occupations which may be licensed or regulated under the express provisions of the city and village act (Hurd's Rev. St. 1909, c. 24). The city contends, however, that under its general police power it had the right to pass the ordinance in question, and concedes that, if the power to pass the ordinance in question does not exist under the police power, it does not exist at all and the ordinance is therefore void.

The city of Chicago is organized under the statute known as the city and village act. It may exercise only such powers as are expressly delegated to it by the Legislature, and such as are necessarily implied from those expressly given. All governmental powers primarily reside in the people. Some of these powers have been delegated to the federal government by the Constitution of the United States. All of the powers not thus delegated are reserved to the people of the several states, and are exercised by the people through their representatives in the Legislature and the other departments of the state government. The Constitution of the state does not confer power upon the Legislature to act, but it is a limitation upon its powers. The state Legislature has inherent power to pass any law that it sees fit, unless it contravenes some provision of the state or federal Constitution. The Legislature may delegate all or a part of its power to municipalities created by the Legislature. Among the essential powers of government are the taxing power, the police power, and the power of eminent domain. These powers belong to the state. They are essential to the existence of government. The state cannot divest itself of these powers and retain its sovereignty. Stripped of these great powers,

the state would become subordinate to the municipality or corporate entity in which such powers were vested. The mere delegation of any of these powers does not divest the state of its sovereign right to exercise them for itself or to take them away from municipalities at its pleasure. Counties, townships, school districts, cities, villages, and other municipal and quasi municipal corporations are created under the authority of the Legislature, to better accomplish the purposes of local government. These, and all other local municipalities which are authorized by the Legislature, derive their existence and all their powers from the Legislature of the state creating them. There is therefore no such thing as an inherent power in any municipality which is created by legislative enactment.

The police power of the state is difficult to define. All of the authorities agree that the Constitution supposes the pre-existence of the police power, and its construction must be with reference to that fact. *Village of Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490. In *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, in speaking of the police power, Shaw, C. J., said: "It is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise." In a general way the police power is exercised to promote the health, comfort, safety, and general welfare of society. The police power may be delegated by the Legislature to cities and villages. *Smith on Mun. Corp.* § 1321. An examination of the 97 clauses of section 62 of our statute providing for the incorporation of cities and villages will show that the Legislature has delegated to cities and villages police powers over a large number of subjects, among which may be mentioned the following: Wharfbots, tugs, etc., by clause 35; hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals, shows, etc., by clause 41; hackmen, draymen, cabmen, expressmen, etc., by clause 42; runners, by clause 43; billiards, etc., by clause 44; liquor selling, by clause 46; sale of meats, fish, butter, etc., by clause 50; and by other clauses the sale of bread, vegetables, cotton, tobacco, and flour may be regulated, and under still other clauses such occupations as auctioneers, distillers, keepers of secondhand and junk stores and slaughterhouses, and the use of streets by wagons and vehicles, may be regulated, but nowhere in the said section is there any express power given to cities to regulate the occupation of keeping hotels. Clause 66 of section 62 is general and reads as follows: "To regulate the police of the city or village and pass and enforce all necessary police ordinances."

Defendant in error contends that the ordinance in question is a proper police regulation, and that the power to pass it is delegated to the city by the general language in

clause 66. To this we cannot yield our assent. If by clause 66 the Legislature intended to delegate to cities and villages the entire police power of the state, the special clauses above referred to granting police power over certain enumerated subjects and occupations are wholly unnecessary. Where all or nearly all of the ordinary police powers are made the subjects of express grants, only such additional ones can be exercised under a general grant of police power as are absolutely essential to the welfare of the community. *Smith on Mun. Corp.* § 1320; *Horr & Bemis on Mun. Police Ordinances*, § 211. The specific mention in the various clauses of section 62 of certain enumerated subjects with reference to which the city may exercise the police power is, under a well-known canon of construction, the exclusion of all other subjects. *City of Cairo v. Bross*, 101 Ill. 475; *Thomas v. West Jersey Railroad Co.*, 101 U. S. 82, 25 L. Ed. 950.

Clause 66, which purports to delegate general police power to cities, must be construed in connection with other clauses of said section 62 which specifically enumerate the various subjects in reference to which the police control is given. Thus construed, the general language of clause 66, to "pass and enforce all necessary police ordinances," means that this power can only be exercised in reference to such subjects and occupations as are enumerated in other specific clauses of the section. In other words, clause 66 is intended to give cities and villages the power to "pass and enforce all police ordinances" which may be necessary in reference to the subjects and occupations the regulation and control of which are by other specific clauses expressly delegated to such municipalities. That clause is not a general delegation of all the police power of the state, which, if given to them, would authorize cities and villages to pass and enforce all police ordinances upon any and all subjects, without regard to any other specific delegation of power. If such comprehensive meaning be given to this general grant of power, then a city council, within its territorial jurisdiction, is co-ordinate with the state Legislature so far as the enactment and enforcement of general police regulations are concerned. Again, if the construction contended for be sound law, the question of the power of a city to pass any police regulation could not arise in reference to any ordinance of that character, and yet this court has frequently declared such ordinances void for want of power in the municipality to pass them. We are not unmindful of the rule that a statute should be so construed as to give every part its appropriate force and meaning, and that the maxim *ejusdem generis* cannot be invoked to nullify or destroy the meaning of general terms or provisions. *Misch v. Russell*, 186 Ill. 22, 26 N. E. 528, 12 L. R. A. 123.

The construction which we have placed

upon clause 66 does not leave it without force and meaning. It serves the purpose of removing any doubts that might otherwise arise as to the extent of the implied powers granted respecting the specific things enumerated. Statutes granting powers to municipal corporations are strictly construed, and any fair and reasonable doubt as to the existence of the power is resolved against the municipality claiming the right to exercise it. *Seeger v. Mueller*, 183 Ill. 86, 24 N. E. 518. The maxim *ejusdem generis* is especially applicable to all statutes requiring a strict construction. In *re Swigert*, 119 Ill. 83, 6 N. E. 469. We think that this construction is supported by *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 87 Am. St. Rep. 224, and *Harder's Storage Co. v. City of Chicago*, 235 Ill. 58, 85 N. E. 245, which are known as the "wheel tax cases." In the *Collins Case* this court had under consideration the validity of an ordinance providing that all vehicles used upon the streets of the city, including those for private use and pleasure, should pay an annual license fee and obtain a tag showing the payment of such license fee, and providing for a fine of not less than \$10 nor more than \$50 for using any wheeled vehicle propelled by horse power or by the rider, without having a license so to do. This ordinance was held void by this court because there was no express power granted to license and regulate the use of vehicles upon the streets, notwithstanding the general language of clause 66 was then in the statute as it is now. After the decision in the *Collins Case*, the Legislature, in 1907, amended the law, and specifically authorized cities and villages "to direct, license and control all wagons and other vehicles conveying loads within the city," etc. After the statute was amended, the city passed another ordinance somewhat similar to the one that was held invalid in the *Collins Case*. This last ordinance came before this court in the *Harder's Storage Co. Case* and was held valid, and the *Collins Case* was distinguished on the ground that the statute had been changed so as to confer the power since the *Collins Case* was decided.

Defendant in error contends that the hotel business is impressed with a public interest, and for that reason it is subject to control and regulation under the police power. The case of *Munn v. People*, 94 U. S. 113, 24 L. Ed. 77, is relied on as establishing this contention. In that case, on page 125, 94 U. S., 24 L. Ed. 77, Mr. Chief Justice Waite, speaking for the majority, said: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is affected with a public interest it ceases to be juris

privati only.' * * * Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

It may be conceded that the business of innkeeper is not strictly *juris privati*, and that it has an aspect of public interest which would warrant the Legislature in passing an act for the regulation of such business, or we may with safety go one step farther and concede that this power exists in the Legislature, and that it may be either exercised by it directly or delegated to municipalities, but the answer to this contention is that the power to license and regulate hotels has not been exercised by the Legislature directly nor has it authorized its exercise by cities and villages. What was said in the *Munn Case* was with reference to the licensing and regulation of public grain elevators under a statute passed by the Legislature, but it is not an authority supporting the position of defendant in error that the general police power of the state may be exercised by municipalities without express and specific legislative authority. If the ordinance in question was an act of the Legislature, or if it had been passed by the city council in pursuance of express authority from the Legislature, then the doctrine of the *Munn Case* and other authorities relied upon by the defendant in error would be in point.

There are other objections urged by plaintiff in error to the ordinance in question, but, in view of the conclusion we have reached in respect to the power of the city to pass the ordinance, it is not necessary to consider any other question.

We are of the opinion that the ordinance under which plaintiff in error was convicted is void in its entirety for want of power in the city to pass it.

The judgment of the municipal court of Chicago will be reversed.

Judgment reversed.

CARTER, J., dissents.

(248 Ill. 242)

CITY OF CHICAGO et al. v. TRIBUNE CO.

(Supreme Court of Illinois. Dec. 21, 1910.

Rehearing Denied Feb. 10, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 15*)—SCHOOL PROPERTY—CONSTITUTIONAL PROVISIONS.

Const. art. 8, § 2, providing that property donated, granted, or received for schools and the

proceeds thereof shall be applied to the objects for which the gifts or grants are made, places it beyond the power of the Legislature to divert school funds, granted to the state, to any other purpose than the support of the schools, but a lease of school lands for a long term subject to revaluation at specified intervals, and subsequent agreements waiving the right to revaluation and stipulating for a fixed annual rent, do not divert school lands in the absence of any evidence that the rent has not been or is not intended to be faithfully applied for the use of the schools, even if such misconduct could affect the lessee not at fault:

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 17-22; Dec. Dig. § 15.*]

2. CONSTITUTIONAL LAW (§ 278*)—DUE PROCESS OF LAW—TAKING OF PROPERTY.

The acts of the board of education of a city controlling the school lands within the city in leasing school lands for a long term, with the right of revaluation at designated periods, and in subsequently agreeing for a fixed annual rent for the whole term, and waiving the right of revaluation in consideration of the lessee making valuable improvements on the land, are not violative of the fourteenth amendment to the federal Constitution on the ground that, by surrendering to the lessee the benefit of future increase in the value of the property, there is a taking of property without due process of law, the surrender of the right of revaluation being supported by a valuable consideration.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 278.*]

3. PUBLIC LANDS (§ 64*)—SCHOOL LANDS—GRANTS BY FEDERAL GOVERNMENT—EFFECT.

The granting by Congress to the state of school lands subject to the condition that the state shall, by irrevocable ordinance, exempt from taxes all land sold by the United States for five years after the date of sale, and bounty lands held by patentees or their heirs for three years from the date of the patents, and that lands of nonresidents shall not be taxed higher than lands of residents, and accepted by the state on the specified conditions, did not make the state a trustee of a charitable use, but the school lands may be leased or sold as the Legislature may provide.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 54.*]

4. STATUTES (§ 188*)—CONSTRUCTION—MEANING OF WORDS.

The words used in a statute are to be taken in their ordinary acceptance.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 266-281; Dec. Dig. § 188.*]

5. PUBLIC LANDS (§ 55*)—SCHOOL LANDS—SALES—LEASES.

A lease of school lands by the board of education of a city controlling the lands for a term of over 80 years conditioned on revaluation at designated periods, modified by a subsequent agreement waiving revaluation, and fixing an annual rent for the entire term, is not a sale, but a mere lease, though the act as to judgments declares that leasehold estates, when the unexpired term exceeds five years, shall be included in the term "real estate," and though the conveyance act includes leases like the lease in question.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 55.*]

6. PUBLIC LANDS (§ 55*)—SCHOOL LANDS—LEASES—RATIFICATION.

Where modifications in a lease of school lands were voidable at the election of the school officers, their subsequent ratification constituted

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an election to confirm the modifications so as to render them binding.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 55.*]

7. TRUSTS (§ 237*) — ACTS OF TRUSTEES — RIGHTS OF BENEFICIARIES—RATIFICATION.

Where trustees having duties to discharge for a beneficiary enter into a contract with one of the trustees, the beneficiary may determine whether the contract is fair and confirm or avoid it, according to his own judgment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 262, 325, 344; Dec. Dig. § 237.*]

8. TRUSTS (§ 231*) — ACTS OF TRUSTEES — RIGHTS OF BENEFICIARIES.

One occupying a trust relation cannot place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting contrary to the interest of the party to whom he owes a duty.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330-335; Dec. Dig. § 231.*]

9. SCHOOLS AND SCHOOL DISTRICTS (§ 80*)—OFFICERS—CONTRACTS—ACTS OF BOARD OF EDUCATION—VALIDITY.

Where the board of education of a city enters into contracts with one of its members as a representative of a third person, the contracts are voidable at the election of the board.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 80.*]

10. PUBLIC LANDS (§ 55*)—SCHOOL LANDS—ACTS OF BOARD OF EDUCATION—VALIDITY.

The fact that one of the members of the board of education of a city who acted with the board in executing agreements modifying a lease of school lands had been employed by the lessee as attorney for particular cases, did not make the agreements voidable on the ground that such member was a representative of the lessee in the transaction.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 55.*]

11. PUBLIC LANDS (§ 55*)—SCHOOL LANDS—LEASES—MODIFICATIONS—FRAUD.

In a suit to set aside a lease of school lands as modified by subsequent agreements, whereby the revaluation clause in the lease was waived, evidence held not to show that the waiver of the revaluation clause was fraudulent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 55.*]

Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Suit by the City of Chicago, in trust for the use of schools, and another against the Tribune Company. From a decree for defendant, plaintiffs appeal. Affirmed.

Clarence N. Goodwin, Frank Hamlin, and Angus Roy Shannon, for appellants. Isham, Lincoln & Beale and Donald L. Morrill, for appellee.

CARTWRIGHT, J. The title to school lands in the city of Chicago is vested in the city by a grant from the state in trust for the use of schools, and the control and management of the same are vested in a board of education of 21 members, subject to control by the Legislature and with powers defined by the statute. On May 8, 1880, the appellee, the Tribune Company, was occupying under an existing lease lots 12, 13, and 14 in

block 142, in School Section addition to Chicago, which was school property, and had improved the same with a building, which it occupied for the purposes of its business. On that day the board of education, one of the appellants, having the right, by a provision of the school law, to lease the property, executed a lease to the Tribune Company for a term of 50 years, at an annual rental of \$7,776 for the first 5 years, and thereafter at an annual rental of 6 per cent. of valuations made every 5 years by appraisement. Under this lease an appraisement was made in 1885, which was the subject of litigation between the parties, and on June 15, 1888, the board of education and the Tribune Company executed an agreement reciting the dispute between the parties and the making of said agreement for the purpose of compromising and adjusting the matters in dispute. That agreement extended the term to May 8, 1895, and changed the revaluation periods from 5 years to 10 years, the first appraisal to be made in 1895 and each appraisal to stand for 10 years. It was therein agreed that the lease as so changed should stand in full force and effect. The rent was payable quarterly in advance, and the Tribune Company paid rent on the basis of 6 per cent. of the appraised valuation. Under the lease another appraisement was to be made on May 8, 1895, and the appraisers then fixed the value of the three lots at \$500,000 and the rental for the ensuing 10 years at \$30,000 per year. There were negotiations between the Tribune Company and the committee of the board of education for a fixed and certain rental for the remainder of the term, and on May 30, 1895, the board of education and the Tribune Company entered into an agreement fixing such yearly rental at \$30,000 from May 8, 1895, to May 8, 1905, and a yearly rental of \$31,500 for each of the remaining 80 years of the term, all payable in equal quarterly payments in advance. The board of education waived the revaluations, and it was provided that, except as so changed, the lease of 1880 and the supplemental agreement of 1888 should stand and be in full force and effect. There were leases of lots 15, 16, and 17 in the same block similar to the one held by the Tribune Company and which had been extended to 1895, but still provided for revaluations every 10 years. The appraisement of these lots on May 8, 1895, was \$84,000 each, cash value, and the annual rental for the 10-year period following was \$5,040 each. On November 17, 1897, the Tribune Company had acquired the leases of lots 15 and 16, and on that day the board of education and the Tribune Company entered into an agreement reciting that the company owned the leasehold in lot 15 under a lease to Thomas Mackin and the leasehold in lot 16 under a lease to Samuel Gregsten, and the company agreed to pay as rent

for said lots \$10,080 a year from February 8, 1898, until May 8, 1905, and an annual rental for the balance of the term of \$10,580. The board of education waived the revaluation clauses in the leases, and in consideration thereof the Tribune Company agreed to put improvements on the five lots of the value of not less than \$300,000. The leases, except as modified by the agreement, were confirmed and declared to be in full force and effect. The Tribune Company also acquired the leasehold of lot 17, and on December 14, 1899, the board of education and the Tribune Company made a further agreement, by which the company agreed to pay an annual rent for that lot of \$5,040 from February 8, 1900, to May 8, 1905, and for each of the next 10 years \$5,292, and an annual rental of \$5,558.60 for each of the remaining 70 years of the term. The board of education waived the revaluation clause in the lease of that lot, and the Tribune Company agreed to erect a new building on the six lots to cost not less than \$400,000. This agreement ratified and confirmed all the preceding leases, supplemental leases, and agreements, and provided that they should stand and be in full force and effect as modified. The Tribune Company erected a building on the premises for about \$1,800,000 and paid rent quarterly in advance at the rates specified in the leases and agreements as modified. The city of Chicago afterward filed the bill in this case asking the court to set aside all the said leases, instruments and agreements, and the board of education was added as a complainant, by amendment, in 1907. The bill and amended bill were answered, and the issues were referred to a master in chancery, who took the evidence and reported in favor of the defendant on all the issues of fact, and recommended, as a conclusion of law, that the bill should be dismissed for want of equity. The chancellor heard and considered the evidence on exceptions to the report of the master, overruled the exceptions and dismissed the bill for want of equity. The complainants prayed an appeal, and alleged that the instruments in question were executed in violation of the state and federal Constitutions and had the effect to deprive them of constitutional rights. The appeal was therefore allowed to this court and was perfected.

Section 2 of article 8 of the Constitution provides that all property donated, granted, or received for schools, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made, and it is assigned for error that the modifying agreements of 1895, 1897 and 1899 violated that provision by diverting school property from the objects for which it was granted, and also violated the fourteenth amendment to the Constitution of the United States by surrendering to the defendant, without consideration, the benefit of future increase in the value of the property and

amounted to a taking of property without due process of law. So far as section 2 of article 8 of the Constitution is concerned, there was no allegation in the bill and no evidence produced tending to show that the rent had not been or was not intended to be faithfully applied by the board of education to the use of the schools, even if misconduct of that kind would affect the defendant without his fault. The constitutional provision puts it beyond the power of the Legislature to divert school lands to any other purpose than the support of the schools, but there has been no diversion of this property to any other purpose. We are unable to perceive any connection between the fourteenth amendment to the Constitution of the United States and the agreements sought to be set aside, and it is not true that the right to revaluations was surrendered or given away without a valuable consideration.

It is also contended that the agreements were in violation of the compact created by the act of Congress of April 18, 1818, c. 67, § 6, 3 Stat. 430, offering to the constitutional convention held at Kaskaskia section 16 in every township for the use of schools and the acceptance of the same by the convention on August 26, 1818. Counsel say that the school lands in Chicago are held by the city under a donation from the government for a charitable use, and that the agreements constitute a gross breach of the trust. The proposition of Congress was to grant the school lands to the state, together with other things, subject to the conditions that the state should by an irrevocable ordinance exempt from taxes lands sold by the United States for five years after the day of sale and bounty lands held by the patentees or their heirs for three years from the date of the patents, and that lands of nonresidents should never be taxed higher than lands of residents of the state. The question whether the compact made the state the trustee of a charitable use was decided in *Bradley v. Case*, 3 Scam. 585, where it was held that the state purchased the lands for a valuable consideration by surrendering two important rights of sovereignty; that the United States was not and never had been a donor for charitable purposes and had no right whatever to control the lands vested in the state. The doctrine of that case was reiterated in *Trustees of Schools v. Schroll*, 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575, and adhered to in *Black v. Chicago, Burlington & Quincy Railroad Co.*, 237 Ill. 500, 86 N. E. 1065. School lands are not held by the state as trustee for a charitable use, and they may be leased or sold, as the Legislature may provide. The school law of 1872, and each subsequent act, has provided that the board of education may lease such property, or the city may sell it, upon request of the board. There was no violation of any compact or agreement with the United States.

It is next argued that the leases, as ex-

tended until 1885, amounted to a sale of the property, which was beyond the power of the board of education, and the basis of the argument is that the terms were long. Reliance is placed upon the act in regard to judgments, which declares that leasehold estates, when the unexpired term exceeds five years, shall be included in the term "real estate," as used in that act, and also upon the conveyance act, as including leases like these. The question raised as to the nature or quality of a leasehold estate has little or nothing to do with the question whether these leases constituted a sale of the property. A decision that a lease for a long term is personal property or a chattel real, or real estate proper, would not affect the question whether the instrument is a lease or a sale. Words used in the statute are to be taken in their ordinary acceptation, and a lease, although for a long term, with payments of annual rent, is not a sale, which is a grant of absolute ownership. These leases were for a fixed and determinate period, conditioned upon the payment of fixed annual rental, and have all the characteristics of a lease and none of the features of a sale.

It is also urged that the agreements were unfair, improvident, and fraudulent, and therefore ought to be set aside. It is charged that the modifications made in 1895 and 1897 were fraudulent and voidable in law because one Alfred S. Trude was a member of the board of education and acted in the matter and was also attorney for the defendant. He was not a member of the board in 1899, when the last modification was made and all the leases were ratified and confirmed by the board of education, so that the validity of the leases does not depend upon his action. If the modifications were voidable at the election of the board, their ratification years afterward would constitute an election to confirm them. However, the question raised deserves consideration, and we are of the opinion that the leases were not voidable on the ground alleged. Trude was an attorney at law, and had been employed by the defendant in various libel suits covering a number of years, but his employment was specific for the particular cases, and he was never employed by the defendant in relation to its business affairs or any other matters than those specified. He was not an officer of the defendant nor authorized to act for it except in the defense of suits for a particular class of torts, and he was no more a representative of the defendant than any attorney is the representative in business affairs of a client who habitually employs him in litigated cases. There is a controversy between counsel concerning the law in cases where trustees, or a body or board occupying the same position and having duties to discharge for a beneficiary, enter into a contract with a

party who is one of the trustees or a member of the body or board, or who is represented by a member authorized to act for him, and there is some difference of opinion between different courts on that question. Some courts have held that if the vote of the party or his representative, as a member of the body or board, was not necessary to the contract, and the contract is such that the court considers it fair and just, it will be sustained. In that view contracts are made or unmade, according to the judgment of the court concerning the fairness of the contract, if the act of the interested party or his representative was not essential to the making of the contract. It seems to us a better rule that the beneficiary should be allowed to judge whether the contract is fair and favorable to his interests and to confirm or avoid it according to his own judgment rather than to have the court determine the question for him, and ordinarily no one can say that there would have been a majority sufficient to do the act if the interested member had performed his duty and used his best efforts for the one to whom he owed the obligation. The general rule is, that one occupying a trust relation cannot place himself in a position which would subject him to conflicting duties or expose him to the temptation of acting contrary to the interests of the party to whom he owes a duty. We regard the rule governing trustees, and those occupying confidential relations generally, as the better one. *Aberdeen Railway Co. v. Blaikie*, 1 Macq. 461; *People v. Township Board*, 11 Mich. 222; *Nunemacher v. City of Louisville*, 98 Ky. 334, 32 S. W. 1091; *Traction Co. v. Board of Public Works*, 56 N. J. Law 431, 29 Atl. 163; *City of Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *Ashley v. Kinman* (Sup.) 2 N. Y. Supp. 574. If the board of education was, in fact, entering into contracts with one of its own members as a representative of the defendant, we think the contract would be voidable at the election of the complainants, but the relation of Trude to the defendant was not such as would make him its representative in the transaction. Perhaps a fine sense of propriety would lead one who is habitually employed by another, or with whom he has profitable business relations, to withdraw entirely from any participation in a matter in which such person is concerned, and if he does act, perhaps the contract would receive a closer scrutiny than it otherwise would. We do not regard the modifications of 1895 and 1897 as voidable on account of the participation of Trude, leaving out of view the ratification in 1899.

Finally, it is contended that the waiver of the revaluation clause in the leases was fraudulent, as a matter of fact, because the school fund was thereby deprived of increased rentals in the future which would result from revaluations. There had been a great

advance in the value of the property, but whether there would be further advances, or the extent of them, was purely guesswork and speculation; but if such advances could be reasonably expected, the evidence was conclusive that leases with revaluation clauses had been generally abandoned as being unfavorable to the making of valuable improvements on leased property and objectionable in many other respects, which were stated by many disinterested witnesses of large experience. It is not necessary to go into the reasons given in detail by the witnesses, which are entirely satisfactory and support their conclusions. The defendant, in consideration of the waiver of revaluations and a fixed and certain rental, agreed to erect on the lots buildings to cost not less than \$400,000, and, in fact, did erect a building that cost about \$1,800,000.

The charges of fraud and unfair dealing, and of the consequent invalidity of the leases and the modifications of the same, are without any basis in the evidence, and we do not see how the chancellor could have reached any different conclusion. The charges of the bill not being sustained by the proof, the chancellor did right in dismissing it.

The decree is affirmed.

Decree affirmed.

(248 Ill. 112.)

PEOPLE ex rel. LEE, County Collector, v. CHICAGO & E. I. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 10, 1911.)

1. COUNTIES (§ 192*)—TAX LEVY—REQUISITES. A county tax levy for building purposes, without stating more specifically what the tax is levied for, is void.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192.*]

2. PAUPERS (§ 10*)—TAX LEVY—REQUISITES. A county tax levy for the support of paupers is valid.

[Ed. Note.—For other cases, see Paupers, Cent. Dig. § 12; Dec. Dig. § 10.*]

3. COUNTIES (§ 192*)—TAX LEVY—REQUISITES. A county tax levy for salaries of officers is valid in the absence of evidence affirmatively showing that the tax is excessive for that purpose.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 192.*]

4. TOWNS (§ 62*)—CLAIMS—AUDIT.

Under Township Organization Law (Hurd's Rev. St. 1909, c. 139) § 124, providing that the auditing board shall make a certificate and file the same with the town clerk, specifying the nature of the claims allowed and the amount thereof, and the names of the persons in whose favor they are allowed, all claims of every kind which are a proper charge against a town must be audited by the auditing board and allowed.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 105-109; Dec. Dig. § 62.*]

5. TOWNS (§ 56*)—LEVY OF TAXES—STATUTES.

Under Hurd's Rev. St. 1909, c. 139, § 115, requiring the town clerk to annually certify to

the county clerk the amount of taxes required for town purposes, and Revenue Law (Hurd's Rev. St. 1909, c. 120) § 122, containing a similar provision, and fixing the time within which the certificate shall be made, and Township Organization Law (Hurd's Rev. St. 1909, c. 139) § 124, requiring the auditing board to certify the amounts required to be raised by taxation for town purposes, the town clerk need not set out in his certificate the proceedings that occurred, either in the town meeting or in the meeting of the board of auditors, and the certificate need not recite that the special items for which taxes are to be levied have been audited and approved by the board of auditors.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 56.*]

6. TOWNS (§ 57*)—LEVY OF TAXES—STATUTES.

Where the board of auditors of a town properly audited an item for the payment of bonded indebtedness, and certified the same to the town clerk, who certified to the county clerk the amount to be raised by taxation for that purpose, the levy of the amount was valid, irrespective of any action of the town meeting approving the levy.

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 57.*]

7. CONSTITUTIONAL LAW (§ 92*)—LEVY OF TAXES—CHANGE IN BASIS OF VALUATION.

A taxpayer has no vested rights under the statutes fixing a basis of assessment, and the entire subject is within the control of the Legislature, and where at the time a town voted a hard road tax, the statute provided that the assessed valuation should be one-fifth of the full valuation, the Legislature could change the basis of assessment and provide for an assessment on the basis of one-third of the full valuation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 92.*]

Appeal from Kankakee County Court; A. W. Deselm, Judge.

Application by the People, on the relation of Dan G. Lee, County Collector, for judgment against the Chicago & Eastern Illinois Railroad Company for delinquent taxes. From a judgment for taxes, defendant appeals, and relator assigns cross-errors. Affirmed on direct appeal, and reversed and remanded on cross-errors.

W. R. Hunter and Walter O. Schneider, for appellant. J. Bert Miller, State's Atty., for appellee.

VICKERS, O. J. The county court of Kankakee county overruled certain objections filed by the Chicago & Eastern Illinois Railroad Company to the rendition of judgment for taxes for the year 1909. The railroad company has prosecuted an appeal from that judgment, and the county collector has assigned cross-errors upon the judgment sustaining other objections interposed by appellant.

The evidence shows that a levy of \$80,000 for county purposes was made upon the property of the county, and among the items for which this tax was levied are the following: \$11,000 for building purposes, \$8,000 for care of paupers, and \$12,500 for salaries of officers. The item for \$11,000 for building pur-

poses is void because it is not stated more specifically what the tax is levied for. It is conceded that the objection to this item was properly sustained. The objection to the item of \$8,000 levied for the care of paupers was properly overruled. The objection here made to this item is the same objection that was considered by this court at the present term in the case of *People v. Cincinnati, Lafayette & Chicago Railway Co.*, 93 N. E. 421, and is disposed of contrary to appellant's contention by what is said in those cases. The item of \$12,500 for salaries of county officers is objected to because, it is said, it exceeds the amount required to pay the salaries of county officers by \$5,000. This same item was objected to by the appellant in *People v. Cincinnati, Lafayette & Chicago Railway Co.*, supra, and under the evidence in the record of that case it was held that the proof failed to affirmatively show that this tax was excessive. The evidence offered by appellant in the case at bar is substantially the same as that in the case above referred to. What was said by this court in that case is a sufficient answer to appellant's contention in this case. There was no error in overruling appellant's objections to these items.

Appellant also objected to a levy of \$1,000 in the town of Ganeer, levied to pay bonded indebtedness. The objection made to this tax is that it was levied by the electors at a meeting held April 6, 1909. This court has held that the town meeting has nothing to do with the levy of a tax to pay principal or interest upon bonded indebtedness. *St. Louis, Rock Island & Chicago Railroad Co. v. People*, 147 Ill. 9, 35 N. E. 228. The proper method of providing a tax to meet bonded indebtedness is pointed out in the case of *People v. Chicago, Burlington & Quincy Railroad Co.*, 93 N. E. 410, but the case at bar is not controlled by the rule laid down in that case. The facts here present an entirely different situation from that before us in the case last above cited. The evidence in the record in the case before us shows the following facts: On March 31, 1909, the town board of auditors met in regular session for the purpose of auditing claims against the town. The record of that meeting shows that numerous claims were audited and approved. The record also shows the following: "We, the auditing board, recommend that one thousand dollars (\$1,000) be raised at the town meeting April 6, 1909, to pay on bonded indebtedness." The board of town auditors at the same meeting made a formal certificate certifying that they had allowed a claim in favor of the holders of bonds Nos. 5 and 6 for \$500 each. Said certificate was duly signed by the board of auditors and filed with the town clerk, and a copy of it, made on a separate piece of paper, was pasted into the record book. Charles B. Astle, a member of the board of auditors, testified that the board allowed \$1,000 for the purpose

of paying the two bonds, Nos. 5 and 6, mentioned in the certificate. This witness explains the reason for referring the matter of levying the \$1,000 to pay the bonded indebtedness to the town meeting and also making a certificate to the town clerk, by saying that the board of auditors were "up in the air" as to what ought to be done with these bonds, and that to be sure they were right they would allow it at the auditor's meeting and also bring it up at the town meeting. On April 14th the town clerk made a certificate, which was transmitted to the county clerk, on which the taxes in the town of Ganeer were extended. This certificate is in the following words and figures:

"I, George Marland, clerk of said township, hereby certify that in pursuance of authority by section 3 of article 4 of the Township Organization law, the electors of said township in township meeting assembled on the first Tuesday in April, A. D. 1909, elected to raise for the year A. D. 1909, by taxation on all the taxable property in said township, for all township purposes authorized by law, to wit:

Election expenses, the sum of.....	\$ 100 00
Officers' salary, the sum of.....	200 00
Printing, the sum of.....	50 00
Town poor, the sum of.....	500 00
Highway commissioners, the sum of.....	150 00
On bonded indebtedness, two bonds, sum of	1,000 00
	<u>\$2,000 00</u>

"Geo. Marland, Town Clerk.

"Making the aggregate sum of two thousand dollars (\$2,000), as appears in the record of the proceeding of said township meeting now in my office in said township.

"Given under my hand at Ganeer town hall, in said township, this 14th day of April, A. D. 1909.

"Geo. Marland, Township Clerk."

In pursuance of the above certificate the county clerk extended \$1,000 of taxes to pay bonded indebtedness in the said town. On the hearing of the objection before the court the appellee asked and obtained leave of the court to amend the certificate of the town clerk by inserting after the word "meeting," in last line, the following: "and from the certificate of the board of town auditors." Appellant assigns error upon the order of the court permitting the amendment of this certificate. There was no error in allowing the amendment to this certificate. *People v. Kankakee & Southwestern Railroad Co.*, 237 Ill. 362, 86 N. E. 742; *Toledo, St. Louis & Western Railroad Co. v. People*, 225 Ill. 425, 80 N. E. 283; *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 405. There is nothing in the statute requiring the town clerk to set out in his certificate the proceedings that occurred either in the town meeting or in the meeting of the board of auditors. Section 4, art. 12, c. 189, Hurd's Rev. St. 1909, provides that the town clerk "shall annually at the time required by law certify

to the county clerk the amount of taxes required to be raised for all town purposes." Section 122 of the revenue law (Hurd's Rev. St. 1909, c. 120) contains a similar provision and fixes the time within which such certificate shall be made. Section 7 of article 13 of the Township Organization law provides that the auditing board shall make a certificate and file the same with the town clerk, specifying the nature of the claims allowed and the amount thereof, and the name of the person in whose favor they are allowed, and shall certify in the same manner the amounts required to be raised by taxation for town purposes. All claims of every kind and character which are a proper charge against the town must thus be audited and allowed, and the certificate should specify every sum directed by law to be raised for any town purpose, as provided in section 8 of article 13. The information which the taxpayer is entitled to have should be contained in the certificate of the board of town auditors. It is not necessary, under the statute, that the certificate of the town clerk made to the county clerk should recite that the several items for which taxes are to be levied have been audited, approved, and allowed by the board of auditors. The certificate to the county clerk is intended as a guide to that officer in properly extending the taxes against the town, and it is not necessary, under the statute, that such certificate should show, on its face, that all of the antecedent steps have been taken. The board of auditors having properly audited the item for the payment of bonded indebtedness and certified the same to the town clerk, that officer was authorized to certify, as he did, to the county clerk the amount required for that purpose. The levy of \$1,000 in the town of Ganeer having been made by the proper officers and in the proper manner, the action of the town meeting in reference to the levying of this tax did not destroy the legal effect of the acts of the board of auditors and the town clerk. The objection to this item of taxes was properly overruled.

The appellee assigns cross-errors upon the action of the court in sustaining objections of appellant to the amount of hard road taxes in the towns of Momence, Ganeer, and Yellowhead in excess of 60 cents on each \$100 valuation of property in the several towns. These towns had each voted in favor of levying a tax not exceeding \$1 upon the hundred for hard road purposes. At the time the vote was taken the statute provided that the assessment for all purposes should be upon the basis of one-fifth of the actual value of the property. Under the statute which went into force July 1, 1909, the basis of assessment was changed from one-fifth to one-third. Appellant contends, and the court below so held, that the levy of taxes under the vote for hard road purposes must be at a

rate which would not exceed, in the aggregate, the amount that would have been paid at \$1 per hundred valuation upon the one-fifth basis. The argument in support of this contention seems to proceed upon the theory that the vote of the electors to levy \$1 per hundred upon a one-fifth valuation constituted a contract, which could not be impaired by the subsequent act of the Legislature increasing the basis of valuation. This view cannot receive our approval. The taxpayer has no vested rights under statutes which fix a basis of assessment. The entire subject is within the control of the Legislature, and may be changed whenever, in its wisdom, it sees proper to do so. This question has had the consideration of this court in the case of *People v. Cairo, Vincennes & Chicago Railway Co.*, 93 N. E. 402, and a conclusion reached adverse to the contention of appellant. The court below erred in sustaining the objections to the hard road tax in the towns of Momence, Ganeer, and Yellowhead.

The judgment of the county court is reversed on the cross-errors of appellee and the cause remanded, with directions to the county court to overrule the objections to the hard road taxes above referred to and to render judgment therefor.

Reversed and remanded, with directions.

(243 Ill. 275)

ELLISON v. GLOS.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 10, 1911.)

1. RECORDS (§ 18*)—COPIES OF ABSTRACTS.

Under Hurd's St. 1909, c. 116, § 24, authorizing the admission in evidence of copies of abstracts on preliminary proof being made and reasonable opportunity given the adverse party to verify the correctness of the copies, copies of abstracts offered in evidence by one suing to remove a cloud on title, which show all that is necessary to make out plaintiff's chain of title, are properly received in evidence as against the objection that they do not contain all that is contained in the originals from which they are made, and defendant may, if he desires, offer the other parts of the originals.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

2. RECORDS (§ 18*)—TITLE OF PLAINTIFF—EVIDENCE.

In a suit to remove a cloud on title, a burnt record decree of the circuit court of Cook county, entered pursuant to a mandate of the Supreme Court adjudging persons named to be the owners in fee simple of the premises involved, established title in the persons named; and plaintiff, showing that he succeeded to such title by regular chain, was entitled to a decree, in the absence of proof of title prior to that time.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 36-43; Dec. Dig. § 18.*]

3. EVIDENCE (§ 183*)—SECONDARY EVIDENCE.

An affidavit of the attorney of one suing to remove a cloud on title that complainant wished to use on the trial deeds described, that the originals were each and all acknowledged and proved according to law and were entitled to be recorded, that the originals were each and

all lost or destroyed and not in the power of complainant to produce, and that to the best of affiant's knowledge the originals of the deeds were not intentionally destroyed or in any manner disposed of, to introduce in evidence a copy or copies of them, or any of them, in place of the originals, or any of them, was sufficient to justify the admission in evidence of certified copies of the deeds described.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

Appeal from Circuit Court, Cook County; Adeler J. Petit, Judge.

Suit by Eugene L. Ellison against Jacob Glos. From a decree for plaintiff, defendant appeals. Affirmed.

John R. O'Connor, for appellant. William Gibson, for appellee.

FARMER, J. Appellee, Eugene L. Ellison, claiming to own in fee simple lots 15, 17, and 18, in block 1, in Mulvey and Others' subdivision of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 15, township 38 N., range 14 E. of the third principal meridian, situated in the city of Chicago, Cook county, Ill., filed his bill in the circuit court to remove and cancel as a cloud upon his title a tax deed issued to appellant, Jacob Glos. The bill alleged that appellee was the owner of the premises in fee simple; that said premises were unimproved and unoccupied, and no person was in the possession of any part thereof; that a tax deed issued to appellant and filed for record September 5, 1908, purporting to convey said premises to the appellant pursuant to a sale thereof for nonpayment of taxes, was invalid and void. The bill set out numerous grounds upon which it was claimed the tax deed was invalid; but as the errors assigned on this appeal raise no question concerning the validity of the deed, and appellant asserts no claim of title by virtue thereof, it is unnecessary to set out the allegations of the bill or further refer to that subject. Appellant answered the bill, denying all the material allegations. Replication was filed to the answer, and the cause heard upon testimony offered in open court. The chancellor found that the proof sustained the allegations of the bill, that appellee was the owner of the premises, and that the tax deed was null and void and a cloud upon the title. Appellee was ordered by the decree to pay to appellant the amount paid at the tax sale upon which the deed was issued, all subsequent taxes on the premises paid by appellant, together with interest thereon, and all costs and penalties incurred on account of said tax sale. The total amount so found due was \$241, which the decree finds appellant refused to accept. It was therefore ordered deposited with the clerk of the court for the use of appellant, which the decree finds was accordingly done, and the tax deed was ordered canceled as a cloud upon appel-

lee's title to the premises. This appeal is prosecuted by Jacob Glos for the purpose of reversing that decree.

The grounds relied on for reversal are that appellee did not prove title in himself by legal and competent evidence. To sustain his title appellee offered in evidence copies of what are called ante-fire abstracts, also certified copies of deeds, and a burnt record decree. It is conceded by appellant "the ante-fire abstracts of title offered in evidence in this case to prove the complainant's title show an apparent chain of title from the government down to George Peterson." It is also conceded that "it is only necessary for the complainant in a bill to set aside a tax deed as a cloud upon his title to show prima facie proof of title." Copies of two such abstracts were offered in evidence. Attached to each was the affidavit of John L. Day, secretary of the Chicago Title & Trust Company, stating that they were true copies from the original letterpress copies of the abstracts of title made by Jones & Sellars from the records in the office of the recorder of deeds in Cook county and from the records and files in the offices of the clerks of the circuit and superior courts of said county, in the due and ordinary course of business as abstract makers, prior to the destruction of the records, on or about October 8 and 9, 1871. The objection made to the introduction of these documents is that the copies offered were not complete copies of the abstracts and did not contain all that was shown by the originals relating to the premises in controversy.

At the conclusion of appellee's evidence, appellant testified in his own behalf that he had examined the originals from which copies were made, and that the copies were not full and complete; that there were a number of items in each of the originals omitted from the copies. John L. Day, secretary of the Chicago Title & Trust Company, testified on behalf of appellee that the copies were copies of such parts of the original abstracts as the party ordering them desired, and that all the items in the originals were not copied. Section 24 of chapter 116 of Hurd's Statutes authorizes the admission in evidence of copies of abstracts upon preliminary proof having been made and reasonable opportunity given the opposite party to verify the correctness of such copies. Glos v. Patterson, 209 Ill. 448, 70 N. E. 911. It is conceded opportunity was afforded appellant to verify the correctness of the copies of abstracts offered in evidence in this case, and it is not denied that the proof of the loss or destruction of the original deeds or other instruments in writing was sufficient. The objection to the copies is that they do not contain all that was contained in the originals from which they were made. We think this question is conclusively set-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tled against appellant in *Glos v. Patterson*, 195 Ill. 530, 533, 63 N. E. 272, 273, where it was said: "The competency of these exhibits under the preliminary proof is not denied; but it is insisted that 'they fail to show that the copies contain all the entries in relation to the lot in question.' They did show all that was necessary to make out plaintiff's chain of title. Defendant was at liberty to offer other parts of them, if he chose to do so. It was not necessary for the plaintiff to introduce more than the nature of her case required."

These copies of abstracts showed title from the government by patent in 1842, through regular chain, to George Peterson. on January 23, 1869. From George Peterson to appellee the title was proven by the introduction of deeds and certified copies of deeds. Appellee also offered in evidence the record of a burnt-record decree of the circuit court of Cook county, entered in 1878 pursuant to a mandate of this court, finding and adjudging George A. Springer and Frederick W. Springer to be the owners in fee simple of the premises described in this case. This decree was sufficient to establish title in the Springers at the time it was entered, and if appellee succeeded to their title by regular chain that would have justified the decree, in the absence of proof of title prior to that time.

Appellee introduced in evidence certified copies of deeds from Peterson to Springer, from Springer to Wilson, from Wilson to Springer, from Springer to King, from King to Dale, and from Dale to Ward. The original deeds from Ward to Platt and from Platt to appellee were introduced in evidence. Appellant contends that the preliminary proof contained in the affidavit of Edmond McMahon, agent and attorney for appellee, as to the loss or destruction of the original deeds and the inability of appellee to produce them, was insufficient to authorize the introduction of the certified copies of the deeds. The affidavit, after reciting that the affiant is the agent and attorney of appellee, and that appellee wished to use on the trial of the case certain deeds (describing them particularly), states "that the originals of said deeds are each and all acknowledged and proved according to the laws of the state of Illinois and are entitled to be recorded; that the originals of said deeds are each and all lost or destroyed, and not in the power of said complainant to produce the same; and this affiant further says that to the best of his knowledge said originals of said deeds were not intentionally destroyed or in any manner disposed of for the purpose of introducing in evidence a copy or copies of them, or any of them, in place of said originals, or any of them."

Appellant insists that under the decision of this court in *Scott v. Bassett*, 194 Ill.

602, 62 N. E. 914, this affidavit was insufficient to authorize copies of the deeds being received in evidence. We think there is a vast difference between the affidavit in that case and the one in this case. In that case the language of the affidavit, that the party desiring to introduce the deeds in evidence was unable to produce them and that they were not intentionally destroyed or disposed of, was held to refer to all the deeds collectively, and not severally, and it was said: "For aught that appears, some one or more of the deeds may have been destroyed or disposed of for the purpose of introducing a copy of the same, and the affidavit in that respect does not comply with the statute." No such objection appears to the affidavit here involved. It states that the original deeds are each and all lost or destroyed, and that they were not intentionally destroyed or disposed of for the purpose of introducing in evidence a copy or copies of them, or any of them, in place of said originals, or any of them. This language plainly refers to and embraces the deeds collectively and severally, and to hold otherwise would be to place an absurd construction upon the affidavit. It sufficiently complies with the requirements of the statute to justify the admission in evidence of the copies of the deeds.

We find no error in the record, and the decree of the circuit court is affirmed.

Decree affirmed.

(246 Ill. 201)

PALMER v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 21, 1910.

Rehearing Denied Feb. 10, 1911.)

1. HIGHWAYS (§ 7*)—PRESCRIPTION—PERMISSIVE USE.

Where travel over a vacant tract originating in a desire to avoid toll gates and the payment of toll was in its beginning permissive and subsequently a drainage ditch separated a strip from the balance of the tract, and the travel continued on the strip only, the travel was presumptively permissive only, and so continued until there was some act warranting a different inference.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 10; Dec. Dig. § 7.*]

2. EVIDENCE (§ 386*)—PAROL EVIDENCE—VARYING TERMS OF JUDGMENT.

Where, on the issue of the existence of a highway over land, it appeared that a special assessment for the construction of a water supply pipe through the land was paid by the agent of the owner, evidence that the persons interested in the construction of the pipe brought before the trustees of the town a written permission of the owner for the laying of the pipe, and that after the permit was obtained the pipe was laid, and that the persons interested paid therefor because the owner would not pay, was admissible to show that the pipe was laid by permission of the owner as against the objection that it contradicted the judgment of confirmation of the assessment.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1678; Dec. Dig. § 386.*]

3. PRINCIPAL AND AGENT (§ 23*)—DOCUMENTS—EXISTENCE OF AGENCY.

An entry on the record of a town that a payment of a special assessment was made by an agent of the owner of the land assessed does not prove agency, for the entry is the mere act of the collector of the assessment.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.*]

4. TRUSTS (§ 130*)—TESTAMENTARY TRUSTS—PASSIVE TRUST—TITLE OF TRUSTEES.

Testamentary trustees who held real estate under a will whereby testator devised the real estate to the trustees to hold for eight years after his death, when the title should vest in his children, were mere naked trustees, and the title vested at once in the children on the death of the testator.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 179; Dec. Dig. § 136.*]

5. DEDICATION (§ 15*)—HIGHWAYS—ACTS CONSTITUTING DEDICATION.

A common-law dedication of a highway can be established only by clear and unequivocal proof of an intention of the owner to donate the land for a highway, but the intention may be shown by declarations or by acts which plainly manifest it, but not by the mere nonassertion of a right, unless the circumstances establish the intent to donate.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 13; Dec. Dig. § 15.*]

6. DEDICATION (§ 37*)—HIGHWAYS—ACTS CONSTITUTING DEDICATION.

Where there is clear proof of an unequivocal act of dedication of land for a highway, the dedication becomes effectual on the acceptance by the public, and no definite period of use is required.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 73, 74; Dec. Dig. § 37.*]

7. DEDICATION (§ 15*)—HIGHWAYS—ACTS CONSTITUTING DEDICATION.

A finding that, when a strip of land was first begun to be used as a way for travel, it was private property, and that since that time the owner had not done any overt act which operated to estop him from claiming that the land was still private property, showed a want of an intention on the part of the owner to dedicate the land for a public highway.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 13; Dec. Dig. § 15.*]

8. HIGHWAYS (§ 1*)—PRESCRIPTION—PUBLIC HIGHWAY.

To establish a highway by prescription, the user must be open and notorious, exclusive, continuous, and uninterrupted for 15 years under a claim of right with the knowledge of the owner, but without his consent, and the user must not be merely permissive.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

9. HIGHWAYS (§ 17*)—PRESCRIPTION—PUBLIC HIGHWAY.

Evidence held not to establish a highway by prescription because of a failure to show a continuous and uninterrupted use for 15 years.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 24; Dec. Dig. § 17.*]

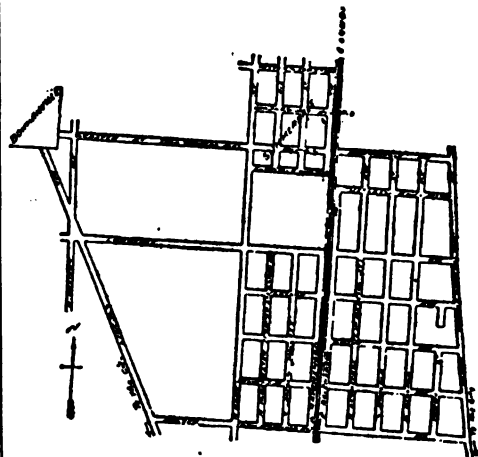
Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Suit by Stanton Palmer against the City of Chicago. From a decree of dismissal, plaintiff appeals. Reversed and remanded.

Herbert H. Reed and Tolman, Redfield & Sexton (Edgar Bronson Tolman, of counsel), for appellant. Edward J. Brundage, Corp Counsel, and Clarence N. Boord, for appellee.

DUNN, J. The question presented by this record is the existence of a highway over certain land, and it is largely a question of fact. The appellant filed a bill for an injunction restraining the appellee from interfering with his possession and control of the strip of land in question, and the appellee answered, claiming the same as a public street. A replication was filed, the cause was referred to a master to report his conclusions of law and fact, and evidence was heard by the master and reported, together with his findings. The appellant's objections, having been overruled by the master, were renewed as exceptions before the chancellor, and on the motion of the appellee to confirm the master's report they were overruled, the master's report was confirmed, and the bill was dismissed for want of equity.

The alleged street was never established by virtue of any legal proceeding or formal dedication. If it ever became a street, it was through an implied dedication or by prescription. The following plat shows the situation:



The tract bounded on the north by Clay avenue (now Argyle street), on the west by North Robey street, on the south by Lawrence avenue, and on the east by the Chicago & Northwestern Railroad is the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 7. The railroad right of way occupies a strip four rods wide off the east side of the tract. Adjoining the right of way on the west is the strip 80 feet wide which the city claims as a street, extending from Lawrence avenue to Argyle street, and indicated on the plat by a dotted line. The appellant became the owner of this 40-acre tract, subject to the right of way of the railroad company in September,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1906, by virtue of a warranty deed from Malvina B. Armour. It was originally open prairie and, together with the land north and west of it, was low and was partly under water in the spring. There was a pond in the northeast corner. It remained unbroken and unoccupied until 1885, when Jonathan Ogden, the owner, leased it to Charles Hoffmeyer, whose tenancy continued until 1905. Prior to 1870 the neighboring country was very sparsely settled; the land, when occupied, being used for farms and gardens. Lawrence avenue was not used, and no road was there. The principal roads leading into Chicago from this neighborhood were the Green Bay road (now Clark street) and Lincoln avenue. Bowmanville, which was north and west of the tract in question, was connected with the Green Bay road by the Bowmanville road (now Winnemac avenue). All these were toll roads, and there was a toll gate at the junction of the Bowmanville and Green Bay roads. For the purpose of avoiding the payment of toll by passing around this gate, persons going to and from Chicago traveled north and south over the tract in question, so that in 1871 there was a roadway there similar to an ordinary country road. West of this road a ditch ran south across the tract from near its northern boundary. This ditch was constructed many years before there was any travel over the strip of land in question, and its purpose was the general drainage of the lands, and not the road. There was also a ditch on the east side of the road, but it does not appear when, why, or by whom it was constructed. Outside the track the strip was covered with grass, willows, cottonwood trees, and undergrowth, and its surface remained in practically the same condition until 1905, and was used by people passing north and south, though much less in later years since the improvement of the adjacent streets. About 1873 some one interested in the new subdivision of Summerdale, lying immediately north of this tract, built a two-plank sidewalk along the west side of West Ravenswood Park, in that subdivision, extending south along the west side of the strip in question here, to a point opposite where Tuttle street appears on the plat, then turning east across the railroad through a break in the fence to the east side of East Ravenswood Park, and thence south.

Jonathan Ogden was the owner of this tract from 1857 to his death, in 1888. He lived in Cincinnati, Ohio, and visited Chicago twice a year during the last 10 years of his life. There is no evidence that he ever objected to or acquiesced in the travel over this land or that he ever knew of any such travel or ever saw the land. Apparently no attention was given the land, except to pay the taxes, until the lease to Hoffmeyer in 1885. After that, Charles F. Babcock acted as agent for the collection of the rent until Jonathan Ogden's death, and afterward for

the subsequent owners until his own death. On Jonathan Ogden's death the title vested in his three children, of whom Malvina B. Ogden was one, and on the death of her two brothers she became the sole owner. The collection of the rent, the payment of taxes and special assessments, and the management of the property after Jonathan Ogden's death were attended to through the office of Armour & Co. until the conveyance to the appellant.

The travel over this tract, originating in the desire to avoid the toll gates and the payment of toll, was in its beginning entirely permissive. The whole tract lay vacant and unoccupied. The owner had no occasion to occupy it exclusively, and there was nothing to induce him to inclose it. The natural effect of the drainage ditch separating the strip between it and the railroad from the rest of the land was to induce the travel to go over this strip, but did not change the character of the travel. Such travel, because limited by circumstances to this narrow strip, was not, therefore, under a claim of right, but, being permissive in its origin, must be presumed to have continued so, and not to have been adverse until some act done or suffered by the owner warranted a different inference.

On October 26, 1875, an ordinance was passed for the laying of a six-inch water supply pipe in West Railroad Park from Summerdale avenue to Washington avenue, to be paid for by special assessment, and thereafter, upon application to the county court, a special assessment of \$523.83 against the 40-acre tract for the laying of said water pipe was confirmed, and said assessment, being afterward returned delinquent, appears of record to have been paid on May 24, 1876, by "Jonathan Ogden, by S. Marrs, His Agent." A resolution of the board of trustees of the town of Lake View was passed on August 20, 1883, directing the town clerk to notify the owners of abutting property to build sidewalks, in accordance with the town ordinances, within 15 days on certain streets, including "the west side of Ravenswood Park from Lawrence avenue to Argyle street." The master found that a six-foot sidewalk was built along the west side of the west ditch in compliance with this ordinance. In 1891 an ordinance was passed for the construction of another six-foot sidewalk along the west side of West Ravenswood Park, for which a special assessment was levied against the Ogden 40 acres. The master finds that a sidewalk was soon after built, and that the owner put it in by private contract and paid for it.

The ordinance for the laying of the water pipe, the resolution of 1883, and the ordinance of 1891 in reference to the sidewalks are stated in the master's report to be the only formal acts proved showing notice to the owner of the adverse claim of the public to this strip as a highway. In regard to the

water pipe ordinance, it was shown by Adam J. Weckler, who was at the time of the occurrence of the events in question a member of the board of trustees and of the committee on waterworks, that prior to the passage of the ordinance the people of Summerdale north of the Ogden tract, represented by Robert Greer, petitioned the board of trustees to extend the water pipes to that subdivision. They were told that this could not be done because the water pipes could not be laid in private property. They then took the matter up among themselves, and afterward brought a written permit from the owner of the property allowing the town of Lake View to lay the water pipe in this ground. After this permit was obtained, the water pipe was laid, and the people of Summerdale had to pay for this pipe because the owner would not pay for it although he was willing to let it go through. The master refused to consider this evidence because the assessment and the payment by the owner were shown by the record. The evidence does not contradict the record. The validity of the judgment of confirmation in every particular is conceded. This testimony does not interfere with, qualify, or limit it in any way. Whatever that judgment adjudicates remains adjudicated. But the fact that before any action was taken toward laying the pipe in this strip the permission of the owner was secured may be shown to determine whether there was any adverse claim of right. The entry showing payment by an agent was the act of the collector of the assessment, and was of no validity to prove agency. Unless the testimony of this witness is rejected, it must be concluded that the water pipe was laid by the permission of the owner. There is no evidence that the assessment was paid by Jonathan Ogden personally, but the evidence is consistent with its payment by someone in his name on behalf of the people of Summerdale. There is some criticism of Weckler's testimony, and it is apparent that he is confused as to the time of some of the events he testifies about, but he is not contradicted and we see no reason to doubt the substantial correctness of his statements.

There is no evidence to show that the notice directed by the resolution of 1883 was ever given by the town clerk, or that Jonathan Ogden, or any agent for him, ever had any notice of the resolution. The evidence that any sidewalk was built in compliance with this ordinance is vague. A sidewalk was built there at some time within two or three years before or after the date of the resolution, but it would be mere conjecture to say that it was built after August 20, 1883, by the owner of this land.

The evidence as to the sidewalk claimed to have been built under the ordinance of 1891 is no more satisfactory. There is no certainty that any sidewalk was built under this ordinance. A second sidewalk was built, but the evidence is indefinite as to when it was

built. Jonathan Ogden had died in 1888 leaving a will, whereby he devised this land to trustees to hold for eight years after his death, when the title was to vest in his three children. They were naked trustees and the title vested at once in the children, but by agreement they permitted the land to be managed by the trustees as directed in their father's will. If any presumption is to be indulged as to the person who built the sidewalk, it would be presumed that it was the trustees. It will not be contended, however, that they could, without the consent of the owners, dedicate a street or by their action affect the title to the land.

In 1888 and 1889 Lawrence avenue was macadamized and curbed, and the officials of the city of Lake View acted on the theory that there was no street in the strip in question. The improvement was paid for by special assessment, and the plan and profile of the improvement which were used in the special assessment proceeding indicated that the curb on the north side of Lawrence avenue would begin at the west line of the right of way of the railroad and extend west. The curb was put in, as indicated, across the south end of the strip and closed the strip entirely, so that there was no access to it without driving over the curb. The south half of the Ogden tract, including the strip in question, was assessed to pay for this improvement and the assessment was paid.

On May 1, 1905, the city council of the city of Chicago passed an ordinance for the construction of a sewer in West Ravenswood Park from Winnemac avenue to Clay street, to be paid for by special assessment. For the purpose of making this improvement a drainage district was created, and a map thereof was prepared by the city showing that the north half of the strip in question was included in the drainage district. A special assessment was levied to pay for the improvement, and the sum of \$207.93 was assessed against 232 feet of the north half of the southwest quarter of the southeast quarter, described by metes and bounds, with the west line of the railroad right of way as the east line of the premises assessed. This included the whole north half of what is now claimed to have been a street. This assessment was paid.

A common-law dedication of a highway can be established only by clear and unequivocal proof of an intention of the owner to donate the land for a public street. The intention may be shown by declarations or by acts which plainly and unequivocally manifest it, but not by the mere nonassertion of a right unless the circumstances establish the intention to donate the use to the public. A dedication results from an active, and not a passive state of mind; from intention, and not inattention. *Grube v. Nichols*, 86 Ill. 92; *City of Chicago v. Chicago, Rock Island & Pacific Railway Co.*, 152 Ill. 561, 38 N. E. 768; *Town of Bethel v. Pruett*, 215 Ill.

162, 74 N. E. 111. If there is clear proof of an unequivocal act of dedication, the dedication becomes effectual at once upon acceptance by the public, and no definite period of use is required. *Marcy v. Taylor*, 19 Ill. 634; *Moffett v. South Park Com'rs*, 138 Ill. 620, 28 N. E. 975; *Seldschlag v. Town of Antioch*, 207 Ill. 280, 69 N. E. 949. The master found that "when the strip of land in question first began to be used as a way for travel it was certainly private property, and that since that time no owner of the land has done any overt act which operates to estop him from claiming that said strip is still private property." Neither party made any objection to this finding. It is in accordance with the evidence. The unequivocal proof of the intention to dedicate this ground to the public use is lacking.

It is insisted by the appellee that the evidence conclusively shows that the disputed strip has become a public highway by prescription. To establish a highway by prescription the user must be open and notorious, exclusive, continuous, and uninterrupted for 15 years, adverse—that is, under a claim of right—with the knowledge of the owner but without his consent. *Rose v. City of Farmington*, 196 Ill. 226, 63 N. E. 631; *O'Connell v. Chicago Terminal Transfer Railroad Co.*, 184 Ill. 308, 56 N. E. 355; *Township of Madison v. Gallagher*, 159 Ill. 105, 42 N. E. 316; *Town of Brushy Mound v. McClintock*, 150 Ill. 129, 36 N. E. 976. There must be something more than mere travel by the public. The user must be under a claim of right by the public, and not by the mere acquiescence of the owner. A permissive use never ripens into a prescriptive right. No prescriptive right was acquired, and no period of prescription began to run in Jonathan Ogden's lifetime. The travel over his unoccupied land began without any claim of right. It was a mere convenience to the farmers and others to go across this uninclosed land, which no one considered a road, and thus avoid paying toll. In the spring and in the wet seasons this way had to be abandoned and travelers were confined to the toll roads, but in dry times it served the convenience of those desiring to use it. It was a winding track through underbrush and trees, and the little work shown to have been done occasionally in cleaning out the ditch and scraping the dirt out of it upon the road and cutting some of the underbrush cannot be regarded as notice that this track was claimed as a public highway. On the other hand, the action of the authorities of the town when they declined to lay a water pipe in the strip without getting the permission of the owner, and later, in 1888, when they ran the curb on the north side of Lawrence avenue across the strip, shutting it off from Lawrence avenue, indicates their intention not to assume control of the strip and their belief that it was not a street.

After Jonathan Ogden's death the travel was not different in character from what it was before. There was less travel after the improvement of Lawrence avenue and the other streets, and as to any work done upon this strip aside from the sidewalk, after the death of Jonathan Ogden, the record is silent. There is no evidence of any claim of public right after Jonathan Ogden's death until the passage of the sidewalk ordinance of December 28, 1891. The owners of the property then were Mrs. Armour and her brothers. They never had any knowledge of the ordinance, so far as the record shows. If it be conceded that travel continued over the alleged street and that after that date it was under a claim of right, it was not uninterrupted for 15 years. In 1905 Joseph Weber was the tenant of the whole tract. Mrs. Armour desired to lease to Hanreddy & McGovern, contractors then engaged in building the Lawrence avenue intercepting sewer, a portion of the premises fronting 850 feet on the railroad and 205 feet deep on Lawrence avenue. She purchased from Weber a release of this portion of the premises, which she then leased to Hanreddy & McGovern, who in October, 1905, entered upon the premises so leased, built a switch track from the railroad across the strip in question, obstructed it with their machinery and by piling clay thereon, and continued in possession until the filing of this bill. If the prescriptive rights claimed by the appellee were made out in all other respects, it would therefore fail because not continuous and uninterrupted for 15 years.

Our conclusion is that the existence of the street claimed has not been established by the clear and unequivocal proof required by law. The decree of the circuit court will therefore be reversed and the cause remanded to that court, with directions to enter a decree granting to the complainant the relief prayed for.

Reversed and remanded, with directions.

(248 Ill. 126)

PEOPLE ex rel. LEE, County Collector, v.
CHICAGO, I. & S. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 10, 1911.)

1. TOWNS (§ 57*)—TAXATION—PROCEEDINGS—
CERTIFICATE OF TOWN CLERK—AMENDMENT.

Since, under Hurd's Rev. St. 1909, c. 139, § 121, requiring the town auditors to audit all claims, claims for bonds outstanding against the town must have been audited and allowed before a tax could be levied to pay them, the electors at the annual town meeting not having the power of auditing claims, the certificate of the town clerk upon which the tax to pay the bond was extended was defective in stating the electors elected to raise their taxation certain sums for paying the bonds, instead of showing that the claim on the bonds was audited by the board of town auditors, and an amendment thereto was properly allowed so as to make it conform to the facts by stating that

the claim was audited and allowed by such board; Hurd's Rev. St. 1909, c. 120, § 191, providing that any irregularity in tax proceedings connected with the assessment or levy of town taxes may be corrected to conform to law by the court or by the person by whose neglect the irregularity was caused.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 99; Dec. Dig. § 57.*]

2. TOWNS (§ 57*)—TAXATION—ALLOWANCE OF CLAIM.

The certificate contemplated by Hurd's Rev. St. 1909, c. 139, § 124, requiring the board of town auditors to make a certificate signed by a majority of the board specifying the nature of the claim, and to cause it to be delivered to the town clerk, is the basis for the town clerk's certificate to the county clerk, upon which the tax levied for payment of the claim is extended, and neither the fact that the town clerk's record did not show the action of the board of town auditors in allowing the claim, or that it showed that the board recommended that the money required to pay the claim be raised at the next annual town meeting, would overcome the certificate of the board of town auditors delivered to the town clerk showing the allowance of the claim.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 99; Dec. Dig. § 57.*]

3. HIGHWAYS (§ 127*)—TAXATION—PROCEEDINGS TO LEVY—CERTIFICATES OF COMMISSIONERS OF HIGHWAYS.

Under the Road and Bridge Act (Hurd's Rev. St. 1909, c. 121) § 14, providing that if, in the opinion of the commissioners of highways a greater levy than authorized by section 13 is needed to maintain the highways, in view of some contingency, they may certify the same to the board of town auditors and assessor, and may, with the written consent of the entire board, make an additional levy, the question of whether the contingency exists, depends on the character of the force causing the condition of the roads requiring an additional levy, so that the certificate of the commissioners of highways must show the causes which produce the defect.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

4. HIGHWAYS (§ 127*)—TAXES—PROCEEDINGS FOR ASSESSMENT—AMENDMENT—DEFECTS CURABLE BY AMENDMENT.

The failure of the certificate of the commissioners of highways, to state the cause of defects in a highway requiring an additional levy cannot be cured by amendment upon application for judgment for delinquent taxes, so as to show that the condition of the highway was caused by a cloudburst, etc.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 384; Dec. Dig. § 127.*]

5. COUNTIES (§ 194*)—TAXATION—PROCEEDINGS—EVIDENCE.

An objection made on an application for judgment for delinquent county taxes to an item of the levy for "salary of the officers," on the ground that it was greater than was necessary, was not sustained by showing the salaries in years other than that for which the levy was made.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 194.*]

6. APPEAL AND ERROR (§ 671*)—TAXATION—PLEADING—REVIEW—RECORD.

The Supreme Court cannot presume that the trial court erred, it being necessary for error to be shown by the abstract furnished by appellant or the additional abstract furnished by appellee, so that alleged error in abating a tax cannot be considered where appellant's

abstract does not show the objection to the tax or grounds thereof, nor the reasons for the trial court's action, and does not contain the evidence concerning such taxes, or only shows the amount of the taxes abated and appellee's exceptions to the court's action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. § 671.*]

Appeal from Kankakee County Court; A. W. De Selm, Judge.

Proceedings by the People, on the relation of Dan G. Lee, County Collector, against the Chicago, Indiana & Southern Railroad Company. From a judgment for relator, defendant appeals. Reversed in part and remanded, with directions.

W. R. Hunter and Walter C. Schneider, for appellant. J. Bert Miller, for appellee.

COOKE, J. Appellant, the Chicago, Indiana & Southern Railroad Company, interposed objections to the application made by the county collector of Kankakee county to the county court of said county for judgment for delinquent taxes for the year 1909. Some of the objections were sustained, others were overruled, and a judgment was entered against appellant's property for the taxes to which objections had been overruled, from which judgment appellant has prosecuted this appeal.

Appellant first contends that \$89.71 of the town tax of the town of Ganeer is illegal because that sum was extended against its property upon a levy of \$1,000 made at the annual town meeting to pay certain bonds outstanding against the town. This tax was extended by the county clerk upon the certificate of the town clerk that the electors of the town, at the annual town meeting in 1909, elected to raise for the year, by taxation, certain sums for certain purposes enumerated in the certificate, including \$1,000 for bonded indebtedness. At the hearing upon objections appellee asked leave to permit the town clerk to amend his certificate, and offered in evidence a certificate made and signed by the board of town auditors on March 31, 1909, and delivered to the town clerk, in which it was certified that at the meeting of the board held on that day for the purpose of auditing town accounts, bonds numbered 5 and 6 against the town of Ganeer, for \$500 each, were presented, examined and allowed. Appellant then offered in evidence that portion of the record of the board of town auditors kept by the town clerk showing the proceedings of the board at its meeting of March 31, 1909, and it did not appear therefrom that any portion of the bonded indebtedness was audited or allowed at the meeting, but, on the contrary, the record did show a resolution adopted by the board at the said meeting recommending that \$1,000 be raised at the next annual town meeting to pay on bonded indebtedness. Aft-

er the introduction of this evidence, the court, over the objection of appellant, permitted the town clerk to amend his certificate upon which the tax had been extended, by inserting therein a statement that a claim in favor of the holder of the two bonds for \$500 each was audited and allowed by the board of town auditors at their meeting on March 31, 1909. These bonds were charges or claims against the town of Ganeer, and the statute required that they be audited and allowed by the board of town auditors before they could be made the basis for the levy and collection of taxes. Hurd's Rev. St. 1909, c. 139, art. 13, § 4. The electors at the annual town meeting do not possess the power of auditing charges or claims against the town or of levying taxes to meet the same (*People v. Chicago & Alton Railroad Co.*, 193 Ill. 364, 61 N. E. 1063), and the certificate of the town clerk was defective in stating the action of the electors at the annual town meeting, instead of the action of the board of town auditors at the meeting of March 31, 1909, as the basis for his certificate of the levy of \$1,000 to pay these bonds; but this was an error on the part of the town clerk which did not affect the substantial justice of the tax itself. A valid levy had been made by the proper authorities for a purpose authorized by law. The amount and the purpose for which the same was levied were correctly stated in the certificate upon which the tax was extended, and the county court did not err in permitting the town clerk to amend his certificate to conform to the facts by showing the allowance by the board of town auditors of \$1,000 in favor of the holders of these bonds. Hurd's Rev. St. 1909, c. 120, § 191.

Appellant contends, however, that the record kept by the town clerk of the proceedings of the board of town auditors shows that the board did not audit and allow these bonds as a claim against the town, but referred the matter of their payment to the electors at the next annual town meeting. Section 7, art. 13, c. 139, Hurd's Rev. St. 1909, requires the board of town auditors to make a certificate, to be signed by a majority of the board, specifying the nature of the claim or demand and to whom the amount is allowed, and to cause such certificate to be delivered to the town clerk; and this certificate, and not the record kept by the town clerk of the proceedings of the board, is the basis for the certificate of the town clerk to the county clerk upon which the tax is extended. *People v. Chicago & Alton Railroad Co.*, supra; *Cincinnati, Lafayette & Chicago Railway Co. v. People*, 206 Ill. 387, 69 N. E. 39. Neither the fact that the record kept by the town clerk did not show the action of the board in allowing the claim, nor the fact that such record showed that the board recommended that the money required to pay the bonds be raised at the next annual town meeting, overcomes the certificate signed by

a majority of the board and delivered to the town clerk, showing the allowance of the bonds by the board of town auditors as a claim against the town.

Appellant next contends that \$217.82 of the road and bridge tax of the town of Limestone is void. This tax was extended upon the certificate of the town clerk showing that the commissioners of highways had filed in his office their certificate requiring 36 cents on each \$100 valuation of property for road and bridge purposes and for the payment of outstanding orders drawn on their treasurer for the year 1909, and had also filed their certificate showing an additional amount of 25 cents on each \$100 valuation levied by the commissioners, with the consent of the board of town auditors and assessor. Appellant paid that portion of the road and bridge tax extended at the rate of 36 cents on each \$100 valuation, but refused to pay that portion extended at the additional rate of 25 cents on each \$100 valuation, amounting to \$217.82, and urges that the additional levy was not made in conformity with the statute, and is void.

The certificate of the highway commissioners that 36 cents on each \$100 valuation should be levied for road and bridge purposes and for the payment of outstanding orders was made on September 7, 1909. On the same day the commissioners certified to the board of town auditors and the assessor of the town of Limestone that in their opinion a greater levy than 36 cents on each \$100 valuation "is needed to repair the highways on the section line between sections 5 and 8, town 30, range 14 west, which was flooded by heavy rains on June 24, 1909, also on August 11, 1909, washing away the grade and making the same impassable; and also to repair the highway in the center of section 9, town 31, range 11 east, where the grade was badly damaged by heavy rains on June 24 and August 11, 1909, making the same impassable; and will cause an expenditure of \$1,200 to repair said places named above, and that it will take all of the 36 cents on each \$100 valuation to pay for the ordinary repairs for road work needed this year." The board of town auditors and the assessor thereupon, on the said seventh day of September, in writing, consented to an additional levy of 25 cents on each \$100 valuation. Appellee offered as a witness one of the highway commissioners of the town of Limestone, who testified, over appellant's objection, that the damages to the highways mentioned in the certificate of the highway commissioners were occasioned by a cloudburst and flood. Thereupon the court permitted the commissioners of highways to amend the certificate which they had made to the board of town auditors and assessor so as to show that the condition of the highways, as described in the original certificate, was the result of "an unusual and extraordinary storm in the nature of a cloudburst,

the like of which never happened there before."

The certificate made by the highway commissioners to the board of town auditors and assessor was clearly insufficient. *People v. Elgin, Joliet & Eastern Railway Co.*, 243 Ill. 546, 90 N. E. 1080. Section 14 of the road and bridge act (Hurd's Rev. St. 1909, c. 121), under which it was sought to make the additional levy, provides that if, in the opinion of the commissioners, a greater levy than the amount authorized by section 13 of the act is needed in view of some contingency, they may certify the same to the board of town auditors and the assessor, and may, with the consent of a majority of this entire board given in writing, make an additional levy of any sum not exceeding 25 cents on the \$100 of the taxable property of the town. Whether a contingency exists, within the meaning of this section, depends entirely upon the character of the force which causes the condition sought to be remedied, and the certificate must show not only the defects sought to be remedied, but the cause that produced those defects, in order to authorize an additional levy. *People v. Kankakee & Southwestern Railroad Co.*, 237 Ill. 362, 86 N. E. 742.

Appellee virtually concedes that the certificate was insufficient, but contends that the amendment made by the commissioners upon the hearing of objections cures the defect. This defect, however, is not such as can be cured by amendment upon application for judgment. In *Chicago & Northwestern Railway Co. v. People*, 200 Ill. 141, 65 N. E. 705, we said: "Where the power to levy a tax is conferred by law, and is regularly exercised by the proper authorities in substantial conformity to the law, the court, upon proof of such fact, may permit the certificate of the levy to be amended on the hearing by changing the official designation of the officers, allowing the individual signatures to be substituted for the corporate name and correcting other like formal errors. *Spring Valley Coal Co. v. People*, 157 Ill. 543 [41 N. E. 874]; *Chicago & Alton Railroad Co. v. People*, 171 Ill. 544 [49 N. E. 489]; *Chicago & Northwestern Railway Co. v. People*, 183 Ill. 247 [55 N. E. 680]. But if the statute authorizing the levy of the tax has not, in fact, been followed and complied with, the levy cannot be made valid by amendments of certificates or proceedings, because that would not be a correction of a mere irregularity, but would be an attempt to make valid a levy at the time of the amendment. *People v. Smith*, 149 Ill. 549 [36 N. E. 971]; *Chicago & Northwestern Railway Co. v. People*, 184 Ill. 240 [56 N. E. 367]. There must be a valid levy, which is defective in matters merely formal, to authorize an amendment."

The existence of a contingency is an indispensable prerequisite of an additional levy under section 14 of the road and bridge

act, and the statute requires that such contingency be stated in the certificate levying the same. *People v. Elgin, Joliet & Eastern Railway Co.*, supra; *Toledo, St. Louis & Western Railroad Co. v. People*, 226 Ill. 537, 80 N. E. 1059. In the absence of a certificate by the highway commissioners showing a contingency, the board of town auditors and assessor have no authority to consent to an additional levy. Their consent enters into and is an indispensable part of a valid levy under said section 14, and if such consent has been given upon a certificate of the highway commissioners which does not show some contingency authorizing an additional levy, the consent is wholly ineffective and no valid levy can be predicated thereon. The board of town auditors and the assessor acted upon the original certificate. To permit that certificate to be amended upon application for judgment would result in sustaining the tax upon a certificate made by the highway commissioners which has never been before the board of town auditors and the assessor for consideration. The amendment was not the correction of a mere irregularity, but was an attempt to make valid the levy at the time of the amendment. The defect in the certificate was substantial and not merely formal, and the court erred in permitting the certificate to be amended and in overruling the objection to this tax.

The county board levied for all county purposes the sum of \$80,000, which included \$12,500 for "salary of the officers" and \$8,000 for "care of paupers." Appellant objected to that portion of the county tax levied for "salary of the officers" in excess of \$7,500 on the ground that the county board had no authority to levy a greater sum than \$7,500 for such purpose, and also objected to all that portion of the county tax levied for "care of paupers" on the ground that the county board had no authority to levy any tax for the care of paupers in Kankakee county. These objections were overruled by the court, and appellant contends that this action of the court was erroneous.

Appellant offered no evidence in support of its objection to the levy for "salary of the officers," but contends that a portion of the levy was for salaries of employees who do not come within the term "officers," and for salaries of officers who can only receive compensation out of the fees of their office. In the case of *People v. Kankakee & Southwestern Railroad Co.*, 237 Ill. 362, 86 N. E. 742, the same amount had been levied by the county board of Kankakee county for the year 1907 for the same purpose, and we there held that the purpose of this tax was sufficiently designated by the words "salaries of the officers"; that the taxpayer would understand therefrom that the levy was made to pay salaries payable out of the county treasury from money raised by general taxation, and that if the levy for such purpose was greater than it should be, he could then ob-

ject to the excess. The only means by which the court could determine, upon the hearing of objections, that this levy for "salary of the officers" was greater than it should be, was upon evidence introduced showing the salaries of those officers whose salaries are payable out of the county treasury from money raised by general taxation, as fixed by the county board. No evidence was introduced showing what salaries had been fixed for such officers by the county board. Appellant's argument on this branch of the case is based entirely upon the testimony of the county treasurer, introduced by appellee, showing various offices and employments, and the salary attached to each, according to a list which the witness testified was "a list of the officers paid by the county" which he had made. The most that this evidence can be said to prove is, that at some previous time the salaries mentioned by the witness had been paid by the county to the persons holding the positions specified in the list which he had made. It does not establish that those are the salaries, as fixed by the county board, of the officers of Kankakee county during the year for which the levy was made, or that the offices shown on the list were the only county offices, during such year, filled by persons whose salaries were payable out of the county treasury from money raised by general taxation. The evidence was therefore insufficient to sustain the objection to this portion of the county tax.

The objection to the item of \$8,000 levied for the "care of paupers" is the same objection that was considered by us at the present term in *People v. Cincinnati, Lafayette & Chicago Railway Co.*, 93 N. E. 421, and is there disposed of on a record identical with the record here, contrary to appellant's contention. That objection was properly overruled.

Appellee has assigned cross-errors questioning the action of the court in sustaining objections to that portion of the hard road taxes of the towns of Momence and Ganeer in excess of the rate of 60 cents on each \$100 valuation. The abstract shows that the court abated the hard road tax of the town of Momence in the sum of \$338.72 and the hard road tax of the town of Ganeer in the sum of \$276.02, and that appellee excepted to the action of the court, and this is all that is shown by the abstract with reference to these two taxes. Neither the objections, nor the grounds thereof, nor the reasons for the action of the court, appear from the abstract, and none of the evidence concerning these taxes is preserved; nor is it shown whether the taxes which were abated were all, or only a portion, of the hard roads taxes levied in those two towns. We cannot presume that the court erred. The error must be shown by the abstract furnished by ap-

pellant or by an additional abstract furnished by appellee. No additional abstract has been filed, and, as the matters complained of, do not appear from the abstract furnished by appellant, the cross-errors cannot be considered.

The judgment of the county court will be affirmed as to the town tax of the town of Ganeer, that portion of the county tax levied for "salary of the officers" and for "care of paupers," and the hard road taxes of the towns of Momence and Ganeer, and as to the road and bridge tax of the town of Limestone it will be reversed and the cause remanded, with directions to sustain the objections.

Reversed in part and remanded, with directions.

(248 Ill. 114)

PEOPLE ex rel. LEE v. KANKAKEE & S. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 10, 1911.)

1. TOWNS (§ 56*)—TAXATION—LEVY—RECORD OF TOWN MEETING—CLERICAL ERROR—EFFECT.

The use of the word "preceding," in the record of a town meeting showing the adoption of a motion that the supervisors be allowed a certain sum for use for town purposes during the preceding year, to be used for the purposes stated, was a clerical error, which will be disregarded, and does not affect the validity of a tax levied for the purposes stated, since the town meeting only had power to levy a tax for the succeeding year; it being permissible to have omitted such word altogether, or to have substituted the word "succeeding" therefore.

[Ed. Note.—For other cases, see *Towns*, Dec. Dig. § 56.*]

2. HIGHWAYS (§ 127*)—TAXATION—LEVY—PETITION—REQUIREMENTS—QUALIFICATIONS OF PETITIONER—PETITIONERS.

Under Hurd's Rev. St. 1908, c. 121, § 245, requiring the town clerk, upon the petition of 50 landowners who are legal voters of any township for the levy of a tax to construct and maintain hard roads, to give notice that a vote would be taken for or against levying a tax for that purpose, and requiring the petition to state the location and route of the roads and the rate per cent. and the number of years for which a tax should be levied, it is sufficient if the petition is in fact signed by the requisite number of qualified persons, and it need not show that the petitioners were landowners and legal voters of the town.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 127.*]

3. HIGHWAYS (§ 127*)—TAXATION—PURPOSE OF LEVY.

Under Hurd's Rev. St. 1908, c. 121, § 245, requiring the town clerk, upon the petition to him of 50 landowners for an election for that purpose, to give notice that a vote will be taken for or against levying a tax for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads, the petitioners may themselves determine the particular kind of hard road they wish to be voted upon, or may petition for a vote upon levying a tax for hard roads generally, leaving the kind of road to be determined by the highway commis-

sioners; but if the petition is for a vote upon a particular kind of hard road, a tax cannot be levied to construct any other kind of hard road than that voted for, so that, where the petition was for the levy of a tax to construct and maintain a macadam road, a levy made for the purpose of constructing and maintaining gravel, rock, macadam, or other hard road, made after an election stated in the notice of election to be for the same purpose, was invalid.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 127.*]

4. STATUTES (§ 245*) — CONSTRUCTION — TAX LAWS.

Laws authorizing municipal authorities, such as highway commissioners, to levy a tax, must be strictly construed and complied with, in order to sustain the exercise of the authority.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. § 245.*]

Appeal from Kankakee County Court; A. W. De Selm, Judge.

Proceeding by the People, on the relation of Dan G. Lee, Collector, against the Kankakee & Seneca Railroad Company. From the judgment, the railroad company appealed, and the People assign cross-errors. Affirmed in part, and reversed in part.

W. R. Hunter and Walter C. Schneider, for appellant. J. Bert Miller, State's Atty., for appellee.

PER CURIAM. This is an appeal by the Kankakee & Seneca Railroad Company from a judgment for taxes, and the people have assigned cross-errors.

The same objections were made to the county tax as in the case of *People v. Cincinnati, Lafayette & Chicago Railway Co.*, 93 N. E. 421, and for the reasons stated in the opinion in that case were properly overruled.

Objection was made to the town tax of the town of Essex, because the certificate of the town clerk upon which it was extended showed a levy of a gross sum for town purposes, and because no town tax was levied for the year 1909. The certificate was afterward amended so as to show a levy of \$350 for the payment of town officers and \$150 for the town poor. As amended, the certificate was sufficient; but the record of the town meeting which was introduced in evidence showed the adoption of a motion that "the supervisors be allowed \$500 for use for town purposes during the preceding year, \$350 to be used for payment of town officers and \$150 to be used for town poor." The use of the word "preceding" is manifestly a clerical mispension. It might have been omitted, or the word "succeeding" used. The meeting had no authority to make such levy for the past year, but had such authority for the coming. It is clear that it was the intention of the voters then present to exercise the power which they possessed of levying taxes for one year, and, as there was only one year to which their action could apply, the mispension

of the clerk who recorded their action was properly disregarded by the court, and the appellant's objection to the tax was rightly overruled.

Objection was made to the levy of a hard road tax in the town of Essex, because no petition for a vote for or against levying such tax, signed by the required number of qualified signers, was presented to the town clerk. The town meeting was held on April 6, 1909. The statute then in force provided that, upon the petition of 50 landowners who were legal voters of any township to the town clerk, he should, when giving notice of the next annual town meeting, also give notice that a vote would then be taken for or against levying a tax, not to exceed \$1 on each \$100 assessed valuation of all taxable property in the township, for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads. The petition was required to state the location and route of the proposed road or roads, not exceeding two, and the rate per cent, not exceeding \$1 on each \$100, and the number of years, not exceeding five, for which the tax should be levied. Hurd's Rev. St. 1908, p. 1873. It is objected to the petition that it does not state that the signers are landowners in the town and legal voters therein. The statute requires the petition to contain certain statements and to be signed by persons having certain qualifications. The fact that the signers possess the necessary qualifications is not required to be stated. If the petition is in fact signed by the requisite number of persons legally qualified, and otherwise complies with the statute, it is sufficient; and it is stipulated that the signers were in fact qualified.

It is further objected that the highway commissioners were not authorized to levy this tax, because the vote and levy did not follow the prayer of the petition. The statute authorizes a vote for or against levying a tax for the purpose of constructing and maintaining gravel, rock, macadam or other hard roads. The petition was for a vote upon the proposition to levy a tax to be used in constructing macadamized roads; the notice and election were for levying a tax for the purpose of constructing and maintaining gravel, rock, macadam, or other roads; and the levy is for the purpose of constructing and maintaining gravel, rock, macadam, or other hard roads. The statute authorizes a vote upon the question of levying a tax for hard roads upon a petition. The petitioners have the right to determine the kind of road they want voted upon—whether gravel, rock, macadam, or other hard road. They may, if they see fit, petition for a vote upon levying a tax for gravel, rock, macadam, or other hard road, leaving the character of the road to be determined by the highway commissioners;

but, if the petition is for a vote upon a particular kind of hard road, the vote must be had upon that proposition, and cannot be extended to other kinds of road. The requirements of notice and of the form of the ballot are in the alternative, and the notice and ballots should follow and agree with the petition. Laws which confer upon municipal authorities, as highway commissioners, the right to levy a tax, must be strictly construed, and their requirements must be strictly complied with, or the power will not be conferred. The petition here was for a tax to construct and maintain a macadam road. That question was not voted upon, and the levy was not made for that purpose. The objection to this tax should have been sustained.

The judgment will be affirmed as to the town tax of the town of Essex and the county tax, and will be reversed as to the hard road tax of the town of Essex.

Judgment affirmed in part.

(248 Ill. 113)

PEOPLE ex rel. LEE v. KANKAKEE & S. W. R. CO.

(Supreme Court of Illinois. Dec. 21, 1910.)

Appeal from Kankakee County Court; A. W. Deselm, Judge.

Proceedings by the People, on the relation of Dan G. Lee, against the Kankakee & Southwestern Railroad Company. From a judgment for relator, defendant appeals. Reversed and remanded, with directions.

W. R. Hunter and Walter C. Schneider, for appellant. J. Bert Miller, State's Atty., for appellee.

PER CURIAM. The legal questions and the facts in this case (except as to the amount of taxes) are identical with those involved in *People v. Kankakee & Seneca Railroad Co.*, 93 N. E. 773. The conclusions reached in that case must control here.

The judgment of the county court must therefore be reversed, and the cause remanded, with directions to enter judgment in accordance with the views set forth in that opinion.

Reversed and remanded, with directions.

(248 Ill. 224)

HOWARD v. BURKE et al.

(Supreme Court of Illinois. Dec. 21, 1910.)

Rehearing Denied Feb. 10, 1911.)

1. OFFICERS (§ 41*)—TENURE—"DE FACTO OFFICERS"—UNAUTHORIZED ASSUMPTION.

A mere claim to be a public officer and the exercise of the office will not constitute one an officer de facto, for there must be at least a fair color of title or acquiescence on the part of the public.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63; Dec. Dig. § 41.*]

2. OFFICERS (§ 39*)—TENURE—"DE FACTO OFFICERS."

A de facto officer is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 61; Dec. Dig. § 39.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1845-1851.]

3. OFFICERS (§ 41*)—TENURE—DE FACTO OFFICERS—"COLOR OF TITLE."

"Color of title" to an office is the authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1263-1273; vol. 8, p. 7606.]

4. OFFICERS (§ 42*)—DE FACTO OFFICERS—ACTING UNDER IRREGULAR ELECTION.

Where the members of a board of education irregularly elected were the only ones to assume the duties of office, and this assumption was acquiesced in by the public, such members are de facto officers.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 64; Dec. Dig. § 42.*]

5. OFFICERS (§ 42*)—DE FACTO OFFICERS—EXISTENCE OF DE JURE OFFICERS.

Where members of a board of education, irregularly elected, were the only ones to assume the duties of the office, and that assumption was acquiesced in by the public, the fact that there were de jure officers who failed to assume such duties will not prevent the others from being officers de facto.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 64; Dec. Dig. § 42.*]

6. TAXATION (§ 608*)—INJUNCTION.

The acts of de facto officers, so far as they affect third persons or the public, are, in the absence of fraud, as valid as those of officers de jure, so that a tax levied in due form by de facto officers will not be enjoined merely because they were not officers de jure.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 608.*]

7. STIPULATIONS (§ 18*)—TEMPORARY INJUNCTIONS—DAMAGES ON DISSOLUTION.

Where a stipulation was entered into on the dissolution of a temporary injunction that evidence, if offered, would have shown that the defendants were damaged to the extent of \$250 for solicitor's fees, this amount being awarded them as damages, plaintiff could not on appeal question the authority of the defendant to employ counsel.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 18.*]

8. INJUNCTION (§ 186*)—DISSOLUTION—DAMAGES—ATTORNEY'S FEES—EMPLOYMENT OF ATTORNEYS—EVIDENCE.

Evidence held to make a prima facie case of employment of attorneys to resist a suit for an injunction, so as to warrant an allowance to defendants of attorney's fees as damages on dissolution of the temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 399-405; Dec. Dig. § 186.*]

9. ATTORNEY AND CLIENT (§ 70*)—EMPLOYMENT—PRESUMPTION.

Where attorneys are shown to have been employed, it will be presumed that their employment was proper, until the contrary is shown.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. § 70.*]

10. INJUNCTION (§ 186*)—DISSOLUTION—DAMAGES—ATTORNEY'S FEES—EMPLOYMENT OF ATTORNEY.

In an action against county officers to enjoin the collection of a tax, there being no law forbidding the employment by defendants of counsel other than the state's attorney, the employment of such other counsel cannot be held illegal, so as to deprive the defendants of an

allowance of attorney's fees as damages on dissolution of the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 899-405; Dec. Dig. § 186.*]

Appeal from Circuit Court, Christian County; Thomas M. Jett, Judge.

Action by Patrick Howard against Henry J. Burke and others. From a decree for defendants, plaintiff appeals. Affirmed.

C. F. Mortimer and Hogan & Wallace, for appellant. E. S. Smith and A. D. Stevens, for appellees.

CARTER, J. Appellant filed this bill in the circuit court of Christian county praying for an injunction to restrain the collection of certain taxes levied for township high school purposes. The court, after a hearing, dissolved the temporary injunction and dismissed the bill, awarding \$250 damages against the complainant. From that order and decree this appeal has been prosecuted.

In April, 1909, a township high school for township 13 N., range 4 W., of the Third Principal meridian, lying partly in Sangamon and partly in Christian county, was established by a vote. No question is here urged as to the legality of that vote. May 3, 1909, the trustees of schools of that township met and decided to call an election for June 5 to choose a high school board. They instructed the township treasurer to post notices of election on May 24th, but named no polling place, deciding to allow Riddle and Davis, two of the trustees, time to investigate as to the proper place for holding the election. The treasurer prepared the notices and inserted as the place for election the town hall of Pawnee, a village situated in the northwest part of said township. Said town hall had been for many years used as the polling place for school elections in the district. May 21st the president of the board of trustees, McTaggart, caused these notices to be posted. A few days later Riddle and Davis held a meeting of the board and authorized notices for an election on June 5th, naming as the polling place the Hopewell schoolhouse, some three or four miles from Pawnee. These notices were also posted. The evidence tends to show that the schoolhouse was much nearer the center of the township than the town hall. Elections were held on the day in question in both places, and five members of the high school board were declared elected at the town hall meeting, each receiving 445 votes, and five other candidates each received 253 or 254 votes at the Hopewell schoolhouse election. All the voters at the town hall voted for one set of candidates, and all the voters but one at the schoolhouse voted for the other set. Certificates of election were filed with the township treasurer as to both of these boards. On June 14th the Hopewell board met and

determined by lot the term of office of its members and elected a president and secretary; the certificate of such election being filed with the township treasurer. No further meetings appear to have been held by that board, nor any other business transacted. Several of its members testified that they did not want to do anything until they found how the court proceedings came out. The board of education elected at the town hall meeting met on June 8th, determined by lot the tenure of office of its members, elected a president and secretary, and later filed a certificate of such election with the township treasurer. On the same day it resolved to erect a high school building, and hold an election to decide on the questions of issuing bonds and the selection of a site. Notices were thereafter posted as to such election, and it was held on June 19th, the vote being 226 for and 6 against the issuance of the bonds, and a site was also selected by the voters at the same election. July 31st this board held another meeting, and resolved that the sum of \$5,000 be levied as a tax for high school purposes. August 7th the same board employed a principal for nine months of school, and on September 4th accepted a proposition from the district board to furnish the high school board with a room, heat, and janitor service for nine months for \$500. October 2d an assistant principal was employed, and from time to time other orders were entered and payments authorized. This high school seems to have been in actual operation under the management of this board elected at the town hall meeting until about the time of the judgment of ouster in the quo warranto proceedings. June 18, 1909, quo warranto proceedings were instituted in the circuit court of Sangamon county against the persons composing the so-called town hall board, and a judgment of ouster was entered against them January 14, 1910, on the ground that the notices of election were illegal because the trustees had not designated the town hall as the place of election. As stated above, the town hall board, at a meeting held on July 31, 1909, passed a resolution that the sum of \$5,000 should be levied against the taxable property of the district for high school purposes, and a certificate of levy was thereafter filed with the township treasurer and with the clerks of Sangamon and Christian counties. The bill in the case at bar sought to enjoin the clerks and county treasurers of both these counties and all the members of the two high school boards from taking any steps toward the collection of said tax. On the hearing the court found that the town hall board was exercising its duties and acting as a high school board of education de facto when it made such levy, and that the Hopewell board was not at that time exercising the duties of the high school

board, and dissolved the temporary injunction.

The chief question in dispute in this case is whether the so-called town hall high school board was a de facto board at the time the resolution to levy such taxes was passed. It is conceded by both sides that on the record in this case the Hopewell board was the de jure board on that date. Counsel for appellant insist that the Hopewell board on that date was also the de facto board, and that therefore the town hall board could not have been a de facto board; that two persons cannot be officers de facto in the same office at the same time, as there cannot be two incumbents at once. *State v. Blossom*, 19 Nev. 312, 10 Pac. 430; *Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Throop on Public Officers*, § 641.

A mere claim to be a public officer and exercising the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be presumed to act as an officer either by right of appointment or election. *Brown v. Lunt*, 37 Me. 423. A de facto officer was defined by Lord. Ellenborough as "one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law." *Rex v. Bedford Level*, 6 East, 356; *Barlow v. Standford*, 82 Ill. 298; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; 8 Am. & Eng. Ency. of Law (2d Ed.) p. 781, and cases cited. Color of title to an office has been defined to be "that which in appearance is title but which in reality is no title." *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280; 8 Am. & Eng. Ency. of Law (2d Ed.) 794. Color of authority (which is usually considered synonymous with color of title) to an office is held to be authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer. *McCrary on Elections* (4th Ed.) § 253; *State v. Oates*, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912; *People v. Lieb*, 85 Ill. 484. The board of education elected at the town hall meeting was the only board of education that assumed or attempted to transact any business for said township high school district up to and after the time of making the levy in this case and the beginning of this proceeding. Its members were not mere volunteers. They were elected at an election held under notice, at which they received a much larger vote than was cast for the Hopewell board of education. They had a certificate of election from the proper officials if a proper notice for the town hall election had been given. We are disposed to hold that under the decisions they had such color of authority to act as would make them de facto officers under the circumstances of this case. It must be conceded on this record that there existed de jure of-

fices, as to said high school board, to be filled, and that the Hopewell board were the de jure officers. While there cannot be a de facto officer if a de jure officer is exercising the functions of the office in question (*McCahon v. Commissioners*, 8 Kan. 437; *Powers v. Commonwealth*, 110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L. R. A. 245; 29 Cyc. 1392), such was not the case here. The Hopewell school board, after it was organized, did not attempt to act as a board. The so-called town hall board, from the time of their election until they were ousted in the quo warranto proceedings, assumed to act as such board of education. They were the only officials that did attempt to so act. They were in actual possession of the office. Their possession was acquiesced in and acknowledged by the public to such an extent that, so far as the public and third persons are concerned, they must be held to be the de facto board of education at the time this levy was made. *City of Chicago v. Burke*, 226 Ill. 191, 80 N. E. 720; *Samuels v. Drainage Com'rs*, 125 Ill. 536, 17 N. E. 829; *Pritchett v. People*, 1 Gilman, 525; *Attorney General v. Ocker*, 138 Mass. 214; 29 Cyc. 1396, and cases cited.

Judicial decisions are practically a unit in holding that the acts of officers de facto, so far as they affect third parties or the public, in the absence of fraud, are as valid as those of officers de jure. This is a wise and salutary rule. This being so, equity will not enjoin the collection of a tax levied in proper form by officials who are acting as de facto officers. *Schofield v. Watkins*, 22 Ill. 66; *Merritt v. Farris*, 22 Ill. 303; *Metz v. Anderson*, 23 Ill. 463, 76 Am. Dec. 704; *Union Trust Co. v. Weber*, 96 Ill. 346; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61.

It is further urged that the damages allowed of \$250 for solicitor's fees cannot be sustained because there is no evidence preserved in the record showing that such fees were reasonable, or should have been allowed. The temporary injunction was dissolved on hearing. Suggestions in writing were filed stating the nature and amount of the damages claimed. Instead of hearing evidence as to the amount of the damages, a stipulation was filed by which it was agreed that "the evidence, if heard, would show that the damages for the defendants, by reason of solicitor's fees, etc., would be in the sum of \$250." The authorities cited by counsel for appellant, such as *Hamilton v. Stewart*, 59 Ill. 330, to the effect that under the practice in our courts a party should not be mulcted in damages until he shall first have had an opportunity to be heard, in his own defense after the nature of the demand has been stated in court, are not in point. The reason for this rule does not apply when there is a stipulation in the record which waived the hearing and the preservation of the evidence on the question in dispute.

It is further insisted that the record does not show the employment by the defendants of the solicitors who were allowed fees in this case. The record shows that these solicitors appeared for the defendants in the injunction suit, in the preparation of the pleadings, the taking of evidence, and the arguing of the motion for dissolution of the injunction, and that the injunction was dissolved. This work was for the benefit of the defendants. The court, in making the order allowing defendants' solicitors' fees, specifically named the counsel here in question as the solicitors for defendants. These facts are prima facie proof that these solicitors were employed by the defendants, and it will be presumed that they were properly employed until the contrary is shown. It is also insisted that some of these defendants were county officials, and, as it was the duty of the state's attorney to appear for them, it was not lawful to allow solicitors' fees to counsel here in question. While it is true the statute makes it the duty of the state's attorney to appear for county officials, there is no law precluding the employment of other counsel. On this record the services of these solicitors appear to have been proper and necessary, and the court did not err in allowing the fees in question.

We have considered all the questions raised in the record, and find that the decree of the circuit court must be affirmed.

Decree affirmed.

(248 Ill. 141)

PEOPLE ex rel. EDGAR v. NATIONAL BOX CO.

(Supreme Court of Illinois. Dec. 21, 1910.

Rehearing Denied Feb. 9, 1911.)

1. CONSTITUTIONAL LAW (§ 284*)—ASSESSMENT OF OMITTED PROPERTY—STATUTES—NOTICE—"THIS"—"PRECEDING."

Revenue Act (Hurd's Rev. St. 1909, c. 120) § 276, declares that, if any property shall have been omitted in the assessment of any year or number of years, the same, when discovered, shall be listed and assessed by the assessors. Section 277 provides that, if the tax on property liable to taxation has been prevented from being collected for any year, it shall be added to the tax for any subsequent year. Section 278 declares that no such charge for tax and interest for previous years as provided for in the "preceding" section shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was first ascertained, provided that the owner of the property, if known, assessed under "this" and the "preceding" section shall be notified by the assessor or clerk as the case may require. *Held*, that the word "this" in section 278 did not refer to an assessment under that section, which contained no provision for assessment, but referred to section 277, and the word "preceding" to section 276, and, since the assessment which before the revenue act would have been made under section 276 by the assessor is now made by the board of review, the notice required by the provision of section 278 must be given prior to the assessment of omitted property by the

board of review, so that the statute is not unconstitutional as failing to provide for due process of law in the assessment of such omitted property.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 893-896; Dec. Dig. § 284.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5493-5494; vol. 8, pp. 6961-6962.]

2. TAXATION (§ 319*)—ASSESSMENT—OPPORTUNITY TO BE HEARD.

An assessment for taxation, made without notice or opportunity for hearing, which was conclusive on the taxpayer, was invalid.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 319.*]

3. TAXATION (§ 119*)—REVENUE ACT—INSTRUCTIONS—CORPORATE STOCK.

Revenue Act (Laws 1871-72, p. 1) § 1, as amended by Laws 1906, p. 353, provides that the property named in the section shall be assessed and taxed except so much thereof as may be in the act exempted, refers to all real and personal property in the state; second, to all moneys, credits, bonds, or stocks and other investments, shares of stock of incorporated companies and associations, and all other personal property; and, fourth, to the capital stock of companies and associations incorporated under the laws of the state, except companies organized for purely manufacturing and mercantile purposes, etc. *Held*, that the capital stock of a corporation is taxable, to it a tax on such stock being regarded as a tax on property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 215; Dec. Dig. § 119.*]

4. TAXATION (§ 194*)—CORPORATIONS—TAXATION OF STOCK—EXEMPTIONS—VALIDITY.

Revenue Act (Laws 1871-72, p. 1) § 1, as amended by Laws 1906, p. 353, subd. 4, provides that corporations incorporated under the laws of Illinois, except corporations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for mining and sale of coal, or for printing or for the publishing of newspapers, or for the improvement or breeding of stock, shall be taxable on their capital stock. *Held*, that the attempted exemption of corporations of the character enumerated from the assessment of their capital stock was in violation of the equality rule established by Const. art. 9, § 1, and was therefore invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 310, 311; Dec. Dig. § 194.*]

5. TAXATION (§ 467*)—CORPORATE STOCK—ASSESSMENTS—BOARD OF REVIEW—DUTY.

It is the duty of the local assessor to assess all personal property not specially required to be assessed by the State Board of Equalization, and Hurd's Rev. St. 1909, c. 120, § 108, prohibits the State Board of Equalization from assessing the capital stock of corporations organized for manufacturing purposes. *Held* that, where the capital stock of such a corporation has escaped taxation for several years, it is the duty of the county board of review to assess such stock for such years as omitted property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 831-836; Dec. Dig. § 467.*]

Appeal from Circuit Court, Cook County; Jesse A. Baldwin, Judge.

Mandamus by the People, on the relation of Maxwell Edgar, to compel the Board of Review of Cook County to value and assess the capital stock of the National Box Company for taxes for the years 1899 to 1909,

inclusive. Judgment for relator, and the box company appeals. Affirmed.

Barker, Church & Shepard and M. W. Borders (Frank L. Shepard, of counsel), for appellant. Maxwell Edgar (Ossian Cameron, of counsel), for appellee.

DUNN, J. This appeal is from a judgment of the circuit court of Cook county awarding a peremptory writ of mandamus against the board of review of that county commanding it to value and assess the capital stock of the appellant, the National Box Company, for each of the years from 1899 to 1909, inclusive. The board of review answered the petition, admitting that the appellant is a corporation organized for purely manufacturing purposes, that it was the duty of the board to value and assess the capital stock of the appellant in the years mentioned, and that it had not done so. The appellant demurred to the petition, and, upon its demurrer being overruled, stood by it, and judgment was rendered upon the petition and answer of the board of review.

The first objection made to the judgment is that the statute authorizing the assessment, when discovered, of any property which may have been omitted in the assessment of any year or number of years, is in violation of the constitutional requirement of due process of law because it does not provide for any notice to the owner of the property or person to be assessed. Section 276 of the revenue act (Hurd's Rev. St. 1909, c. 120) directs that, if any property shall have been omitted in the assessment of any year or number of years, the same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. Section 277 provides that, if the tax or assessment on property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year. In neither section is mention made of any notice. Section 278 is as follows: "No such charge for tax and interest for previous years, as provided for in the preceding section, shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was first ascertained: Provided, that the owner of property, if known, assessed under this and the preceding section, shall be notified by the assessor or clerk, as the case may require."

Section 278 contains no provision for the assessment of property. It only fixes a limitation for the extension of the tax which has not been collected in previous years by reason of any erroneous proceeding or other cause, "as provided in the preceding section" (277). The proviso then declares that "the owner of property, if known, assessed

under this and the preceding section, shall be notified by the assessor or clerk as the case may require." The word "this," as here used, applies to section 277, and the word "preceding" to the section before 277—that is, section 276. "This" cannot refer to section 278 because it is used in the phrase "assessed under this section," while there can be no assessment under section 278, which provides for none. "This" is said in Webster's New International Dictionary to be "a demonstrative word referring particularly to what is present or near in place, time or thought, or to something just mentioned or to be mentioned." Section 277 had just been mentioned, and was near in thought when this proviso was added to section 278, and was the section referred to as "this" section. Expressing fully the idea intended to be conveyed by the proviso, section 278 would read as follows: "No such charge for tax or interest for previous years, as provided in the preceding section, shall be made against any property prior to the date of the ownership of the person owning such property at the time the liability for such omitted tax was first ascertained: Provided, that the owner of property, if known, assessed under the section which has just been mentioned and the preceding section, shall be notified by the assessor or clerk, as the case may require." No notice could possibly be given or required under section 278 because no person could be assessed under that section. Nor could the case, under any circumstances, require notice to be given by the assessor under section 277, because that section has nothing to do with the assessor, and he has no duties to perform under it. It deals only with a tax which had been already levied, and had not, for some reason, been collected. The assessor's duties arise under section 276 only, and the notice mentioned in the proviso to section 278 applies to sections 276 and 277. The assessment which before the revenue act of 1898 would have been made under section 276 by the assessor is since that act authorized to be made by the board of review (*People v. Sellars*, 179 Ill. 170, 53 N. E. 545; *Barkley v. Dale*, 213 Ill. 614, 73 N. E. 325), and the notice required to be given by the assessor must be given by the board of review. An assessment, made without notice or opportunity for hearing, which is conclusive on the taxpayer, would be invalid. *Carney v. People*, 210 Ill. 434, 71 N. E. 365; *Central of Georgia Railway Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134. The objection that the statute, though requiring notice, does not provide for a hearing, cannot prevail. The right to a hearing is constitutional, and the statute requiring notice makes it effective.

It is contended that the law does not require an assessment of the capital stock of the appellant as such, but that corporations organized for purely manufacturing and mercantile purposes, or for either of such pur-

poses, or for the mining and sale of coal, or for the improving and breeding of stock, are to be assessed only as individuals are assessed upon specific items of property, and that the assessment of the actual property of such corporations by items is all that is required.

Section 1 of the revenue act (Laws 1871-72, p. 1), as amended in 1905 (Laws 1905, p. 353), is as follows: "That the property named in this section shall be assessed and taxed, except so much thereof as may be, in this act exempted: First, all real and personal property in this state. Second, all moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu, to or from this state, used, held, owned or controlled by persons residing in this state. Third, the shares of capital stock of banks and banking companies doing business in this state. Fourth, the capital stock of companies and associations incorporated under the laws of this state, except companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing of newspapers, or for the improving and breeding of stock."

Although the words "all real and personal property in this state" may be regarded as broad enough to cover all property of every character, tangible or intangible, the Legislature saw fit to declare expressly that the capital stock of companies and associations incorporated under the laws of this state shall be assessed and taxed. We have held that the capital stock of a corporation is taxable, and that a tax upon capital stock is a tax upon property. *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561; *The Hub v. Hanberg*, 211 Ill. 43, 71 N. E. 828.

It is insisted that the effect of the exception to the fourth clause of section 1 is to classify the corporations of the state so as to relieve those mentioned in the exception from the assessment of their capital stock, as such, though it is said that this is not an exemption, and it is sought to be justified under the recognized right of the Legislature to provide by a general law, uniform as to the classes upon which it operates, for the assessment of the capital stock of different classes of corporations by different assessing bodies. But that principle does not apply here. This section does not attempt to classify corporations for the purpose of the assessment of their capital stock, but enacts that the capital stock of some corporations shall be assessed and of others shall not. The Legislature recognizes, as the courts have recognized, the capital stock of corporations as property and has provided for its

assessment, as it has the power to do. It has not the power, however, to exempt from the rule of equality established by section 1 of article 9 of the Constitution, the property of any corporation, no matter for what purpose organized, except as authorized by section 3 of the same article. The attempted exemption of corporations of the character enumerated from the assessment of their capital stock is in violation of the Constitution and is ineffectual. *Consolidated Coal Co. v. Miller*, 236 Ill. 149, 86 N. E. 205.

The statute expressly prohibits the State Board of Equalization from assessing the capital stock of corporations of the character of appellant. *Hurd's Rev. St. 1909, c. 120, § 108, p. 1844*. It is the duty of the local assessor to assess all personal property not specifically required to be assessed by the State Board of Equalization. *Knopf v. Lake Street Elevated Railroad Co.*, 197 Ill. 212, 64 N. E. 840. It was clearly the duty of the board of review to assess the omitted property. *People v. Sellars, supra*; *Stevens v. Henry County*, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. (N. S.) 339.

The judgment of the circuit court was right, and it will be affirmed.

Judgment affirmed.

(242 Ill. 195)

KARKOWSKI v. LA SALLE COUNTY CARBON COAL CO.

(Supreme Court of Illinois. Dec. 21, 1910.

Rehearing Denied Feb. 10, 1911.)

1. MASTER AND SERVANT (§ 118*)—INJURIES TO SERVANT—MINES—ENTRY-DOORS—ATTENDANT—"PRINCIPAL DOORWAY."

Mining Act (*Hurd's Rev. St. 1909, c. 93*) § 19, cl. "g" requires the keeping of an attendant at all principal doorways through which cars are hauled in a mine, to open and close the doors when cars are passing to and from the workings. *Held*, that the term "principal doorway" is not limited to ways controlling the main current of air before it is subdivided, but extends to each doorway which is essential to the ventilation of any portion of the face of the coal where the miners are at work, and which is in frequent, regular and habitual use for hauling cars while coal is being mined.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 118.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for injuries to a driver in a mine by defendant's alleged failure to keep an attendant at a doorway leading to one of the entries, whether such doors were principal doorways, within Mining Act (*Hurd's Rev. St. 1909, c. 93*) § 19, cl. "g," requiring an attendant to be kept at all principal doorways through which cars are hauled, is a question of fact.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.*]

3. EVIDENCE (§ 472*)—CONCLUSIONS—OPINION.

On an issue as to whether a doorway in a mine was a principal doorway, it was improper for the court to permit witnesses to state wheth-

er it was not a principal doorway to that part of the mine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

4. APPEAL AND ERROR (§ 1050*)—EVIDENCE—PREJUDICE.

Where there was no conflict in the testimony or room for difference of opinion, on an issue as to whether a doorway in a mine was a principal doorway, defendant was not injured by the court's erroneous admission of opinions of certain witnesses on such subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160, 4166; Dec. Dig. § 1050.*]

5. MASTER AND SERVANT (§ 98*)—INJURIES TO SERVANT—DOORWAYS OF MINES—KNOWLEDGE OF DEFECTS.

Where the operator of a mine was acquainted with all the facts, and was charged with knowledge that a door leading to a certain entry was necessary for the ventilation of a portion of the face of the coal where miners were at work, it was estopped to claim that it was mistaken as to the law, and that its failure to provide a trapper for such door as required by Mining Act (Hurd's Rev. St. 1909, c. 93) § 19, cl. "f," was not willful.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 161; Dec. Dig. § 98.*]

6. TRIAL (§ 293*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS—CORRECTION BY OTHER INSTRUCTIONS.

A driver in a mine was injured by defendant's failure to maintain a trapper at the principal doorway at one of the main entries. The court charged that at all such doorways an attendant was required, and that although the jury might believe that before and at the time of the occurrence plaintiff was negligent in not refusing to drive through the doorway, or in not quitting so as to avoid having to pass through the doorway in question, or that at the time of the occurrence he was not exercising ordinary care for his safety, nevertheless if he was injured as alleged, and such injury was caused by defendant's willful failure to comply with the provisions of the law, he was entitled to recover. The court further charged that the jury should regard the instructions as a connecting series and apply them to the facts as a whole, and then in three separate instructions declared that, if the doorway in question was not a principal doorway, the law did not require an attendant, and they should find defendant not guilty. Held that, though the first instruction might be misleading, its misleading tendency was corrected by those that followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 293.*]

7. MASTER AND SERVANT (§ 291*)—INJURIES TO MINER—STATUTORY REQUIREMENTS—NEGLECT.

Where an action for injuries to a miner was founded on the master's failure to provide a trapper for a doorway leading to an entry in a mine, as required by Mining Act (Hurd's Rev. St. 1909, c. 93) § 19, cl. "f," and not on defendant's negligence, a request to charge as to the burden of proof of negligence was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

8. TRIAL (§ 219*)—INSTRUCTIONS—DEFINITIONS.

A request to charge defining a term was properly refused, where the definition would have been of no value to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 489, 512; Dec. Dig. § 219.*]

Error to Appellate Court, Second District, on Appeal from Circuit Court, La Salle County; Edgar Eldredge, Judge.

Action by John Karkowski against the La Salle County Carbon Coal Company. Judgment for plaintiff affirmed by the Appellate Court, and defendant brings error. Affirmed.

McDougall, Chapman & Bayne and Walter A. Panneck, for plaintiff in error. Duncan, Doyle & O'Connor, for defendant in error.

DUNN, J. The defendant in error recovered a judgment against the plaintiff in error, which was affirmed by the Appellate Court for the Second district, and the record has been brought here by writ of certiorari for review.

The cause of action was for personal injuries received in the coal mine of the plaintiff in error, and was based upon its alleged willful failure to have an attendant at a certain principal doorway in the mine for the purpose of opening and closing the door, whereby the defendant in error, while passing along the entry in the discharge of his duties, was injured. The defendant in error, a driver in the mine, was driving a trip of loaded cars through the entry. He went down an incline toward the door, which the mule was expected to open by bumping with its head. The door, however, failed to open, and the loaded cars came down against the mule, which turned sideways in the entry, catching and crushing the defendant in error. The mule struggled and finally kicked the door open. The defendant fell and was caught under the wheels and received serious injuries. The principal controversy at the trial arose over the question whether the doorway was a principal doorway at which a trapper was required.

It is insisted that the court erred in not directing a verdict for the defendant, in the admission of evidence and in giving and refusing instructions.

Some description of the mine is necessary to an understanding of the case. Extending east and west from the bottom of the hoisting shaft are two main entries, known as the "main east" and "main west." About 600 feet east of the hoisting shaft an entry known as the "main south" is turned off of the main east entry, and just east of this point in the main east entry are double doors, whose office is to deflect the current of air into the main south entry. The current is then carried along the main south entry to the face of the coal, being prevented from going up the side entries off the main south by various doors and sheets. When the air reaches the face of the coal it separates, part going to the east and part to the west, and after passing around the face returns to the shaft through the return airways. The main north entry is turned off the main west about 118 feet west of the

hoisting shaft, and just beyond it are doors which deflect the air into the main north entry. About 760 feet north of the main west entry the third west is turned off the main north entry, and about 2,785 feet from the main north the seventh north is turned off the third west, and in this seventh north entry, 162 feet from the third west, is the door at which the defendant in error was injured. The effect of this door was to deflect the current of air in the third west entry and to send it around the face of the coal, where miners were at work, for several hundred feet before it reached the return airway. The mine is ventilated by means of a fan on the surface, which draws the air up in the air shaft, with which the return airways in the mine are connected. This causes air to pass down the hoisting shaft to take the place of that drawn out. The amount of air which passes down the hoisting shaft is about 50,000 cubic feet a minute. The current divides at the bottom, going to the east and the west, and by means of the doors is directed to the different parts of the mine. The amount of air passing up the third west entry is about 3,500 cubic feet a minute.

Clause "f" of section 19 of the mining act (Hurd's Rev. St. 1909, c. 93) provides that at all principal doorways through which cars are hauled an attendant shall be employed for the purpose of opening and closing said doors when trips of cars are passing to and from the workings, and section 33 gives a right of action for any injury occasioned by a willful failure to comply with any of the provisions of the act. We have held that while the principal purpose of section 19 is to provide for the ventilation of the mine, the requirement of an attendant at all principal doorways is not designed solely for protection against injuries arising from improper ventilation, but also to secure the safety of drivers from dangers resulting from the existence of the doors. *Himrod Coal Co. v. Stevens*, 203 Ill. 115, 67 N. E. 389; *Madison Coal Co. v. Hayes*, 215 Ill. 625, 74 N. E. 755. We also held that it was a question of fact whether a particular doorway was a principal doorway. The plaintiff in error contends that the principal doorways are only those which control the main current of air before it has been subdivided. Under this construction only the doorways east and west of the hoisting shaft which direct the current to the north and south main entries would be regarded as principal doorways. That the meaning of the term is not thus restricted is manifest from the cases cited. In the *Stevens Case* the doorway was in a cross-cut between the third and fourth parallel entries turned off the main entry and separated by a wall of coal about 20 feet thick, and its purpose was to force the air further up the third entry to another cross-cut provided to take it into the upper part of the fourth entry. It did not control the main current and served only a small

portion of the mine. The same may be said of the doorway in the *Hayes Case*. Without attempting a definition of the term "principal doorways," it may be said that any doorway is a principal doorway, within the meaning of the act, which is essential to the ventilation of any portion of the face of the coal where miners are at work, and which is in frequent, regular, and habitual use for the hauling of cars while coal is being mined.

Opinions of many witnesses on both sides were permitted to be given to the jury as to whether this was a principal doorway. On cross-examination of the witnesses for the plaintiff in error the defendant in error was permitted to ask them if this was not the principal doorway for that part of the mine, and what doorway first guided the air current on the side of the mine where the defendant in error was injured. It is insisted that there was error in this. Whether or not the doorway was a principal doorway was a question of fact, to be determined by the jury from the office it performed, and not from the opinions of witnesses. It was proper to show the quantity of the air current and the various doors by which it was guided, including the door in question. It was not proper to ask a witness whether this was a principal doorway, for that was a fact to be determined by the jury from the evidence, under the instructions of the court.

It is insisted that there was no willful violation of the statute because the plaintiff in error in good faith believed the doorway was not a principal doorway. The plaintiff in error was, however, acquainted with all the facts. It was charged with knowledge that the door was necessary for the ventilation of a portion of the face of the coal where miners were at work. It cannot be heard to say that it was mistaken as to the law, and its failure to provide a trapper under such circumstances must be regarded as willful.

The court, at the request of the plaintiff, gave the following instruction to the jury: "At the time in question there was in force in this state a provision of law in reference to coal mines in words as follows: 'At all principal doorways through which cars are hauled an attendant shall be employed for the purpose of opening and closing said doors when trips of cars are passing to and from the workings,' and although you may believe, from the evidence, that before and at the time of the occurrence in question the plaintiff was negligent in not refusing to drive his trip through the doorway in question, or in not quitting the employment so as to avoid having to pass through the doorway in question, or that at the time of the occurrence in question he was not exercising ordinary care for his safety, nevertheless, if you believe, from the evidence, that he was injured at the time and place in question as alleged in the declaration and thereby sustained damages as stated in the declaration, and that said injury and damage were occasioned by the

willful failure on the part of the defendant to comply with the foregoing provision of law above set forth in this instruction, then you should find the defendant guilty and assess the plaintiff's damages in the matter stated in these instructions."

"The willful failure on the part of the defendant to comply with the foregoing provision of law above set forth in this instruction," refers to a failure to furnish an attendant at "all principal doorways," and the other instructions make the meaning clear, so that the jury could not have been misled. They were told that they should regard the instructions as a connected series, and apply them to the facts as a whole, and not separate in their minds any instruction from the others. They were then told, in three separate instructions asked by the plaintiff in error, that if the doorway in question was not a principal doorway the law would not require an attendant at such door, and the jury should find the defendant not guilty; that the defendant was not required to keep a trapper at the doorway at or near which the plaintiff was injured unless the jury believe, from the greater weight of the evidence, that the doorway in question was a principal doorway, and that before they could find a verdict for the plaintiff they must believe, from a preponderance of the evidence, that the doorway at or near which he was injured was a principal doorway. With these instructions, the jury could not fail to understand that the vital question in the case was whether or not the doorway in question was a principal doorway and that that question was submitted to them for determination.

Instruction 32 was properly refused because it referred to the burden of proof as to negligence when the cause of action was not founded on negligence, as the jury were told in the first instruction given them at the request of the plaintiff in error.

Instruction 33 stated that the word "principal" means a thing of first or prime importance. This information would have been of no value to the jury in determining the issue.

Instruction 34 was based on the theory that principal doorways are concerned only with the main current of air and instruction 36 on the theory of the good faith of plaintiff in error. Both were properly refused.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(248 Ill. 187)

PEOPLE ex rel. BANCROFT et al. v. LEASE et al.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 9, 1911.)

1. QUO WARRANTO (§ 43*)—FILING OF INFORMATION—DISCRETION OF COURT.

On a petition for leave to file an information in the nature of quo warranto, the court

in its discretion may enter a rule against defendant to show cause why an information shall not be filed, or it may act on the petition ex parte, and, if satisfied that there is probable cause, may allow the filing of the information.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 35, 36; Dec. Dig. § 43.*]

2. QUO WARRANTO (§ 62*)—DISCRETION OF TRIAL COURT—FILING OF INFORMATION IN QUO WARRANTO—REVIEW.

The discretion of the trial court in allowing the filing of an information in the nature of quo warranto, without any evidence other than the petition, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 73; Dec. Dig. § 62.*]

3. QUO WARRANTO (§ 43*)—FILING OF INFORMATION—DUTY OF COURT.

Where the petition for leave to file an information in the nature of quo warranto shows probable ground for the proceeding, leave should be given to file the information, unless good cause is shown for refusing it.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 35, 36; Dec. Dig. § 43.*]

4. MUNICIPAL CORPORATIONS (§ 7*)—EXISTENCE—POWERS.

Two municipalities cannot exercise jurisdiction over the same territory for the same purpose at the same time.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 13; Dec. Dig. § 7.*]

5. DRAINS (§ 15*)—DRAINAGE DISTRICTS—VALIDITY OF ORGANIZATION.

A drainage district cannot be organized out of territory included in a drainage district already organized.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 15.*]

6. DRAINS (§ 18*)—CREATION OF DISTRICTS—POWERS.

A drainage district organized under the levee act (Hurd's Rev. St. 1909, c. 42) derives its powers from the statute, and not from the court creating it; and the court can merely ascertain whether the requirements of the statute as to the organization of the district are complied with, and may not add to nor take from the powers of the district; and, regardless of the petition for the organization of the district, or the special character of the work in immediate contemplation, a drainage district under the levee act, authorized to carry out the work originally reported and confirmed, may construct additional drains, if necessary, for more complete drainage of particular tracts, as authorized by section 59 of the act.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 18.*]

7. DRAINS (§ 15*)—CREATION OF DISTRICTS—POWERS.

A drainage district was organized for the sole and exclusive purpose of repairing and maintaining a levee and improving and caring for a stream. Subsequently another district within the same territory was organized for the sole purpose of improving and caring for another creek within the territory. *Held*, that the two districts could not exist within the same territory, for the first district had, under Levee Act (Hurd's Rev. St. 1909, c. 42) § 59, full authority over the territory within the district, to carry out the work to drain the lands therein, and the organization of the second district was invalid.

[Ed. Note.—For other cases, see Drains, Dec. Dig. § 15.*]

8. QUO WARRANTO (§ 6*)—NATURE OF REMEDY—DISCRETION OF COURT.

The remedy by information in the nature of quo warranto is not a matter of absolute right, but is a subject for the exercise of a

sound judicial discretion; and considerations of public interest or convenience, as well as unreasonable delay or acquiescence, will justify a refusal to grant leave to file an information or to proceed to judgment.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 7; Dec. Dig. § 6.*]

9. QUO WARRANTO (§ 29*)—NATURE OF REMEDY—DISCRETION OF COURT.

A petition for leave to file an information in the nature of quo warranto, to test the right to the office of commissioners of a drainage district, filed about five months after the organization of the district, and before any corporate action was attempted, will not be denied on the ground of considerations of public interest or convenience, or unreasonable delay, or acquiescence in the organization of the district.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. §§ 31-33; Dec. Dig. § 29.*]

Error to Circuit Court, Pike County; Harry Higbee, Judge.

Quo warranto by the People, on the relation of Almon C. Bancroft and others, against W. H. Lease and others, to test the right of defendants to the office of commissioners of a drainage district. There was a judgment of ouster, and defendants bring error. Affirmed.

William Mumford and Edward Doocy, for plaintiffs in error. George C. Weaver, State's Atty. (Williams & Williams and Anderson & Matthews, of counsel), for defendants in error.

DUNN, J. The state's attorney of Pike county filed in the circuit court an information in the nature of a quo warranto, charging the plaintiffs in error with usurping and executing, without lawful authority, the office of commissioners of the McCraney Creek drainage and levee district, in said county. The plaintiffs in error filed a plea of justification, the people replied, and the plaintiffs in error filed a rejoinder, which was demurred to. The court sustained the demurrer, and, the plaintiffs in error electing to stand by their rejoinder, entered a judgment of ouster against them, to reverse which this writ of error is prosecuted.

The plea set out in detail the various proceedings in the county court of Pike county, under the levee act (Hurd's Rev. St. 1909, c. 42), by virtue of which the McCraney Creek drainage and levee district was organized and the plaintiffs in error became the commissioners of the district. The replication to this plea alleged that the Sny Island Levee drainage district was organized in 1880, and has been since exercising the functions of a corporation organized for agricultural and sanitary purposes under the levee act; that it comprises about 110,000 acres of land in Adams, Pike, and Calhoun counties; that after its organization the levee which had been previously built was repaired, and that at the time of such organization a stream, called the Sny Carte, traversed said district, which served as a drain for all waters com-

ing into said district, and that a special assessment was thereafter made for the purpose of cleaning out, straightening, widening, and deepening said Sny Carte, and that special assessments have been made on all the lands in said district, from time to time, for the purpose of improving the levee and the Sny Carte, and have been expended for such purposes; that the said district is an existing corporation in successful and satisfactory operation, and that the commissioners thereof are in the peaceful possession of all the territory within said district, and are exercising exclusive jurisdiction over the same for drainage and levee purposes; that the McCraney Creek drainage and levee district is organized under the same levee act and comprises about 7,000 acres, about 6,000 of which are located within the boundaries of the Sny Island Levee drainage district, and were at the time of the pretended organization of the said McCraney Creek drainage and levee district, and for a long time prior thereto; that it is a part of the proposed plans of the McCraney Creek district to straighten said McCraney creek and to empty its waters into the Sny Carte at a point different from its present outlet; that the said McCraney creek is a silt-bearing stream, and will bear silt and debris into the Sny Carte, and fill and obstruct it, and that there will be a conflict of authority between the commissioners of the Sny Island Levee drainage district and those of the pretended McCraney Creek drainage and levee district relative to the right of such change and the emptying of the waters of McCraney creek into the Sny Carte, and as to all matters and things pertaining to the purposes for which said districts, respectively, were organized; that the county court was without jurisdiction of the subject-matter, and without authority of law to embrace within said pretended McCraney Creek drainage and levee district the lands thereof which are located within the Sny Island Levee drainage district and subject to its control, jurisdiction, and authority.

The rejoinder averred that the Sny Island Levee drainage district was organized for the sole and exclusive purpose of repairing and maintaining the levee referred to in said replication, and of improving and caring for the said stream called Sny Carte, and for no other purpose whatsoever, and has existed and still exists with the powers and for the purposes above named and no other, and that said district has not, and never has had, any power or authority for drainage purposes except as above stated, and has never exercised or attempted to exercise any other or different powers whatsoever, and that the said district has not the power or right or the duty to drain, improve, and care for McCraney creek; that the McCraney Creek drainage and levee district was organized

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for the sole purpose of improving, deepening, and otherwise caring for said McCraney creek, and that the powers and duties of the two drainage districts above named are entirely separate and distinct, and that neither of said districts has the legal power or duty to perform and do the drainage work for which the other was organized; that the McCraney Creek drainage and levee district does not propose to empty the waters of McCraney creek at a different point from the present outlet, but that it does propose to empty said waters into the Sny at one of the natural outlets at which said creek now enters said Sny, and that said outlet shall be improved in such manner as to protect the lands from overflow. The rejoinder admits the right of the Sny district to be consulted and satisfied as to the outlet into the Sny of McCraney creek, and avers that there is and will be no conflict of authority between the two districts, but that they can and will operate together to a common end.

It is first insisted that the court erred in permitting the information to be filed, but that question is not the subject of review. Under our practice the court may enter a rule against the defendant to show cause why an information should not be filed; but it is entirely discretionary with the court whether such rule shall be entered or not. The court or judge may act upon the petition of the relator ex parte, and, if satisfied that there is probable cause, allow the information to be filed. *People v. Golden Rule*, 114 Ill. 34, 28 N. E. 383; *People v. Moore*, 73 Ill. 132; *People v. McFall*, 124 Ill. 642, 17 N. E. 63; *People v. Town of Thornton*, 186 Ill. 162, 57 N. E. 841. Since the court might have permitted the filing of the information without any evidence other than the petition, his discretion in allowing leave to file it cannot be reviewed. When the petition shows probable ground for the proceeding, leave should be given to file an information, unless good cause is shown for refusing it. *People v. Anderson*, 239 Ill. 266, 87 N. E. 1019.

The regularity of the proceedings in the county court for the organization of the McCraney Creek drainage and levee district is not contested. The objection made to the legality of its organization is that a drainage district cannot be organized out of territory included in a drainage district already organized. We so held in *People v. Crews*, 245 Ill. 318, 92 N. E. 245, and the plaintiffs in error concede that two municipalities cannot exercise jurisdiction over the same territory for the same purpose at the same time. *West Chicago Park Com'rs v. City of Chicago*, 152 Ill. 392, 38 N. E. 697; *Bishop v. People*, 200 Ill. 33, 65 N. E. 421. They contend that the Sny Island Levee drainage district and the McCraney Creek drainage and levee district were not organized for the same purpose. They assert in their rejoinder that the Sny Island Levee drainage district was organized for the sole and ex-

clusive purpose of repairing and maintaining the levee and improving and caring for the Sny Carte, and with no other authority whatever, and with no power to drain, improve, or care for McCraney creek, while the McCraney Creek drainage and levee district was organized for the sole purpose of improving, deepening, and otherwise caring for McCraney creek, and that neither district can do the work of the other; that, while the Sny Island Levee drainage district has a right to be consulted and to be satisfied about the outlet of McCraney creek into the Sny Carte, there will be no conflict of authority between the two districts, but that they can and will operate together to a common end. It will be observed that all these averments are conclusions of the pleader. The objects of the respective organizations must be determined from a construction of the law under which they were organized, and whether they can operate together without conflict no one at this time can possibly determine.

The work immediately in view when the Sny Island Levee drainage district was organized pertained to the levee and the Sny Carte; but it was organized under the levee act, and had the powers granted to all districts so organized. It was the statute, and not the judgment of the court, which created the corporations, and their powers were derived from the Legislature, and not the court. *Blake v. People*, 109 Ill. 604; *Huston v. Clark*, 112 Ill. 344. The power of the court was limited to ascertaining that the requirements of the statute as to the organization of the districts were complied with. It could neither add to nor take from their powers. Regardless of the particular wording of the petition or the special character of the work in immediate contemplation, regardless of the expectation or desires of the landowners or petitioners, the purpose of both organizations was that mentioned in section 2 of the levee act, and their authority was to exercise the functions conferred upon them by law. Not only is a drainage district under the levee act authorized to carry out the work originally reported and confirmed, but, if additional drains or work appear to be necessary for more complete drainage to particular tracts of land, authority is given for that purpose also by section 59 of the act.

It is said that section 59, before the amendment of 1909, was ineffectual in many cases. It may have been so, but it indicates the intention of the Legislature that the commissioners of a drainage district should have complete jurisdiction of questions of drainage of the lands of the district, and of every part of them, to the exclusion of other authority.

This case is not distinguishable from *People v. Crews*, supra. The plaintiffs in error were required to show a legal right. The county court had no jurisdiction of the lands

within the Sny Island Levee drainage district, and the record does not show a valid organization excluding those lands.

It has been suggested that there are many cases in which drainage districts have been established within or partly within the territory of other districts, and have issued bonds which have been sold to investors, and have levied assessments, incurred liabilities, and entered into contracts involving large amounts, and that great losses and great public inconvenience will be produced if all the districts which have been so established, and all their bonds, assessments, liabilities, and contracts, are held void, as must be done if the principles involved in the affirmation of this judgment are adopted. This suggestion overlooks the rule that the remedy by an information in the nature of quo warranto is not a matter of absolute right, but is a subject for the exercise of a sound judicial discretion, and that considerations of the public interest or convenience, as well as unreasonable delay or acquiescence on the part of the persons complaining, will justify a refusal to grant leave to file an information or to proceed to judgment. *People v. Hanker*, 197 Ill. 409, 64 N. E. 253; *People v. Schnepf*, 179 Ill. 305, 53 N. E. 632. The principle would have full application in the cases referred to, but is without force in this case, in which the order for the organization of the district was made August 18, 1909, the petition for leave to file the information was filed January 1, 1910, and it does not appear that any corporate action was attempted in the meantime.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(248 Ill. 169)

PEOPLE v. ARNOLD.

(Supreme Court of Illinois. Dec. 21, 1910.
Rehearing Denied Feb. 9, 1911.)

1. INDICTMENT AND INFORMATION (§ 137*)— GROUNDS FOR QUASHING—JOINT PRESENCE OF WITNESSES BEFORE GRAND JURY.

While one witness must not be permitted to be present at the examination of another witness before the grand jury, as the proceedings before it must be kept strictly secret, yet defendant in rape could not have been prejudiced, so that it was not error to refuse to quash the indictment because the father of the girl was in the grand jury room with her, when some cloths were identified, for the alleged reason that she was timid and unable to appear alone in respect to such a matter; there having been practically no examination of witnesses in the presence of each other.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 482; Dec. Dig. § 137.*]

2. GRAND JURY (§ 41*)—SECRECY OF PROCEEDINGS—EVIDENCE OF OCCURRENCE BEFORE GRAND JURY.

Refusing, on a motion to quash an indictment for a matter which occurred before the

grand jury, to consider affidavits of grand jurors as to the alleged fact, is not error.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 87; Dec. Dig. § 41.* Indictment and Information, Cent. Dig. § 53.]

3. CRIMINAL LAW (§ 704*)—OPENING STATEMENT—DEFERMENT—DISCRETION.

Leave to defendant to reserve his opening statement till after the evidence for the state has been heard is a matter resting in the court's discretion; and no reason for deferment having been given, and none appearing, it cannot be said refusal of leave was an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1660; Dec. Dig. § 704.*]

4. CRIMINAL LAW (§ 633*)—TRIAL—COMPELLING DECORUM IN COURTROOM.

The court presiding over a trial has power to compel such decorum in the courtroom as will inspire respect for the proceedings; and exercise of such power, rather than mere advice and suggestion, is a duty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 633.*]

5. CRIMINAL LAW (§ 703*)—OPENING STATEMENT—PROPER SCOPE.

An opening statement is to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard; and it is not, and should not be, permitted to become an argument, nor should the state's attorney therein challenge defendant to offer testimony of his good character, and state that, if defendant does so, he, said attorney, will bring witnesses who know his reputation thoroughly, and show what it is; his reputation not being an issue in the case, and it being impossible to make it one unless defendant chose to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. § 703.*]

6. CRIMINAL LAW (§ 676*)—TRIAL—LIMITING NUMBER OF WITNESSES.

Though the court has no power to limit the number of witnesses to be heard as to a controlling fact or facts and circumstances bearing thereon, it is not error to fix a reasonable limit on a collateral matter, such as defendant's reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1608; Dec. Dig. § 676.*]

7. CRIMINAL LAW (§ 338*)—EVIDENCE—MATERIALITY.

That prosecutrix's father went to the office of defendant in rape, more than 10 months after the alleged rape, and had a fight with him because he had been told that defendant had slandered the girl by saying she was loose, cannot be shown on the trial for rape; not even on the theory that the whole story was admissible to show that defendant afterwards practically admitted his guilt to a policeman, in that when defendant was called to the police station, and asked if he wanted to make any complaint against the father, who had been arrested and taken there, on the policeman telling him that, if he did make complaint against the father, the father would bring a charge against him of rape on his daughter, he said "Give him a scare, and let him go," this having no tendency to prove guilt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

8. CRIMINAL LAW (§ 489*)—EXPERT TESTIMONY—CROSS-EXAMINATION.

Where the state offered evidence of the hemorrhage of the girl as tending to prove the ultimate fact of a forcible rape, and defendant, by the testimony of experts, in answer to hypothetical questions based on the fact of an operation whereby part of an ovary of the girl had

been removed, proved that there was another possible cause of the hemorrhage as an irregular flow in consequence of the operation—it was error, on cross-examination of the experts, to permit the adding to the hypothesis of facts the assumption that there was a forcible rape on the girl, and to require answers whether in their opinion the hemorrhage was more likely to have resulted from the forcible rape or the operation; the only purpose of the direct examination being to show that the hemorrhage did not necessarily result from a rape.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1078; Dec. Dig. § 489.*]

9. CRIMINAL LAW (§ 1169*)—EVIDENCE—EXHIBITS.

That the female had a hemorrhage and the flowing lasted several days, being proved and not denied, on a prosecution for rape, defendant's only contention being that it was not caused by rape, it was error, necessarily prejudicial, to allow exhibition to the jury of the cloths and clothing stained thereby; they not being the instruments of any crime, and having no tendency to prove anything but the uncontroverted occurrence of the hemorrhage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

10. CRIMINAL LAW (§ 786*)—INSTRUCTIONS—CREDIBILITY OF DEFENDANT.

While the interest of defendant being different from that of any other witness, it is proper for an instruction to point him out and direct the jury to take into account his interest as affecting his credibility, the court has no more right to disparage or discredit his testimony than that of any other witness; so that the conclusion of such an instruction that, "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith, or false and made only for the purpose of avoiding a conviction," is erroneous and prejudicial, as intimating that defendant's testimony might be merely fabricated for the purpose of avoiding a just conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1896; Dec. Dig. § 786.*]

11. WITNESSES (§ 317*)—CREDIBILITY OF TESTIMONY.

An instruction not limited to a particular fact, but applied to the entire testimony of a witness, authorizing the jury to disregard it if the witness appeared to be mistaken, or his testimony for any other reason appeared to be untrue or unreliable, is incorrect; the privilege of disregarding the entire testimony of a witness being confined to cases where the jury find that he has testified, knowingly and willfully, falsely as to a material matter, and is without corroboration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1081; Dec. Dig. § 317.*]

12. CRIMINAL LAW (§ 759*)—INSTRUCTIONS—PRESUMPTIONS.

A requested instruction reciting particular facts, the surrounding circumstances at the time and place of the alleged offense, and declaring that they raised certain presumptions was properly refused; as while the matters were proper for the jury to take into account in determining the ultimate fact, the presumptions were of fact, and not of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1790; Dec. Dig. § 759.*]

Error to Circuit Court, Stephenson County; Richard S. Farrand, Judge.

Benjamin A. Arnold was convicted of rape, and brings error. Reversed and remanded.

Robert P. Eckert and Amos W. Marston, for plaintiff in error. W. H. Stead, Atty. Gen., and Louis H. Burrell, State's Atty. (Douglas Pattison, of counsel), for the People.

CARTWRIGHT, J. At the March term, 1910, of the circuit court of Stephenson county, the plaintiff in error, Benjamin A. Arnold, a physician and surgeon living in Freeport, in said county, and practicing there, was found guilty by a jury of the crime of rape upon Alta Rosenstiel on July 8, 1908, when she was 15 years and 11 months of age, and his punishment was fixed at imprisonment in the penitentiary for the term of four years. He was sentenced in accordance with the verdict.

There was a motion to quash the indictment on the ground that Alta Rosenstiel and her father and mother were all present in the grand jury room at the same time. The proceedings before a grand jury must be kept strictly secret, and that could not be done if witnesses should be present during the examination of each other. The rule, therefore, is that one witness must never be permitted to be present at the examination of another. 17 Am. & Eng. Ency. of Law (2d Ed.) 1204. The court refused to consider the affidavits of grand jurors with reference to the alleged fact, and did not thereby commit error. *Glitchell v. People*, 146 Ill. 175, 33 N. E. 757, 37 Am. St. Rep. 147. What occurred was proved, however, by other witnesses, and there was no substantial violation of the rule. The father was in the grand jury room at a time when some cloths that had been used were identified, for the alleged reason that the girl was timid and unable to appear alone in respect to a matter of that kind, but there was practically no examination of witnesses in the presence of each other. There could have been no prejudice to the defendant from anything that occurred before the grand jury, and the court did not err in refusing to quash the indictment.

There is much complaint concerning the examination of persons summoned as jurors for the purpose of ascertaining their qualifications, including questions asked by the court; and in the same connection objection is made to questions asked by the court and remarks made in the course of the trial. Without going into unnecessary detail, it is sufficient to say that the complaints are unfounded. The court did not take any more part in the trial than was proper, but in our opinion did not participate in the proceedings to the extent that would have been desirable for the attainment of justice.

After the opening statement by the state's attorney the attorneys for the defendant asked leave to reserve their opening statement until after the evidence for the people had

been heard, but the court refused such leave. It was a matter resting in the discretion of the court. *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253; *Sinclair Co. v. Waddill*, 200 Ill. 17, 65 N. E. 437. No reason was given for deferring the opening statement for the defendant and none is apparent, so that there is no reason for saying that the discretion was abused or the defendant injured by the ruling.

So far as the material facts were not in dispute at the trial they are as follows: Alta Rosenstiel was the daughter of a farmer, living with her parents between five and six miles northwest of Freeport. The defendant was the family physician, and at different times in the spring of 1908 was consulted with reference to troubles of the girl, consisting of pains and soreness in her side, which were diagnosed as appendicitis, and on May 18, 1908, he performed an operation on her at the hospital in Freeport. The difficulty was appendicitis, and the right ovary was also found to be diseased, and a part of it was removed. When the girl left the hospital, she was not fit to go home, and was taken to the home of the defendant, where she was cared for by his wife for a time, and then returned to the farm. Afterwards she visited the defendant at his office with her parents occasionally for consultation and treatment. The defendant also called at the farm while visiting patients in the neighborhood, or at the call of the parents, several times in the early part of July. The last call was on July 8, 1908, at about 8 o'clock in the morning, when he happened to be in the neighborhood. The girl was in bed in a bedroom on the ground floor, and he examined the wound and the condition of her side and prepared new medicine, and soon afterward washed his hands at the summer kitchen and left. The mother was about the house, and most of the time while defendant was there was in the summer kitchen. The doors were all open between the bedroom where the girl was and where the mother was, and there were several carpenters working close to the house in the yard, framing timbers for a barn. The mother and men were all within call from the bedroom. The girl got up and was sitting on the porch, and about an hour and a half after defendant left her mother went to the bedroom and found a blood stain about the size of the palm of her hand on the bed, and also stains upon the girl's nightgown. After asking the girl twice, she stated to her mother the alleged act of the defendant. There was a considerable hemorrhage, which lasted for two or three days. The defendant weighed 180 pounds and the girl 110. In the following spring or summer of 1909 the defendant sent a statement of his account to the father of the girl, and the mother dictated a letter, which the girl wrote, which was not dated but postmarked September 25, 1909, saying: "When you want that bill you hold against us, sue it,

and the public will know more about your damnable character than they already know. —Mrs. Rosenstiel." On the morning of October 2, 1909, a collector and an attorney called at the farm with the bill, and the father said that if the defendant wanted the money to go ahead and sue it, but that, if he did, he would bring a charge against him. Upon the return of the collector to Freeport the defendant sued out a summons against the father, and upon the summons being served the bill was paid. On October 4, 1909, the defendant was arrested upon a warrant issued upon a complaint made by the girl before a justice of the peace, and this was nearly 15 months after the offense was alleged to have been committed.

The matters which were in dispute at the trial were these: The mother and the girl testified that after the defendant had made the examination and gone to get a drink of water he went back into the bedroom, saying that his team was tired, and he would go in and talk with the girl a few minutes and let them rest. The girl testified that he sat down on the bed, and then laid down by her, and then committed the offense by force; that she tried to call her mother, but could not; that she was so frightened, full of pain, and paralyzed that she could not make any outcry, and that, after the offense was committed, her mother, who was attending to the baking, came to the door of the bedroom, and the defendant led the mother out through the house. The mother testified that she came to the door and was led out or backed out, and the defendant then washed his hands and left. The mother knew nothing and heard nothing of any trouble until the girl told her in answer to the inquiries, and she testified that, after learning of the act, she called up the defendant's office at Freeport by telephone, but he was not there; that he called her by telephone before the noon hour, and asked her how the girl was, and she answered that he ought to know, and she wanted to see him just as soon as possible. The father and mother both testified that when the former came home, about 10 o'clock, from the creamery, he was informed of the facts, and he testified that on the afternoon of that day he drove to Freeport to find the defendant to kill him, but the defendant was not at his office. They both testified that the next day they went to Freeport, leaving home about 1 o'clock, and called on the defendant at his office; that the father said, "You have been monkeying with that girl of ours"; that he denied it, and said he had a notion to commit suicide because he was accused, and that he then said the girl was guilty of certain conduct, which it is claimed was an admission, by implication, of a voluntary act. The mother testified that on the Friday or Saturday after July 8th the defendant telephoned her that they should come in and he would fix it up, and the father testified that about

the last of July he went to the defendant's office and referred to the telephone message that they should come in and fix the thing up, and wanted to know of the defendant what he wanted to fix and what they should do, and the defendant said that they would drop the matter and he would go on and be their doctor, but the father said they would see about it, and left. The defendant denied that he went back into the house on July 8th after the examination, but testified that he washed his hands to remove any odor after the examination, and left. He denied that he committed the offense, and denied every incriminating circumstance testified to. The bookkeeper in the office testified that there was no call by telephone from the mother, and the defendant denied that he called the mother by telephone, or that any visit was made by the father and mother to his office. According to the testimony for the prosecution, the father and mother left home about 1 o'clock and went directly to the office of the defendant, but it was proved that about the time they would reach the office, and for a good part of the afternoon, the defendant was a considerable distance in the country making a visit, which occupied a good part of the afternoon. The defendant testified that on the morning of July 8th he agreed to prepare a medicine which was to be called for, and did so, and he was corroborated by evidence that the medicine was called for on July 14th. As to the telephone calls and matters alleged to have occurred at the defendant's office, his testimony was supported by that of the employees in the office, but as to the actual occurrence the only evidence was that of the girl and the defendant, which the jury were called upon to consider in the light of the surrounding circumstances. Those circumstances were that the bedroom was on the first floor of the house; that the door and all other doors were open; that the mother was in the house or summer kitchen; that a number of workmen were within less than 100 feet of the building; that the mother and workmen were within easy call; and that any alarm or outcry would have brought assistance to the girl and certain detection and punishment to the defendant. The reason given by the girl for not giving any alarm was fright and pain, which rendered her unable to make any outcry, and the jury were required to consider the sufficiency of that reason as well as the fact that no complaint was made after the defendant had left the premises until the girl was interrogated by her mother. The reason given was entitled to fair consideration, but did not affect the probability of the defendant committing the act under such conditions. Such an act would be so different from the natural order of things as to occasion surprise in the mind of any person and perhaps engender doubts. There was no attempt at secrecy usual in such cases nor any precaution whatever such as

would be expected of a person of ordinary intelligence, and this would be so whether the defendant had reason to anticipate resistance or not. Even if the defendant expected the act would be voluntary on the part of the girl, the mother was liable to come in at any moment, and nothing was done or any arrangement made which would render it improbable that she would become a witness to the act. Another material question to be considered by the jury was whether one situated as the defendant was would, if he had been guilty of a felony, have brought upon himself a prosecution for his crime for the mere sake of collecting a bill of \$142.50 when the charge would not otherwise have been made. It was proved that the defendant had a large and lucrative practice, and was not apparently in need of money, and, if guilty, could have secured immunity from punishment for the amount of his bill. In considering these questions the defendant was entitled to a fair trial upon legitimate evidence and with proper instructions.

The trial was somewhat disorderly, with much bickering of the attorneys and but little exercise of authority by the court. The court presiding over a trial has power to compel such decorum in his courtroom as will inspire respect for the proceedings, and the exercise of such power, rather than mere advice and suggestion, is a duty. The office of an opening statement is to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard (1 Thompson on Trials, 267; *Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325), and it is not, and should not be, permitted to become an argument. In this case the state's attorney, in the opening statement, indulged in epithets, vituperation, and argument, and on objection was not restrained, as he should have been. He also told the jury that the defendant had a right to offer testimony of his good character, and, if he did, they would bring witnesses who knew his reputation from the top of his head clear down to the soles of his feet, and would show what his reputation was. The reputation of the defendant was not an issue in the case, and could not be unless he chose to make it so, and the challenge and assertion were improper. The defendant afterward offered evidence of good character, and it is objected that the court erroneously limited the number of witnesses which he was permitted to call to 25. The court fixed that limit for each side, and while a court has no power to limit the number of witnesses to be heard as to a controlling fact, or facts and circumstances bearing thereon, it is not error to fix a reasonable limit concerning collateral matters, such as this was. *Green v. Phoenix Mutual Life Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576. After the defendant had examined 25 witnesses to prove his good character, his

attorneys tendered to the court 400 more, offering to give their names. The prosecution then examined 25 witnesses and made a tender of 600 more, whereupon the attorneys for the defendant made a tender of 1,000 additional witnesses. The question of reputation, beginning with a challenge, finally degenerated into a competition in offers of attorneys.

Error was committed in rulings on the admission of evidence. The state's attorney was allowed to prove by the father of the girl that on May 22, 1909, he went to defendant's office, and they had a fight because some one had told the father that the defendant had slandered the girl by saying she was loose. This was more than 10 months after the alleged act, and about another and independent matter. The only excuse offered now is that the whole story was admissible for the purpose of showing that the defendant afterward practically admitted his guilt to a police officer. The father was arrested and taken to the police station, and the defendant, upon notice, went there and was asked if he wanted to make a complaint. The officer testified that he told him if he made a complaint against the father the father would bring a charge against him of rape on his daughter, and that the defendant said, "Give him a scare, and let him go." The defendant testified that the police officer told him that the father would bring a serious charge against him, but did not indicate what it was, and that he did not know there was a charge of rape until he was arrested, but, if the police officer was correct, the fact had no tendency whatever to prove guilt. The police officer did not make any charge or assert the truth of any charge, and the defendant might naturally have preferred not to make any charge against the father rather than to have a charge brought against himself, whether of slandering the girl or some other charge, and regardless of guilt or innocence.

The evidence of the hemorrhage was offered as tending to prove the ultimate fact of a forcible rape, and the defendant proved that there was another possible cause of the hemorrhage as an irregular flow in consequence of the operation on the ovary, and the removal of a part of the same. This was done by the testimony of experts, in answer to hypothetical questions based on the fact of the operation. The court permitted the state's attorney, on cross-examination of these witnesses, to add to the hypothesis of fact the assumption that there was a forcible rape on the girl, and require answers whether in their opinion the hemorrhage was more likely to have resulted from the forcible rape or the operation. The only purpose of the direct examination was to show that the hemorrhage did not necessarily result from a rape, and to permit the state's attorney in cross-examination to assume the existence of the ultimate fact which the jury

were to determine was a palpable violation of the rules of evidence. If the defendant was guilty of a forcible rape, as assumed in the hypothetical questions put to the witnesses, the question whether the hemorrhage came from that cause or from the operation was of no consequence. The fact that the hemorrhage occurred and the flowing lasted for two or three days was proved, and not denied; but the stained cloths and clothing before referred to, which were before the grand jury, were admitted in evidence against defendant's objection, and were displayed to the jury during the trial. They were not the instruments of any crime, and had no tendency to prove any fact, except that the hemorrhage occurred, which was not in controversy. The exhibition was necessarily prejudicial to the defendant, and would create a prejudice which it would be impossible to meet and overcome. It should not have been permitted.

Instructions were given which were erroneous and prejudicial to the defendant.

The twelfth instruction, after telling the jury that the credibility of the defendant was a matter for them and detailing matters to be taken into consideration in weighing his testimony, including his interest in the result of the case, concluded as follows: "You are not required to receive blindly the testimony of such accused person as true, but you are to consider whether it is true and made in good faith or false and made only for the purpose of avoiding a conviction." When a person accused of crime becomes a witness, he is in the same position as any other witness, and any witness may be either disinterested or have an interest, near or remote. The interest of the defendant is of a different character from that of any other, and it is therefore proper to point him out in an instruction and to direct the jury to take into account his interest as affecting his credibility, but the court has no more right to disparage or discredit his testimony than that of any other witness. Such an instruction as this, concerning any other witness having an interest in the result of a case, would not be regarded as proper, and the instruction falls under the condemnation of *Hellyer v. People* 186 Ill. 550, 58 N. E. 245. The words quoted were the ground for a reversal of the judgment in *Donner v. State*, 72 Neb. 263, 100 N. W. 805, 117 Am. St. Rep. 789. The instruction had the effect to prejudice the testimony of the defendant by telling the jury they were not required to receive it blindly, with the intimation that it might be merely fabricated for the purpose of avoiding a just conviction.

The seventh instruction was the same as the second instruction given in *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161, with the omission of the words, "or has knowingly testified falsely." The instruction in that

case was not considered as harmful to the defendant on account of there being no conflict in the evidence on the main features of the case and in view of another instruction, but it is not an accurate statement of the law. As confined to a particular fact an instruction of that kind would be unobjectionable, as was said concerning the third instruction in *Taylor v. Felsing*, supra. The jury would not be required or expected to believe any particular thing testified to by a witness as a fact to be a fact which, from all the evidence before them, they believe is not a fact. *Goss Printing Press Co. v. Lempke*, 191 Ill. 199, 60 N. E. 968. This instruction was not limited to a particular fact or facts but applied to the entire testimony of a witness, and, in effect, authorized the jury to disregard it if the witness appeared to be mistaken or his testimony for any other reason appeared to be untrue or unreliable. The privilege of disregarding the entire testimony of a witness is confined to cases where the jury find that such witness has testified, knowingly and willfully, falsely as to a material matter and is without corroboration. The instruction might not be cause for a reversal of a judgment, but it is not correct.

The court modified some instructions offered by the defendant, but did not err in so doing. The court also refused a large number of instructions which recited particular facts, such as the situation of the parties at the time, the doors being open, and other persons nearby, and declared that such facts raised certain presumptions. The matters stated were proper for the jury to take into account in determining the ultimate fact and for the court in passing upon a motion for a new trial, but they were presumptions of fact and not of law, and the court did not err in refusing them.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

(207 Mass. 441)

COYLE v. TAUNTON SAFE DEPOSIT & TRUST CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 6, 1911.)

BANKS AND BANKING (§ 313*)—TRUST COMPANIES—STOCKHOLDERS—PERSONAL LIABILITY.

The amendment to Rev. Laws, c. 116, § 30, made by St. 1905, c. 228, authorizing receivers of insolvent trust companies to enforce personal liability of stockholders, implies that a judgment can be obtained against a company under receivership, and hence it is no defense to an action by a creditor to lay a foundation for enforcing, under chapter 110, § 60, such personal liability, that before the date of the writ on a petition brought against it under chapter 113, § 6, which is made applicable to trust companies by chapter 116, § 37, all the company's property had been put in receivership.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 313.*]

Exceptions from Superior Court, Bristol County; John H. Hardy, Judge.

Action by Patrick Coyle against the Taunton Safe Deposit & Trust Company. Decision for plaintiff, and defendant brings exceptions. Exceptions overruled.

C. C. Hagerty, for plaintiff. G. A. Sweetser, for defendant.

LORING, J. After our decision in *Nichols v. Taunton Safe Deposit & Trust Co.*, 203 Mass. 551, 89 N. E. 1085, this action was brought against the trust company by one of its creditors to lay the foundation for enforcing, under Rev. Laws, c. 110, § 60, the personal liability of stockholders created by Rev. Laws, c. 116, § 30. The only defense set up here is that before the date of the writ on a petition brought against it under Rev. Laws, c. 113, § 6 (which is applicable to trust companies by force of Rev. Laws, c. 116, § 37), all the property of the trust company had been put in the hands of a receiver to wind up its affairs and it had been enjoined from the further prosecution of any business. The defendant contends that this defense is good on the authority of what was said by Holmes, J., in *Archambeau v. Platt*, 173 Mass. 249, 251, 53 N. E. 816: "Apart from the statute we cannot see how it is possible to justify bringing an action which it is admitted never can result in satisfaction from the defendant." The defendant also relies on *Morse v. Toppan*, 3 Gray, 411, 412; *Train v. Marshall Paper Co.*, 180 Mass. 513, 62 N. E. 967; *Norfolk v. American Steam Gas Co.*, 108 Mass. 404, 407. But the answer to that is that the amendment to Rev. Laws, c. 116, § 30, made by St. 1905, c. 228 (authorizing receivers of insolvent trust companies to enforce the personal liability of stockholders which is here in question), of necessity implies that a judgment can be obtained against a trust company in the hands of a receiver. We do not intimate that the result would not have been the same before the enactment of St. 1905, c. 228.

Exceptions overruled.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(207 Mass. 174)

OLD COLONY ST. RY. CO. v. PHILLIPS.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 3, 1911.)

1. NAVIGABLE WATERS (§ 37*)—LAND UNDER WATER—TIDE FLATS—NAVIGATION.

The grantee of tide flats from the commonwealth, subject to a general navigation right of the public, was bound to permit the public to navigate over the land until built upon or inclosed, and could not build upon or inclose the land so as to wholly cut off his neighbors' access to their houses or land unless permitted by some public authority.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 219; Dec. Dig. § 37.*]

2. NAVIGABLE WATERS (§ 37*)—TIDE FLATS—USE BY PUBLIC.

Where tide flats were conveyed by the commonwealth, subject to the right of passage in the public, the owner of adjoining lands located on a creek, either as one of the public or as a riparian proprietor, had no right to pass over the flats when bare, except when they could be reached without trespass, and then only for a limited purpose, nor in any other way than by water conveyance.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 219; Dec. Dig. § 37.*]

3. NAVIGABLE WATERS (§ 36*)—TIDE FLATS—RIGHT TO NAVIGATE.

The right of a riparian proprietor to navigate tide flats belonging to another is not absolute; and hence, so far as it is a public right, the owner of the flats could impair it, by building inclosures, the right being sustainable only so far as it was a riparian right.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 36.*]

4. NAVIGABLE WATERS (§ 37*)—DEEDS—CONSTRUCTION—WAY OVER TIDE LANDS.

A deed conveying certain land, located on a creek which flowed into a river in which the tide ebbed and flowed, described the land as bounded on the north by the center of the creek. Then followed the words "together with a privilege or passageway from said creek into Town river." The grantor at that time was the owner of certain tide flats, which were navigable at high tide. The creek was dry at low tide, and therefore did not mark the limits of riparian ownership of the flats. The grantee was a shipwright, and access to the river from the lands described in the deed on which he had his shipyard was necessary to his business. *Held*, that the language of the deed should be broadly construed to describe a right of passage over the flats, whether bare or covered with water, at any and all times, by any reasonable method of travel; the easement being one over land, and not through public waters as such, and valid.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 37.*]

5. NAVIGABLE WATERS (§ 46*)—EASEMENTS—RIGHT OF WAY—DEFINITENESS.

Where a deed to riparian lands contained, after the description, the words "together with a privilege or passageway from said creek into Town river," the easement was not void for indefiniteness, because it did not prescribe the limits of the way, or show its precise location, or the purposes for which it might be used, since the court, by the aid of the circumstances, could adjudge the uses intended by the parties, and fix the limits of the location required for a reasonable use.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 46.*]

6. NAVIGABLE WATERS (§ 46*)—EASEMENTS—SCOPE AND EXTENT—TIDE LANDS.

Where a deed conveying land, bounded by a creek which flowed into a river where the tide ebbed and flowed, also granted a privilege or passageway from the creek into the river, the easement was not a mere license, but an easement appurtenant to the land conveyed, commencing at the boundary line thereof.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 46.*]

7. NAVIGABLE WATERS (§ 46*)—EASEMENTS—EXTINGUISHMENT—NONUSER.

An owner of tide flats conveyed certain land riparian to a creek, and bounded on the creek, together with a privilege or passageway from the creek to a river over certain tide flats then owned by the grantor. The grantee used the land as a shipyard, and later it was conveyed to objector, who used it in connection with his business as "diver," bringing in vessels and lighters at high tide clear up to his upland, and anchoring and wintering them in a cove, where at low water they are dry. It also appeared that access to the river over the flats north of the creek was necessary to his business. *Held* that, since the easement was appurtenant to the land, and not to the creek, it was not extinguished by the fact that the creek had become dry, nor had it terminated by nonuser or abandonment.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 46.*]

8. NAVIGABLE WATERS (§ 46*)—RIGHT OF WAY OVER TIDE LANDS—LOCATION.

Where a deed to riparian land granted a privilege or passageway over tide flats from a creek to a river in which the tide ebbed and flowed, the owner of the dominant tenement was bound to exercise his right of passage within the same lines, whether the passage was by land or water, limiting it to the straightest and most direct way.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 46.*]

9. RECORDS (§ 9*)—REGISTRATION OF TITLE—ORDER FOR JUDGMENTS—SCOPE.

Where, in a proceeding to register title, the only issue with reference to a right of way over certain tide flats in dispute before the land court was whether there was a way by water, an order for a decree that the title to petitioner's flats be registered, subject to a right in favor of objector's estate, as recited in a certain deed, was not objectionable, as indefinite as to the limits of and uses of the way, but should be regarded, not as a statement of the whole nature of the easement but merely as a ruling on that feature which was in dispute before the land court, and as an adjudication that a valid easement was created in favor of the land conveyed over the flats, and that the easement continued, authorizing the entry of a final decree, in which would be worked out the details of the objector's right to the easement and the scope thereof.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.*]

Exceptions from Land Court, Norfolk County; C. T. Davis, Judge.

Petition by the Old Colony Street Railway Company to register title, in which Hiram W. Phillips filed objections. From a ruling of the land court as to the scope of an easement in the deed, petitioner brings exceptions. Overruled.

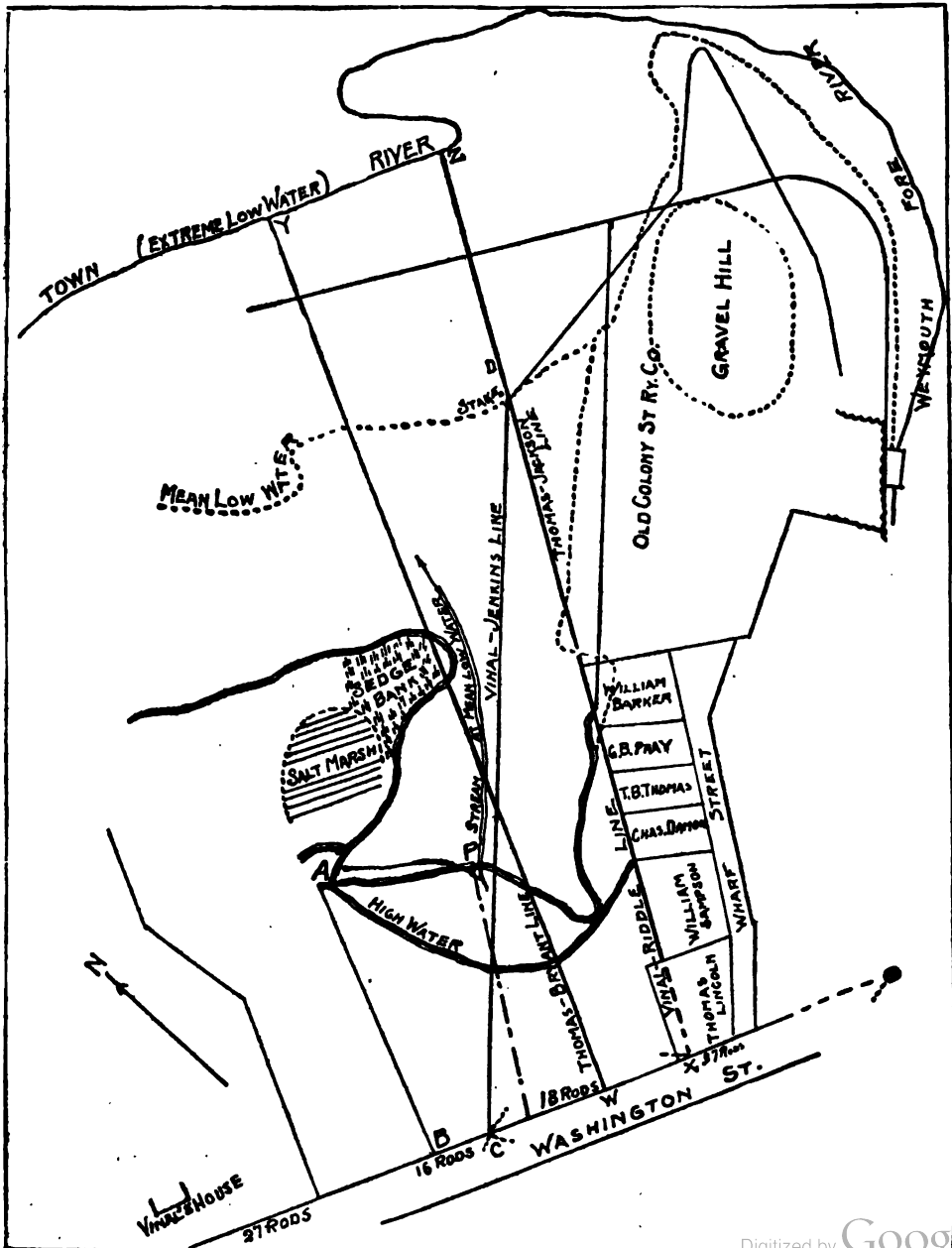
The land court ordered a decree that the title to petitioner's flats be registered, subject "to the right in favor of the Phillips

estate as recited in the deed from Jenkins to Jones." In consequence of this ruling, the court did not pass on the matter of prescription, and petitioner excepted to the ruling and order for a decree on the ground that the words in the deed "from Jenkins to Jones" did not give a right of way by water from the creek out into the river, as stated in the order, and because respondent Phillips had no right of way by water over the petitioner's flats, because the decree was indefinite as to the limits of and uses of the right of way.

The following is a plat of the premises in question:

Currier, Rollins, Young & Pillsbury, for petitioner. W. S. Pinkham, for respondent.

HAMMOND, J. This is a petition for the registration of title to certain flats in Quincy; and the case is before us upon exceptions taken by the petitioner to the ruling of the land court that the passageway named in the deed from Jenkins to Jones "was intended to be a way by water from the creek out to the river," and to the order that "the title to petitioner's flats be registered subject to a right in favor of the Phillips estate as recited in" that deed. The flats are shown upon a plan annexed to the bill of exceptions, and the



bill recites that reference may be made to it, as well as to all the other papers in the case, including a copy of the written decision of the land court. This last paper is a type-written document of 17 pages, setting forth in considerable detail the contentions of the parties at the hearing as to the various questions of law and fact involved, as well as the decision of the court thereon. The so-called grounds of the exceptions to the ruling and order are first, that "the words in said deed from Jenkins to Jones did not give a right of way by water from the creek out into the river"; second, that "the respondent Phillips has no right of way by water over petitioner's flats"; and third, that "the decree is indefinite as to the limits of and uses of the said right of way."

1. As to the ruling: One of the contentions of the petitioner is that the attempted grant was void because in law there is no such thing as a grant of way through tidal water. But this objection proceeds upon an entire misconception of the right granted. The phrase which calls for construction follows immediately the description of the land conveyed in fee and reads thus: "Together with a privilege or passageway from said creek into Town river."

Of the land conveyed by the deed the southern portion was upland bounded on the south by a highway, and the northern portion was flats adjoining the upland and bounded on the north by the center of a creek. This creek was dry at low tide and therefore did not mark the limits of riparian ownership of the flats. Extending from the creek northerly to the low-water mark of Town river, in which the tide ebbed and flowed, was a large extent of flats owned by Jenkins at the time of the delivery of his deed to Jones. By virtue of the colonial ordinance of 1647, Jenkins as such owner was vested with the title in fee, with full power to reclaim the flats by building upon them or inclosing them, but he held the fee subject to a general right of the public for navigation until his land was built upon or inclosed and subject also to the restriction that unless permitted by some public authority it should not be built upon or inclosed in such manner as to cut off wholly the access of his neighbors to their houses or lands. *Commonwealth v. Alger*, 7 Cush. 53, 78; *Davidson v. Boston & Maine Railroad*, 3 Cush. 91, 105; *Henry v. Newburyport*, 149 Mass. 582, 586, 22 N. E. 75, 5 L. R. A. 179. During a certain portion of every 12 hours these flats were bare, and during the rest of the time they were covered with water of varying depth. Before the deed Jones as one of the public had the right to navigate over these flats; and after the deed, even if there had been no special mention therein of any privilege or passageway, he still would have had this public right, and he would have had the right also of a riparian proprietor that, except by public authority, his access to the river or sea

from his land should not be wholly cut off by buildings or inclosures upon the flats. But neither before the deed nor (in the absence of provision therein to the contrary) after the deed, would he have had the right, either as one of the public or as a riparian proprietor, to pass over the flats when bare (except they be reached without trespass and then only for a limited purpose) or in any other way than by water conveyance. See *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764. And even the right to navigate was not absolute. So far as it was a public right the owner of the flats could destroy it by buildings and inclosures, and it stood only so far as it was a riparian right. See the note to *Commonwealth v. Roxbury*, 9 Gray, on pages 519, 520, and cases there cited. In the deed Jones is described as a "shipwright," and the land court has found that he was a shipbuilder and that "access to the river from [the land described in the deed] on which he had his shipyard was necessary in his business."

Under these circumstances what is the fair construction of the phrase "together with a privilege or passageway from said creek into Town river"? What did the parties mean? It is to be assumed that they meant something, that the phrase was intended to confer upon the grantee a right which otherwise he would not have had.

There is nothing in the deed expressly limiting the right to any particular time or to any particular method of travel. The parties were thinking of a passageway from the land described in the deed to the low-water mark of the river—a passageway over land which by the operation of natural laws was bare or substantially bare during a considerable part of every 12 hours, and during the rest of the time was covered with water of varying depth a part of the time capable of being navigated. If the passage was only by land, or if it were only by water, then in either case during a considerable part of every 12 hours it was not available. The language of the deed is broad and comprehensive and must be held to describe a right of passage over the flats, whether bare or covered with water, at any and all times and by any reasonable method of travel. The passage may be by walking on the bare flats, by wading when practicable, or by boat when convenient. The easement is not through public waters as such, but is over land, and that is so whether or not the land is covered with water and whether or not the public have also another and different right to pass through the water. It is an easement over land in fee owned by the grantor. It interferes with no right of the public, and we see no reason why it may not be valid in law as between the parties to the deed and their privies in interest. Suppose the owner of the fee of the bed of a private natural pond should grant a way over a part of the bed, could it be successfully contended that the grantee could not pass over the way in a

boat provided always he keep within the lines of his way? See *Commercial Wharf v. Winsor*, 146 Mass. 559, 16 N. E. 560, for a discussion of some principles of the law on the general subject.

It is further urged that the attempted grant is void for indefiniteness. In support of this it is urged that the deed makes no express mention of the limits of the way, or of its precise location, or of the purposes for which it may be used, and that these deficiencies cannot be supplied by judicial construction. This contention however is untenable. By the aid of the circumstances the court can adjudge the uses intended by the parties; and when the limits or location of the way have not been determined by the parties by a use or otherwise (see *Bannon v. Angier*, 2 Allen, 128), then the rule is that in those respects the location shall be reasonable and what is reasonable may be judicially determined. The deed therefore conveyed a valid right, and this right was not a mere license, but was an easement appurtenant to the land conveyed by the deed. The language of the deed is that the passage is from the creek, and it is suggested by the petitioner that the land of the petitioner did not include the creek and hence that the easement was not appurtenant to the land conveyed. But the northerly line of the land conveyed is the center of the creek and the passageway must be held to start from the boundary line. The easement must be held to be not only over the remaining flats of the grantor Jenkins, but also as appurtenant to the land conveyed by the deed.

It is next urged that even if there ever was a right of way through the water it has been extinguished, first, because the creek, i. e. the dominant tenement, has dried up, and, second, because the premises are no longer used as a shipyard. But, as has been just stated, the dominant tenement is not the creek but the land conveyed by the deed; and while the fact that the dominant estate was used as a shipyard has a bearing upon whether a passageway by water was intended, the easement cannot be held to be solely for the use of the land as a shipyard. And in the written opinion of the land court it appears that "In 1888 the respondent Phillips purchased the Jones tract [the dominant estate] and has used it ever since in connection with his business as a diver, bringing in vessels and lighters at high water clear up to his upland, and anchoring and wintering them in the cove where at low water they are high and dry. Access to the river over the flats north of the old creek, which marks the northerly limits of his ownership, is necessary to his business." It cannot be said that the easement has been extinguished. Nor does there appear to have been at any time an abandonment of the easement by nonuser or otherwise.

But this right of passage must be fairly construed. In the absence of any controlling

reason to the contrary, and in this case we see none, the passage must be by the straightest and most direct way. And the way by water cannot be such as a sailboat would take when beating against a head wind. Whether the passage be by land or water it must be over the same land, and within the same lines. Such is the general nature of the right granted by the deed. It is valid in law and still exists as an easement in favor of the land conveyed by the deed over the flats between that and Fore river. The exception to the ruling must be overruled.

2. As to the order for a decree: The order was that there should be a decree that "the title to the petitioner's flats be registered 'subject to a right in favor of the Phillips estate as recited in the deed from Jenkins to Jones.'" To this order the petitioner excepted "because the decree is indefinite as to the limits of and uses of the said right of way." It is to be noted that the order is not a final decree, nor can it be considered as intending to state in detail the full terms of the final decree as it shall thereafter be formally drawn. To get at its significance it is well to recur to the proceedings in the land court which led up to it.

Although the petitioner has argued before us that the attempted grant of the right of way, whether it be by land or water, was void for indefiniteness, it does not seem to have taken in the land court that sweeping position so far as respects the way by land. On the contrary, as appears from the written decision of that court, "the petitioner argued that the way provided * * * was a way on foot and at low tide only; and that a passageway by water cannot be the subject of private grant." The only thing really in dispute was whether there was a way by water; and this view of the attitude of the petitioner in the land court is supported by the grounds of the exceptions to the ruling as they are set forth in the bill of exceptions.

The order for a decree therefore is not to be interpreted as an order that the decree shall be as narrow as the ruling and refer only to the waterway. Under these circumstances the ruling of the court that there was a way by water is to be regarded not as a statement of the whole nature of the easement, but merely as a ruling upon that feature of it which was in dispute.

The order for a decree therefore is not to be interpreted as an order that the decree when drawn shall be as narrow as the ruling and refer only to the way by water. It was simply an adjudication that by the deed in question a valid easement was created in favor of the land therein conveyed over the flats of the petitioner, and that the easement still exists as thus created. And except as thus adjudicated it left the details of the decree to the future action of the court. As thus interpreted the order was valid.

It would appear from the end of the last paragraph but one of the written opinion of

the land court that it was the purpose of that court to describe in the final decree the general nature of the easement but not the way in which it may be exercised. But whether that be so or not, it is manifest that the question whether the final decree as hereafter drawn will be objectionable because too indefinite or for any other reason cannot now be determined.

Exceptions overruled.

(207 Mass. 484)

TREPANNIER v. COTE

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 6, 1911.)

1. MASTER AND SERVANT (§ 277*)—INJURY TO EMPLOYÉ — RELATIONSHIP — EVIDENCE — SUFFICIENCY.

Evidence in an action for injury to a workman caused by collapse of a barn in process of construction held to sustain a finding that he was hired by defendant, and not by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.*]

2. MASTER AND SERVANT (§ 268*)—INJURY TO EMPLOYÉ—RELATIONSHIP—EVIDENCE.

That defendant had a workman taken home after injury through collapse of a barn may be regarded as an admission by defendant, on an issue whether plaintiff was hired by him or by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 910; Dec. Dig. § 268.*]

Exceptions from Superior Court, Bristol County; Jabez Fox, Judge.

Action by John Trepannier against Flavien Cote. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

A. G. Weeks, for plaintiff. H. A. Dubuque, for defendant.

LORING, J. The plaintiff in this case was injured by the collapse of a barn while in process of construction. One Perrault was in charge of the work. The evidence warranted a finding that the collapse of the barn was caused by the negligent method of erection pursued by Perrault. The defendant contended that Perrault was doing the work as an independent contractor, and the only question here is whether there was evidence that the plaintiff was hired by the defendant and not by Perrault as an independent contractor. If Perrault was not an independent contractor, he was or could have been found to be a superintendent of the defendant.

We are of opinion that there was evidence of that fact. Perrault was dead at the time of the trial. One witness testified that "Perrault always told me that he was running the job; he was foreman." In addition the plaintiff testified that he went to work on October 20th; that on October 19th he asked the defendant "for a job" on the barn, and the defendant said "Go and see Perrault," to which the plaintiff answered, "I went to

see him and he told me to come and see you, he wasn't hiring men," and the defendant replied, "Go and see him and tell him it is I told you to come there;" that he then went to Perrault and was hired on that day and went to work on the morning of the next day, the 20th. Perrault's son testified that "the job started on the 19th day of October," and the defendant's story was that the contract with Perrault was made on the morning of the 20th. Not only was the plaintiff hired the day before the contract was made, and seemingly at an earlier hour on that day, but so far as appears this was the only agreement of hiring which the plaintiff made. There was also evidence that the defendant took the plaintiff home in his buggy after the accident, or hired and paid his brother, a livery stable keeper, for doing so. This could be taken to be an admission that he was the person interested.

Exceptions overruled.

(207 Mass. 390)

MULREY et al. v. CARBERRY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

1. EQUITY (§ 442*)—BILL OF REVIEW—DISCRETION OF COURT.

A petition for a bill of review, to permit petitioner to show what occurred, at and after the trial, which prevented him from presenting questions of law on his original appeal, is not a bill to correct errors of law on the face of the record, which may be prosecuted as a matter of right, but is addressed to the discretion of the court, and the principle applicable is the principle governing bills of review founded on newly discovered evidence.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 442.*]

2. EQUITY (§ 463*)—BILL OF REVIEW—EVIDENCE—ADMISSIBILITY.

Under Rev. Laws, c. 175, § 68, providing that transcripts from stenographic notes, taken in the superior court under the authority of law, when verified by the certificate of the stenographer taking them, shall be admissible as evidence of testimony, the court, on the hearing of a bill of review founded on matters that did not appear in the record of the superior court after the hearing before the justice who made the decision, may admit in evidence the report of the proceedings at the trial in the original suit, made by an official stenographer of the superior court.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 463.*]

Exceptions from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Bill of review by Mary E. Mulrey and others against Anna M. Carberry. The court admitted evidence, and defendant brings exceptions. Overruled.

P. H. Kelley, for plaintiffs. Cronin & Cronin, for defendant.

KNOWLTON, C. J. The story of this case was pretty fully told in *Mulrey v. Carberry*, 204 Mass. 378, 90 N. E. 576. That case was

a petition for a bill of review, and it was decided by this court in favor of the petitioners. The present bill of exceptions is to rulings of law on the trial upon the bill of review, admitting in evidence the report of the proceedings at the trial in the original suit, made by an official stenographer of the superior court, and other kindred matters of proof.

The petition for a bill of review was addressed to the discretion of the court, and was founded upon matters that did not appear of record in the superior court after the hearing before the justice who made the decision. The defendants in the original suit appealed from the decree, and afterwards, when they were about to present to this court the record of the proceedings, they discovered that the stenographer who was appointed a commissioner to take the testimony at the original hearing, and whose report would be for that reason a part of the official record, did not take the testimony at a subsequent hearing which was important to the rights of the defendants, and that another stenographer then acted in his place. As a result, a part of the proceedings, which was reported by this stenographer, was not a part of the record in the case. The defendants moved to have this stenographer appointed a commissioner nunc pro tunc, but the motion was denied, and the defendants appealed. As the case first came to this court (see 192 Mass. 547, 78 N. E. 351) it did not appear that there was any error of law in the proceedings, nor was it shown that there was any error of fact that required a reversal of the decree.

Upon the petition for a bill of review, the petitioners averred facts which, for the purposes of the hearing, were admitted by the respondents to be true, and which showed that the decree was founded on an error of law. These facts did not appear of record, and they did not relate to matters which ought to have been put in evidence but were not. They related to proceedings before the court, and to matters that ought to have appeared in the record, but did not. The only question of doubt, that arose upon the petition for a bill of review, was whether the failure to protect the rights of the original defendants and have the record show all the material facts was so far imputable to negligence of their counsel as to make it improper to grant their petition. Upon a consideration of this question the decision of the court was, that the omission resulted from an oversight and mistake, which ought not to prevent the defendants from showing, upon a bill of review, what the proceedings were at the hearing.

The mistake of the counsel of the defendants, in the present proceeding, is in treating this as a bill to correct errors of law upon

the face of the record, which the plaintiffs might prosecute as a matter of right, instead of a bill issued in the sound discretion of the court, upon a petition to permit the plaintiffs to show what occurred at and after the trial that prevented them from presenting the questions of law on their original appeal. This distinction sufficiently appears in *Elliott v. Balcom*, 11 Gray, 286, *Richardson v. Lloyd*, 99 Mass. 475, and 16 Cyc. 524 to 534. The principle applicable in the present case is the same as that which governs bills of review founded on newly discovered evidence. The evidence objected to was rightly admitted. *Rev. Laws, c. 175, § 68; Mulrey v. Carberry*, 204 Mass. 378, 90 N. E. 578.

Exceptions overruled.

(207 Mass. 539)

**ATTORNEY GENERAL v. SUPREME
COUNCIL AMERICAN LEGION
OF HONOR.**

In re *HACKETT et al.*

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1911.)

1. INSURANCE (§ 710*)—FRATERNAL INSURANCE—INSOLVENCY.

On receivership proceedings against a fraternal insurance corporation, beneficiaries under a certificate illegally reduced in amount by the corporation are not entitled to share in a fund in the hands of receiver, where the deceased member paid two assessments on the reduced amount, and the beneficiaries, without protest, surrendered the certificate, taking such amount in settlement of their claim, and where they gave no notice of a claim to the larger sum until suit was brought three years later.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 710.*]

2. INSURANCE (§ 724*)—FRATERNAL INSURANCE.

That a fraternal insurance member was ill after adoption of an invalid by-law reducing the amount of his certificate does not avoid the effect of his payments on the reduced amount as an estoppel, where his mental capacity was not impaired.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

3. INSURANCE (§ 724*)—FRATERNAL INSURANCE—NOTICE TO LOCAL OFFICER—EFFECT.

A tender by a fraternal insurance member to the treasurer of the local council cannot be relied on as avoiding the effect of the member's payment of assessments on the amount of his certificate as reduced under an invalid by-law, as such tender was not a tender to the corporation.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

4. INSURANCE (§ 724*)—FRATERNAL INSURANCE—INVALID REDUCTION OF AMOUNT—WAIVER.

That a beneficiary certificate surrendered by the member for reduction under an invalid by-law was returned to him did not waive the corporation's right to reduce the certificate, where the return was made to preserve the right of the beneficiaries to the larger amount on the member dying before the future date when the by-law took effect.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Proceeding by the Attorney General against the Supreme Council American Legion of Honor. On claim by Mary M. Hackett and others to share in a fund in the receiver's hands. Case reserved to the Supreme Judicial Court. Bill dismissed.

L. Sullivan and F. W. Bacon, for claimants.

LORING, J. The question of the petitioners' right to share in the emergency fund is an altogether different question from their right to a judgment against the corporation. Attorney General v. American Legion of Honor (Dunlavy's Case), 206 Mass. 168, 172, 92 N. E. 140. The petitioners established their right against the corporation in the case before this court in Hackett v. American Legion of Honor, 206 Mass. 139, 92 N. E. 133. The purpose of the present petition is to establish their right to share in the emergency fund, for that is the only fund in the hands of the receiver.

James P. Hackett, the member under whom the petitioners claimed, paid two assessments of the reduced amount and died on November 26, 1900. The petitioners took \$1,900 in settlement of their claim and surrendered the certificate for cancellation on April 4, 1901. The \$1,900 was not received by the petitioners under protest, and the corporation received no notice from the petitioners that they claimed that they were entitled to the larger sum until the suit against the corporation (which we have already spoken of) was begun on April 16, 1904. The combined period of acquiescence is less than a month shorter than that in Skinner's Case, 206 Mass. 179, 92 N. E. 143. The case at bar is governed by that case and Doleac's Case, 206 Mass. 175, 92 N. E. 143.

The petitioners seek to escape from this result in several ways. In the first place they point out that Hackett was ill during the month and 26 days during which he lived after the invalid by-law went into effect. But it is apparent that although ill in body his mental capacity was not impaired. They say in the second place that Hackett made a tender. But the tender made by him was made to the treasurer of the local council, and that is not a tender to the corporation. Dreyfus' Case, 206 Mass. 180, 92 N. E. 145. Lastly they say that when Hackett surrendered his policy to be exchanged for a \$2,000 policy under the invalid by-law it was returned to him after October 1st and thereby the defendant waived its rights to cut down this policy. But that is not so. The policy was surrendered in August and returned then because the by-law was not to go into effect until October. Manifestly this was done to preserve the right of the bene-

ficiaries named in that policy to the larger sum in case Hackett died before October 1st, when the new by-law was to go into effect.

Under the terms of the interlocutory decree under which this belated petition was allowed to be filed, the entry must be:

Bill dismissed with costs.

(207 Mass. 501)

PERRY v. J. L. MOTT IRON WORKS CO.

(Supreme Judicial Court of Massachusetts.

Suffolk. Jan. 6, 1911.)

1. LANDLORD AND TENANT (§ 160*)—TRADE FIXTURES—EXPENSE OF REMOVAL—LIABILITY OF TENANT.

Where trade fixtures, so constructed as to constitute an addition to the premises, were built by the lessee with the consent of the lessor and added nothing to the value of the premises, and their removal was necessary to let the premises to another lessee, the lessor could not recover from the lessee the cost of removal to adapt the premises to other uses, and the rent for the time required in doing the work, unless the lease gave the right.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 160.*]

2. CONTRACTS (§ 158*)—CONSTRUCTION.

The court, in construing an agreement, will adopt the rule of grammatical construction of language that a qualifying word or phrase ordinarily refers to its nearest antecedent; and, though punctuation may be disregarded when the intent of the instrument seems so to require it, yet it may be resorted to when it seems to throw light on the interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 740; Dec. Dig. § 158.*]

3. LANDLORD AND TENANT (§ 152*)—LEASE—CONSTRUCTION—RIGHTS OF PARTIES—"REPAIR."

A lease provided that the lessee should not deface the premises, by removal of any fixture or otherwise, and yield up the premises and all additions in good repair, but permitted him to make alterations necessary for his business, and to remove the same at the termination of the lease, provided he put the premises in good repair. The lessee built on the premises bathrooms, and installed appropriate fixtures and tiled floors, all of permanent construction, to adapt the premises for his business of selling bathroom and sanitary fixtures. Held, that the lessee had the option of removing the additions at the end of the term, and when he exercised the option the premises must be left undefaced and in good repair, but, where he did not elect to exercise the privilege of removal, the lessor could not compel him to make such removal; the word "repair" meaning mending a waste or decay incident to a removal, and not a restoration to an original state, when the additions were sound as structures and not defacing the premises.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 541; Dec. Dig. § 152.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6096-6102; vol. 8, p. 7785.]

4. EVIDENCE (§ 441*) — PAROL EVIDENCE — MODIFYING WRITTEN INSTRUMENTS.

Where a contract is formally reduced to writing without fraud or mistake, and signed by the parties, and the contract is free from ambiguity, evidence of the contents of a preliminary draft for the contract is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2080; Dec. Dig. § 441.*]

Exceptions from Superior Court, Suffolk County; W. C. Wait, Judge.

Action by Alonzo W. Perry against the J. L. Mott Iron Works Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

J. E. Hannigan, Isidor Fox, and W. I. Perry, for plaintiff. Phipps, Durgin & Cook, for defendant.

RUGG, J. This is an action of contract upon a lease of a store for a term of six years and two months. Its provisions now material were that the lessee would "not injure, overload or deface the premises in any way, or suffer or permit the premises or any part thereof, during or at the termination of these presents, to be injured, overloaded or defaced in appearance, whether by removal of any fixture or otherwise; and * * * not make any alterations or additions during the term * * * except such as are hereinafter permitted, * * * and peacefully yield up to the lessor the premises, and all erections and additions made to or upon the same, clean and in good repair in all respects. * * * And it is agreed that the lessee may make such alterations and additions within said leased premises as may be necessary for his business, and may remove at the termination of this lease such tiling and special fittings as have been put in at his own expense, provided he puts the premises in as good repair as they were in at the beginning of said term." The defendant pursuant to the lease built upon the premises six bathrooms with plaster walls covered with tiling, and installed appropriate fixtures and tiled floors, and a gallery, all of permanent construction for the purpose of adapting the premises for its business of selling bathroom and sanitary fixtures and plumbers' supplies. At the expiration of its lease the defendant did not remove any of these additions and alterations. This action is brought to recover the expense of removing them in order to adapt the premises to other uses and the rent for the time required in doing the work.

The trial court found that the bathrooms were trade fixtures, but were so constructed as to constitute an alteration and addition, and were built with the knowledge and consent of the lessor, but added nothing to the value of the premises, and their removal was necessary in order to let the premises to another tenant. Under these circumstances the plaintiff cannot recover unless some provision of the lease gives this right. *Plaster & Vogel Co. v. Fitzpatrick*, 197 Mass. 277, 83 N. E. 878. It is plain that by the express terms of the lease changes like these actually made were contemplated and allowed. It is contended, however, that the con-

ditional clause in the final paragraph of the lease expressed in the words "provided he puts the premises in as good repair as they were at the beginning of the term" applies as well to the permission to make the alterations and additions as to that to remove them. The rule of grammatical construction of language is that a qualifying word or phrase ordinarily refers to its nearest antecedent, and that, although punctuation may be disregarded when the intent of the instrument seems so to require, yet it may be resorted to when it seems to throw light on the interpretation. *Greenough v. Phoenix Insurance Co.*, 206 Mass. 247-251, 92 N. E. 447, and cases cited. "Repair" as here employed naturally means a mending of the waste or decay incident to a removal rather than a restoration to an original state, when the alterations or additions were sound and without deterioration as structures. "Repair" is not equivalent to "condition" in this connection. This is confirmed by the earlier provision of the lease to the effect that all erections and additions, if left, should be yielded up to the lessor "clean and in good repair." Nor can it be said that these additions "defaced" the premises and hence should have been removed by the tenant. They were not defacements but useful adaptations to the needs of the tenant, for which they were designed. Construing the lease as a whole and giving reasonable effect to its several provisions, it appears to give to the lessee the option of removing the additions and alterations at the expiration of the term, and if this option is exercised the premises must be left undefaced in appearance and not in any state of depreciation by such removal; but if the option was not exercised, then the premises, together with all additions, must be left for the landlord in a good state of repair, reasonable wear and unavoidable casualties excepted. As the tenant did not elect to exercise the privilege of removal, the plaintiff could not compel him to make such removal. Therefore he cannot recover.

The evidence as to the contents of the preliminary draft for the lease was properly excluded under the familiar rule that when a contract is formally reduced to writing, without fraud or mistake, and is signed, all previous or contemporaneous discussions and memoranda are either rejected or embodied in it, which alone expresses the agreement. There is no such obscurity or ambiguity about the language employed or the subject-matter involved as to open the door for explanation. *Commonwealth Trust Co. v. Coveney*, 200 Mass. 379, 86 N. E. 895; *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036, and cases cited.

Exceptions overruled.

(207 Mass. 491)

FALLON v. OLIFTON MFG. CO.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)**1. CORPORATIONS (§ 428*)—AGENTS—EMPLOYMENT—VALIDITY.**

Where the treasurer of a corporation agreed to pay an individual \$50 per week for services which he was to render, and he rendered the services with the knowledge and consent of the corporation, and was paid at that rate for about five months, a finding that the treasurer's agreement had been either originally authorized or subsequently ratified was warranted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1737; Dec. Dig. § 428.*]

2. APPEAL AND ERROR (§ 1070*)—IMMATERIAL QUESTIONS.

Where, in an action for commissions for sale of corporate stock, the jury based their verdict on the reasonable amount for the sale as claimed in the third count of the declaration, the fact that there was no evidence of the usual commission in such a case was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. § 1070.*]

3. TRIAL (§ 340*)—VERDICT—CORRECTIONS.

Where, in an action on contract, the declaration contained a count for wages, a count for commissions, based on customary commissions and a count for a reasonable amount for services rendered, and the jury rendered a general verdict for the amount claimed in the first count, with interest, the action of the court in directing that the verdict should be entered on the first count, and that the judgment should be entered for defendant on the other counts, was not prejudicial to defendant; a judgment on the verdict as amended giving to plaintiff what the jury found and were warranted in finding to be due to him, and finally disposing of all the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 796-799; Dec. Dig. § 340.*]

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by Dalton Fallon against the Olifton Manufacturing Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of contract in three counts; the first for wages, amounting to \$438.70, the second count for a commission of \$1,000 for the sale of stock for defendant, based on customary commissions, and the third count for commission of a reasonable amount for such sale. The jury returned a general verdict for the amount claimed in the first count, with interest.

Joseph Bennett, for plaintiff. E. F. McClennen and A. T. Wright, for defendant.

SHELDON, J. 1. There was evidence that the treasurer of the defendant agreed with the plaintiff to pay him the sum of \$50 per week for the services which he was to render; that he rendered these services with the knowledge and consent of the defendant and its officers; and that he was paid at that

rate for about five months. This warranted a finding that the treasurer's agreement had been either originally authorized or subsequently ratified by the corporation. And Chick, the defendant's secretary, testified that when the plaintiff's bill was presented at a meeting of the directors, "it was allowed he was owed this amount, but we wanted to try and make the best settlement we could." His further testimony, apparently on cross-examination, that all the directors thought "that they did not owe him anything," was to be weighed only in connection with what he formerly had said. *Dunton v. Derby Desk Co.*, 186 Mass. 35, 71 N. E. 91.

2. It may be, though we should hesitate so to decide, that a verdict for the plaintiff on the second count was not warranted. There was to be sure nothing to indicate what the usual commission in such a case was. But this is not now material; for if the jury allowed him any commission it is evident from the amount of the verdict that the finding as to that must have been upon the third count.

3. Upon the third count the evidence was meager, but there was something for the jury. Besides the plaintiff's testimony as to his agreement with the treasurer it could be found on Chick's testimony that this matter too was brought before the board of directors by Chick's memorandum on the plaintiff's bill for services, and was included in their approval, in spite of Chick's further testimony already stated.

4. Under these circumstances, the defendant was not harmed by the order made on the plaintiff's motion that the verdict should be entered on the first count, and that judgment should be entered for the defendant on the second and third counts. The averment in that motion, "that the evidence at the trial would have warranted that verdict on the first count, and upon no other," may be treated as meaning only that a verdict for that amount, being the sum claimed in the first count with interest from the date of the writ, must have been rendered upon that count alone. Whether or not this conclusion is an absolutely necessary one, it is yet manifest that a judgment upon the verdict as amended gives to the plaintiff exactly what the jury found and were warranted in finding to be due to him, and finally disposes of all the issues in the case. Computation shows that the verdict was for the amount claimed in the first count with interest to the date of the verdict; and therefore it is highly probable, if not practically certain, that the verdict was rendered upon the first count only. See *Ashton v. Touhey*, 131 Mass. 26; *Commonwealth v. Delehan*, 148 Mass. 254, 19 N. E. 221; *Minot v. Boston*, 201 Mass. 10, 13, 86 N. E. 783, 25 L. R. A. (N. S.) 311. Justice does not require a new trial.

Exceptions overruled.

(207 Mass. 435)

FLEISCHNER v. DURGIN.(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 6, 1911.)**MASTER AND SERVANT (§ 305*)—AUTOMOBILE DRIVERS—EMPLOYER'S LIABILITY TO THIRD PERSONS.**

An employer is liable for the act of an employé in charge of his vehicle only when it is committed under express or implied authority and in the course of the employment; and hence the owner of an automobile, who engaged one to drive the car less than a mile in a town for an express purpose, is not liable for injury caused by the driver while deviating several miles from his route, and driving through a crowded city on a personal errand, without the owner's knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1223, 1224; Dec. Dig. § 305.*]

Exceptions from Superior Court, Middlesex County; Wm. B. Stevens, Judge.

Action by Otto Fleischner against Charles E. Durgin. Verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

Henry W. Beal, for plaintiff. Bates, Nay & Abbott and Robert E. Buffum, for defendant.

RUGG, J. The plaintiff while in the exercise of due care and traveling on Dartmouth street opposite the Public Library in Boston was injured by the negligence of one Freeman, who was driving the defendant's motor car. Freeman was not in the general employ of the defendant, but on the day in question had been asked by him to drive the car from the Stevens garage in the town of Brookline to the shop of one Burlingame, also in Brookline and less than a mile away, for some repair. Later in the day Freeman took the car, drove first to Coolidge Corner, a square in Brookline, not on the way to the Burlingame shop, where he had lunch. Then with a friend he drove the car about six miles further out of the way from the garage to the Burlingame shop to a shop in Boston for the purpose of getting a chain for his own uses. He had started to return to Brookline and was bound for the Burlingame shop when the accident occurred. The defendant gave no directions to go to Coolidge Corner or to Boston, and this ride was taken without his knowledge. Freeman had worked at the Stevens garage where the defendant kept his motor car, and once before had driven it to Boston, but under what circumstances does not appear.

The principles which govern the rights of the parties are settled. The master is liable for the act of a servant in charge of his vehicle when the latter is acting in the main with the master's express or implied authority, upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations, and is doing something not in

compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged. *Hayes v. Wilkins*, 194 Mass. 223, 80 N. E. 449, 9 L. R. A. (N. S.) 1033, 120 Am. St. Rep. 549. The employment of Freeman was limited to a specific and short trip within a town. He took the car several miles out of the way, which was six or seven times as far as he had a right to go, to a crowded part of a large city on an errand wholly of his own, and had only just commenced to return at the time the act occurred for which damages are sought in this action. He was acting in disregard of his instructions, and wholly outside his employment, and for a purpose having no relation even remote to the business of the master. The extent of the excursion which he undertook on his own account was so disproportionate to the length of the route he was authorized to go that it cannot be minimized to a deviation. It was in fact the chief journey. There is nothing to indicate that the defendant had any hint or ground for suspicion of this unwarranted use of his property. Under such circumstances he cannot be held liable. *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. Rep. 490; *Story v. Ashton*, L. R. 4 Q. B. 476; *Mitchell v. Crassweller*, 13 C. B. 237.

Exceptions overruled.

(207 Mass. 438)

AMERICAN SODA FOUNTAIN CO. v. SPRING WATER CARBONATING CO.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)**SALES (§ 38*)—MISREPRESENTATION—MATTERS OF OPINION.**

A representation that special draught arms, to be manufactured as per drawing submitted, would accomplish certain things, was a mere expression of opinion, and afforded no ground for rescission; it not appearing that the person making the statement had actually made a test of the proposed mechanism.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65-77, 85; Dec. Dig. § 38.*]

Exceptions from Superior Court, Suffolk County; Charles U. Bell, Judge.

Action by the American Soda Fountain Company against the Spring Water Carbonating Company. Heard on exceptions by defendant to ruling on offer of proof. Exceptions overruled.

Phillips Ketchum, for plaintiff. Willard Howland and C. A. Warren, for defendant.

LORING, J. This is an action on a written order for 100 special draught arms to be manufactured "as per drawing submitted." At the trial it was admitted that 100 special draught arms manufactured according to the "drawing submitted" had been delivered to the defendant, and that \$272 of the purchase price had been paid by it on account. But the defendant contended that the contract was procured by fraud and that it had been avoided on that ground. It set this up in defense to the action for the unpaid balance of the purchase price, and filed a declaration in set-off to recover back the \$272 paid by it to the plaintiff on account.

In support of the contention the defendant offered to prove: "That during preliminary negotiations and at the time this order or contract was signed the plaintiff represented to the defendant that it would manufacture special draught arms to be used for the purpose of drawing root beer from wooden kegs, which would deliver, automatically, two streams of different volume and at different degrees of velocity and which would be durable and practical for the purpose for which they were designed, and submitted to the defendant a drawing or plan of a draught arm, claimed by the plaintiff to be durable and practical for the purpose aforesaid, and represented that it would manufacture for the defendant, special draught arms, in accordance with said plan, which would accomplish the purposes aforesaid; that the defendant, relying upon said representations and believing them to be true, ordered the plaintiff to manufacture for it one hundred (100) of said special draught arms, made according to said drawing or plan." The judge ruled "that the offer of proof, if maintained, did not constitute a defense to the action and did not entitle the defendant to recover on its declaration in set-off." The case is here on an exception to that ruling.

It is stated by the defendant in its bill of exceptions that it was induced to give the order sued on "by certain false representations, not fraudulent in fact, but amounting in law to fraudulent representations"; and its sole contention is that the representations of the plaintiff which it offered to prove were representations of fact made by the plaintiff as of its own knowledge and so of themselves fraudulent without proof of a scienter within the rule applied in *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727, where the earlier cases are collected. For a later case see *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498.

To make out a fraud of that kind the defendant had to prove that the plaintiff had in fact tested the special draught arms made according to the "drawing submitted," or represented that that had been done, and that the result of the test was that they would do what the defendant wished them to do.

Or the defendant had to prove something equivalent to that. What he offered to prove manifestly was short of that if it had stood by itself. But it did not stand by itself in the case at bar. Witnesses called by the plaintiff had testified "that the defendant desired to procure a faucet through which both still and live beer could be drawn; that the draughtsman of the plaintiff made a working drawing of a draught arm designed to draw both still and live beer, and submitted it to Mr. Flynn. It appeared that Flynn, the defendant's manager, examined this sketch and signed and delivered to the plaintiff" the order sued on, and there was no offer to contradict this. On this bill of exceptions it must be taken that the plaintiff caused its draughtsman to design the arm shown in the "drawing submitted" for the purpose of accomplishing what the defendant wished, and that the representations which the defendant offered to prove were not representations by the plaintiff as of its own knowledge as to what these special draught arms had done, but a representation of its opinion as to what they ought to do. Such misrepresentations "not fraudulent in fact" are not ground for rescinding a contract. No cases in this commonwealth have gone further than *McCusker v. Geiger*, 195 Mass. 46, 80 N. E. 648, and *Goodwin v. Massachusetts Loan & Trust Association*, 152 Mass. 189, 25 N. E. 100.

Exceptions overruled.

(307 Mass. 373)

SIAS et al. v. CHASE et al.

(Supreme Judicial Court of Massachusetts, Norfolk. Jan. 4, 1911.)

1. WILLS (§ 547*)—GIFT TO "SURVIVORS"—TIME OF DETERMINING SURVIVORSHIP.

Testator, after giving a large number of legacies to relatives and friends, and creating a trust fund, the income of which his wife was to have for life, and providing for the payment, on her death, from the trust fund of a number of legacies to charities, directed that the residue of the trust fund be distributed among the "survivors" of certain of his legatees. *Held*, that the time as of which survivors are to be determined is the death of the widow.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1179-1181, 1185; Dec. Dig. § 547.*]

2. WILLS (§ 548*)—CONSTRUCTION—PROPERTY DISPOSED OF.

The first clause of disposition of a will was, "I give, bequeath and devise all my property and estate, of whatever nature and wherever situated, as follows." After various bequests, there was a bequest and devise in trust of property described as "all the rest and remainder of my estate." The income of this was to be paid to testator's widow for life, and on her death he provided that from the trust fund certain legacies to charities should be paid, and "all the rest and remainder of said trust fund" should be distributed among the survivors of certain named legatees. Some of the codicils also expressly recognized testator's purpose to include all his property in this testamentary disposition. *Held*, all the property not previ-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

ously disposed of was to be included in the distribution to the surviving legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. § 548.*]

3. WILLS (§ 548*)—CONSTRUCTION—PROPORTION FOR DISTRIBUTION.

Where a will provides for the distribution of the entire residue of a trust fund among those of certain named legatees who survive testator's widow, the language as to the proportion in which they are to receive it, "Each * * * shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed," is inaccurate; the part that each receives being in such proportion to the whole amount to be distributed as the amount of his legacy is to the whole amount of the legacies sharing in the distribution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1182, 1183; Dec. Dig. § 548.*]

4. WILLS (§ 585*)—CONSTRUCTION—CODICILS.

A will, after giving specific legacies, created a trust fund from the rest of the estate, the income of which was to be paid to testator's widow for life, and directed that on her death there be paid from such fund certain legacies to charities, and that the residue of such trust fund be distributed among the survivors of his legatees named below, following which were the names of 35 legatees. *Held*, that the provision of a codicil, reciting the giving of legacies to 34 persons named, and directing that no legacy to any one of them shall lapse by reason of his death prior to testator's decease or for other cause, refers only to the legacies given such persons in the part of the will prior to the creation of the trust fund, and does not include the right to share in the residue of the trust fund; a legacy being distinguishable from a gift of a share in a residue, and it not being presumable that the provision of the codicil was intended to include shares in the residue, which by the terms of the clause of the will were given only to those surviving, not only testator, but his widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1274-1278; Dec. Dig. § 585.*]

5. WILLS (§ 858*)—EFFECT OF CODICIL ON RESIDUE.

The part of a remainder in real estate which by a will is to go to a certain person, but by a codicil is separated from her share, falls into the residue, which the will directs to be distributed in a certain way.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 858.*]

6. WILLS (§ 587*)—DISTRIBUTION OF RESIDUE—EFFECT OF CODICIL ON PROPORTION.

A will, after giving certain legacies, created a trust fund from the rest of testator's estate for the benefit of his widow for life, and provided that on her death, after a certain distribution of part of the trust fund, the residue should be distributed among the survivors of certain legatees, so that each should receive an amount in proportion to his "foregoing legacy." *Held*, that a legacy given by a codicil to any such legatees did not entitle him to any greater share in the residue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.*]

Case Reserved from Supreme Judicial Court, Norfolk County.

Bill by Charles D. Sias and others, trustees, against Herbert I. Chase and others, for instructions. The case was reserved for the full court. Instructions given.

Elder, Whitman & Barnum, for plaintiffs. A. Hemenway and A. G. Mitton, for respondents executors of estate of widow of Caleb Chase. Robert M. Morse, Nathan A. Tufts, J. R. Lazenby, Geo. C. Oolt, Henry H. Baker, F. C. Swift, G. L. Mayberry, C. T. Gallagher, Fred A. Fernald, Dickson & Knowles, Andrew J. Howard, Asa P. French, and J. S. Allen, Jr., for certain other respondents.

KNOWLTON, C. J. The plaintiffs, trustees under the will of Caleb Chase, bring this bill for instructions as to their duties under the following clause of the will:

"And I further direct my trustees to so divide and distribute all the rest and remainder of said trust fund among the survivors of my legatees named below, that each survivor shall receive such a proportional part thereof as the amount of his foregoing legacy bears to the sum remaining to be distributed, to wit," etc. Then follow the names of 35 legatees. This residue was what would remain after the giving of a large number of legacies to relatives and friends, and after the creation of a trust fund of which the widow was to have the income for life, and after the death of the widow and the payment from the fund of 22 legacies to as many charities.

Numerous questions have been raised; but the decision of a few of them will render the others inapplicable. Although a large amount of property is in the hands of the trustees for distribution, the questions presented seem simple.

The first inquiry is as of what time are survivors to be determined. The persons mentioned are not members of a class. They are relatives and friends of the testator, to all of whom legacies had been given in the earlier part of the will. By this clause they are to share in a fund which does not take definite form, with the amount of it fixed, until after the death of the widow, and the subtraction from it of the amounts given to charities. We think it plain that only those who survive the widow are included. This is in accordance with numerous decisions in similar cases. *Hulburt v. Emerson*, 16 Mass. 241; *Rich v. Waters*, 22 Pick. 563; *Denny v. Kettell*, 135 Mass. 138; *Coveny v. McLaughlin*, 148 Mass. 576, 20 N. E. 165, 2 L. R. A. 448; *Fargo v. Miller*, 150 Mass. 225, 22 N. E. 1003, 5 L. R. A. 690; *Crapo v. Price*, 190 Mass. 817, 76 N. E. 1043; *Brown v. Wright*, 194 Mass. 540, 80 N. E. 612; *Boston Safe Deposit, etc., Co. v. Blanchard*, 196 Mass. 35, 81 N. E. 654.

It is contended in behalf of some of the heirs of the testator that this clause is void for uncertainty, or that it should be so construed as to leave a large part of the fund undisposed of, to be distributed as intestate estate. The will contains the strongest in-

dications of the testator's purpose to dispose of all of his property. The first clause of disposition is, "I give, bequeath and devise all my property and estate, of whatever nature and wherever situated, as follows." The property bequeathed and devised in trust, of which this fund is a part, is described as "all the rest and remainder of my estate." The clause in question directs the distribution of "all the rest and remainder of said trust fund." In some of the codicils there is also an express recognition of the testator's purpose to include all of his property in this testamentary disposition. We have no doubt that this clause should be construed as including in the distribution all the property not previously disposed of.

Nor is there any ground for question in regard to the proportions in which the legatees are to receive it. The language in which the direction is expressed is inaccurate. The part of the fund that each survivor will receive is in such proportion to the whole amount to be distributed, as the amount of his legacy is to the whole amount of the legacies sharing in the distribution, instead of in the proportion that his legacy is to the sum remaining to be distributed. This follows from the fact that the entire residue is to be divided. As the share of each one is represented in the proportion by the amount of his legacy, and as the amount of all the legacies will represent the shares of all together in the whole residue to be divided, each one will receive such a share of this residue as his share of the legacies bears to the whole amount of these legacies. See *Bartlett v. Houdlette*, 147 Mass. 25, 16 N. E. 740; *Shattuck v. Balcom*, 170 Mass. 245, 49 N. E. 87; *Chambers v. Chambers*, 41 La. Ann. 443, 6 South. 659; *Heyward v. Glover*, 2 McCord, Eq. (S. C.) 395; *Gray's Estate*, 147 Pa. 67, 23 Atl. 205.

The next question is whether the provision in the first codicil, reciting the giving of legacies to 34 persons named, and directing that no legacy to any one of these persons shall lapse by reason of his or her death prior to the testator's decease, or for other cause, includes the right to share in the rest and residue of the estate, or refers only to the legacies given to these persons in the former part of the will. In *Quincy v. Rogers*, 9 Cush. 291-297, Chief Justice Shaw said that, "in common parlance as well as in the more precise use of language, a legacy is distinguishable from the gift of a residue or share in a residue." This language is quoted with approval in *White v. Ditson*, 140 Mass. 351-359, 4 N. E. 606, 54 Am. Rep. 473. The case of *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831, is also in point. See, also, *Pendergast v. Tibbets*, 164 Mass. 270, 41 N. E. 294; *Hall v. Severn*, 9 Slim. 515. Moreover, it is not to be presum-

ed that this provision in the codicil was intended to include shares in the residue which, by the terms of the clause in question, were given only to those who not only survive the testator, but survive his widow. We are of opinion that this part of the codicil has no bearing upon the mode of distribution under the residuary clause of the will.

That part of the remainder in the real estate which by the will was to go to Mrs. Berry, but by the second codicil was separated from her share, falls into the residue, and is to be disposed of by the trustees under the authority of the will; and the proceeds are to be distributed, as a part of the fund, to the survivors of the legatees referred to. *McLaughlin v. Greene*, 198 Mass. 153, 83 N. E. 1112; *Smith v. Haynes*, 202 Mass. 531, 89 N. E. 158; *May v. Brewster*, 187 Mass. 524, 73 N. E. 546.

The term "forfeiting legacy," in the clause in question, refers to the legacies in the preceding part of the will, and does not include any additional legacies under the codicils increasing the amounts given to some of the legatees.

The distribution is to be made among the persons included in the first class in the plaintiff's bill, in such proportions that the amount given to each shall be in the same proportion to the whole amount distributed, as the amount of his legacy, given in the preceding part of the will, bears to the whole amount of the legacies included in making the distribution.

So ordered.

(207 Mass. 513)

DUNHAM v. BLOOD.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1911.)

1. TRUSTS (§ 213*)—NOTES BY TRUSTEES—LIABILITY.

A trustee is individually liable on a note given by him as trustee for borrowed money, even when authorized to borrow.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 296; Dec. Dig. § 213.*]

2. TRUSTS (§ 213*)—NOTES BY TRUSTEES—RIGHTS OF HOLDER.

A trustee giving a note as such for borrowed money, being individually liable thereon, has a remedy over against the trust estate, of which the note holder can avail himself, if the trustee was authorized to borrow.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 296; Dec. Dig. § 213.*]

3. TRUSTS (§ 213*)—NOTES BY TRUSTEES—INDIVIDUAL LIABILITY.

That a note was signed by an estate by the trustee does not defeat his individual liability thereon, where he was not authorized to borrow, and the holder of the note has no remedy over against the estate, unless it be to stand in the trustee's shoes, if the estate owes the trustee anything.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 298; Dec. Dig. § 213.*]

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Bill by Harrison Dunham against Charles W. Blood, trustee. Decree for defendant, dismissing the bill, and plaintiff brings exceptions. Exceptions overruled.

Harrison Dunham & Son, for plaintiff.
Charles W. Blood, pro se.

LORING, J. When a trustee, even when authorized to do so, borrows money in behalf of his trust and gives a note as trustee, the note is his individual note (*Fiske v. Eldridge*, 12 Gray, 474; *Towne v. Rice*, 122 Mass. 67; *Plimpton v. Goodell*, 126 Mass. 119), and he has a remedy over against the trust estate of which the note holder can avail himself. In the case at bar the fact that the note in question was signed "Estate of William R. Clark, by William R. Clark, Jr., Trustee," does not change this result; the note was the note of Clark. He had no authority to borrow money, and so the plaintiff has no remedy over. *Tuttle v. Greenfield Bank*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420. In this case the money lent by the plaintiff was lent to the trustee and became his money. The case differs in that respect from *Newell v. Hadley*, 206 Mass. 385, 92 N. E. 507. If the plaintiff has any remedy over against the trust estate, it is through the plaintiff's right to stand in the trustee's shoes. But it is not shown that as between the trustee and the trust anything is due to the trustee.

Exceptions overruled.

(207 Mass. 525)

REGGIO v. WARREN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. FRAUD (§ 20*)—RELiance ON REPRESENTATIONS.

The old rule that fraudulent representations may be such that one is not justified in acting upon them is now somewhat relaxed in order that persons guilty of actual fraud may not too easily escape liability by setting up their victim's undue gullelessness.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

2. CANCELLATION OF INSTRUMENTS (§ 37*)—PLEADING.

A bill by a beneficiary under a testamentary trust to cancel a release of his claim against the estate given in consideration of a note for the sum he was entitled to in cash, on the ground of mutual mistake of the parties as to the validity of the transaction, was not bad for failing to show that he had a right to rely on his cotrustees' or on his own belief as to such validity, where the transaction was entered into to give him his legal rights and avoid loss to the estate by forcing its property upon a depressed market, and where no loss appears to have resulted to the estate nor to the remaindermen.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Dec. Dig. § 37.*]

3. EQUITY (§ 7*)—MISTAKE OF LAW—EFFECT.

The general rule that one cannot obtain affirmative relief, nor defend himself against an otherwise well-founded claim, on the bare ground of mistake of law, is relaxed, where its enforcement will cause great injustice.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

4. TRUSTS (§ 283*)—RELEASE—MISTAKE OF LAW—RIGHT TO RELIEF.

A beneficiary under a testamentary trust gave a release of claims against the estate in consideration of a void note given by the trustees for future payment, the transaction being designed to avoid forcing the trust property upon a depressed market. The parties believed the transaction to be valid, and no loss to the estate was entailed thereby. *Held*, that the beneficiary's right to rescind the release and receive the sum due him from the estate is not precluded because the mistake was one of law.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 283.*]

5. TRUSTS (§ 283*)—INVALID SETTLEMENT—RESCISSION.

The right of a beneficiary under a testamentary trust to rescind an arrangement whereby he released his right to immediate payment in full, on receipt of a void note, believed by the parties to be valid, covering a large part of the sum due, is not affected because the remaining part was paid in cash at the time of such release.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 283.*]

6. TRUSTS (§ 283*)—INVALID SETTLEMENT—RESCISSION—TENDER.

A beneficiary under a testamentary trust, suing to rescind an arrangement whereby he released his right to immediate payment in full, on receipt of a void note, believed by the parties to be valid, was not bound to return money received under such arrangement; such payments being credits upon his original demand.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 283.*]

7. TRUSTS (§ 283*)—BENEFICIARIES—ERRORS OF JUDGMENT—EFFECT.

One cannot be made to suffer as a beneficiary under a testamentary trust for errors of judgment as a trustee, for which neither he nor his cotrustees are liable as trustees.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 283.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Bill by Andrew C. Reggio against Winslow Warren, trustee, in which Mary Frances Carlida and others petitioned and were allowed to be joined as defendants. On reservation. Decree for plaintiff.

J. F. Cusick, for complainant. M. Storey, for defendant Warren. El. R. Anderson, G. A. Sweetser, and T. L. Wiles, for other defendants.

SHELDON, J. We assume, under the language of the reservation, that these remaindermen, who at their request have been admitted as parties defendant, did not waive their demurrer by going to a hearing on the merits.

They contend that the bill upon its face shows negligence in the plaintiff, on the grounds that he did nothing to ascertain by

his own investigation the facts upon which his right depended, or to determine what his rights were; that he relied merely on the assurances of his cotrustees, believing in their judgment and wisdom, and now resting upon an allegation that he and "all of the trustees believed that under said will and under the circumstances which then existed said trustees had full power and authority, the complainant assenting, to retain in manner aforesaid the sum to which the complainant was entitled, and instead of distributing said sum in cash to the complainant to give said complainant a promissory note as aforesaid, which note should be in all respects valid and binding upon the trust estate." These defendants insist that there is no allegation in the bill that he had a right to rely on or to believe his cotrustees, nothing to show upon what the belief of the trustees or his own belief was based, or to indicate that it was a reasonable belief or one that should have been relied on.

The bill does not proceed upon any claim of deceit or fraud; and the decisions in which it has been held that there are fraudulent representations of such a character that one cannot be justified in believing them or in acting upon them are not applicable. Even in such cases the strictness of the old rule has been somewhat relaxed, in order that parties guilty of actual fraud may not too easily escape from liability for their wrongdoing by setting up the undue gullibility of their victim. *Way v. Ryther*, 165 Mass. 226, 229, 42 N. E. 1128; *Kilgore v. Bruce*, 166 Mass. 136, 138, 44 N. E. 108; *Mabardy v. McHugh*, 202 Mass. 148, 149, 150, 88 N. E. 894, 23 L. R. A. (N. S.) 457, 132 Am. St. Rep. 484, and cases cited. This bill proceeds purely on the ground of a mutual mistake on the part of persons who were in confidential relations with each other, who were not undertaking to deal with each other at arm's length, and who desired to give to the plaintiff and his sister their legal rights in such a manner as to avoid causing thereby any loss to the body of the trust estate by forcing its property and securities upon a depressed and reluctant market. There was here no violation of any legal duty owed by the plaintiff to the other parties, his cotrustees, with whom he was dealing; there was nothing to indicate that his acting upon their common belief and refraining from requiring them to pay to him in cash the money to which he was entitled could result, or that it has resulted, in any loss or injury to the trust estate or to these remaindermen. He is not to be charged with any such laches or acquiescence as was found in *Stone v. Godfrey*, 5 De G., M. & G. 76. Under more stringent circumstances it could not be said that the bill showed such negligence on his part as to preclude him from obtaining relief. See the cases collected in 2 *Pomeroy, Equity Jurisprudence*, § 856. The demurrer cannot be sustained on this ground.

These defendants also contend that the mistake set forth in the bill was a pure mistake of law, for which no redress can be given. It is a general doctrine that, as it is the duty of every one to conform his conduct to the requirements of the law, so all men must be treated, alike in courts of civil and of criminal jurisdiction, as being aware of the duties and obligations which are imposed upon them by the law, and that ordinarily one cannot successfully ask for affirmative relief or defend himself against an otherwise well-founded claim, on the bare ground that he was either ignorant of the law or mistaken as to what it prescribed. *Powell v. Smith*, L. R. 14 Eq. 85; *Rogers v. Ingham*, 3 Ch. D. 98; *Freeman v. Curtis*, 51 Me. 140, 81 Am. Dec. 564; *Rice v. Dwight Manuf. Co.*, 2 Cush. 80; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530; *Wheaton Building & Lumber Co. v. Boston*, 204 Mass. 218, 226, 90 N. E. 598. But it is now well settled that this rule is not invariably to be applied. In some cases where great injustice would be done by its enforcement, this has been avoided by declaring that a mistake as to the title to property or as to the existence of certain particular rights, though caused by an erroneous idea as to the legal effect of a deed or as to the duties or obligations created by an agreement, was really a mistake of fact and not strictly one of law, and so did not constitute an insuperable bar to relief. *Wilcox v. Lucas*, 121 Mass. 21, 25; *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012, 105 Am. St. Rep. 400; *Busiere v. Reilly*, 189 Mass. 518, 75 N. E. 958; *Eustis Manuf. Co. v. Saco Brick Co.*, 198 Mass. 212, 84 N. E. 449; *Blakeman v. Blakeman*, 39 Conn. 320; *McCarthy v. De Caix*, 2 Russ. & M. 614, 621. In other cases, a distinction between ignorance or mistake as to a general rule of law prescribing conduct and establishing rights and duties, and one as to the private right or interests of a party under a written instrument, has been laid down; and it has been declared that while relief could not be given by reason of a mistake of the former kind, one of the latter kind shared by both parties to an agreement and resulting in a loss of the rights of one of them, may be set aside at the suit of the injured party, though no fraud was practiced upon him. The distinction taken is between the general law of the country, for ignorance of which no one is excused, and private rights which depend upon the existence of particular facts and the rules which the law declares as to those facts. *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170; *Beauchamp v. Winn*, L. R. 6 H. L. 223; *In re Oliver's Trusts*, [1905] 1 Ch. 191, 197, 198; *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303. In other cases, sometimes as the ground of decision and sometimes merely in discussion or argument, it has been said that there is no established rule forbidding the giving of relief to one injured by reason of a mistake of law, but

that whenever it is clearly shown that parties in their dealings with each other have acted under a common mistake of law and the party injured thereby can be relieved without doing injustice to others, equity will afford him redress. *Frelchnecht v. Meyer*, 39 N. J. Eq. 551; *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052; *Ryder v. Ryder*, 19 R. I. 188, 32 Atl. 919; *Hausbrandt v. Hofer*, 117 Iowa, 103, 90 N. W. 494, 94 Am. St. Rep. 289, quoting and following *Stafford v. Fetters*, 55 Iowa, 484, 8 N. W. 322, and *Ring v. Ashworth*, 3 Iowa, 458; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52. To the same effect see *Swedesboro Loan & Building Ass'n v. Gans*, 65 N. J. Eq. 132, 55 Atl. 82, in which the old rule as to ignorance of the law is said to be subject to so many exceptions that it is quite as often inapplicable as applicable; *Williams v. Hamilton*, 104 Iowa, 423, 73 N. W. 1029, 65 Am. St. Rep. 475, in which the court declares it to be well settled that a mistake as to law may under certain circumstances afford ground for relief in equity; and *Allcard v. Walker*, [1896] 2 Ch. 369, 381, in which the proposition that relief never can be given in respect to a mistake of law was called inaccurate. So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or of fact entertained by both parties. *Park Brothers & Co. v. Blodgett & Clapp Co.*, 64 Conn. 28, 29 Atl. 133; *Blakemore v. Blakemore*, 44 S. W. 96, 19 Ky. Law Rep. 1619, 1620; *Dinwiddie v. Self*, 145 Ill. 290, 305, 33 N. E. 892; *Benson v. Bunting*, 127 Cal. 532, 59 Pac. 991, 78 Am. St. Rep. 81; *United Commercial Travelers' Society v. McAdam*, 125 Fed. 358, 368, 61 C. C. A. 22; *Stone v. Godfrey*, 5 De G., M. & G. 76, 90; *Naylor v. Winch*, 1 Sim. & Stu. 552, 564; *Re Saxon Life Assurance Society*, 2 Johns. & Hem. 408, 412. This doctrine frequently has been applied to cases of the reformation of contracts; a fortiori, it is to be applied to cases in which justice can be obtained only by a complete rescission. *Canedy v. Marcy*, 13 Gray, 373; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Griswold v. Hazard*, 141 U. S. 260, and cases cited on page 284, 11 Sup. Ct. 972, 999, 35 L. Ed. 678; *Carrell v. McMurray* (C. C.) 136 Fed. 661. Cases in which a release has been either avoided or restricted in its operation by a limitation of its general words rest really upon the same principle. *Remsden v. Hilton*, 2 Ves. Sr. 306; *Lyall v. Edwards*, 6 H. & N. 337; *Turner v. Turner*, 14 Ch. D. 829; *In re Garnett*, 31 Ch. D. 1. So one who has made an election under a will may rescind it upon proof that he acted under a misapprehension

of his legal rights or even in ignorance of the fact that he was bound to make an election. *Watson v. Watson*, 128 Mass. 152; *Macknet v. Macknet*, 29 N. J. Eq. 54; *Pusey v. Desbourrie*, 3 Peere Williams, 315, 316; *Salkeld v. Vernon*, 1 Eden, 64.

The correct doctrine both upon principle and authority was stated by the Supreme Court of Michigan in *Renard v. Clink*, 91 Mich. 1, 3, 51 N. W. 692, 693, 30 Am. St. Rep. 458: "While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties with knowledge of the facts and without any inequitable incidents have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was intended and designed to be made, equity will not allow a defence or grant a reformation or rescission, although one of the parties was mistaken or misconceived its legal meaning, scope or effect. * * * But where a person is ignorant or mistaken with respect to his own antecedent and existing legal rights, interests or estates, and enters into some transaction, the legal scope and operation of which he appreciates and understands, for the purpose of affecting those assumed rights, interests or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." And this statement by the court is amply supported by a full and apt citation of cases.

The approved text-writers have taken the same view. *Kerr* (Accident and Mistake [4th Ed.] 467) thus sums up his treatment of the subject: "When therefore a man, through misapprehension or mistake of the law, parts with or gives up a private right of property or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if under the general circumstances of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." *Pomeroy*, in his treatise on Equity Jurisprudence, after an elaborate discussion of the question in the light of the decided cases, lays down substantially the same proposition in language which has been cited and approved in many of the decisions already referred to. 2 *Pomeroy*, Eq. Jur. § 849. And see further the note to 1 *Story*, Eq. Jur. § 111.

These principles are decisive of the present contention. As to this point the bill, reduced to its lowest terms, presents the question whether one who has innocently left in the hands of trustees money, being a part of the trust fund, to which he was legally entitled and the payment of which he could have enforced, and in consideration thereof has received from the trustees merely a void promise that it shall be paid to him from the trust estate in future, with interest at a fixed rate,

which promise both he and the trustees believed to be valid and binding, and who thereupon has given to them a release and discharge running both to them and to the trust estate, from all liability except upon the void promise, can upon discovering the invalidity of the promise avoid or rescind his release and obtain the money or the part of the trust fund which was his rightful due, it appearing that the trust estate has parted with nothing of value in or by reason of the transaction and that the only effect of refusing the relief asked for will be to deprive him of the money to which he had the lawful right, and which all parties supposed that they had secured to him by what they had done, and correspondingly to enrich the trust fund at his expense and to secure to the beneficiaries in remainder a large amount of money to which they had no claim and to which it never was intended or imagined by themselves or anybody else that they should acquire any claim. The bare statement of this question is enough. We are led irresistibly to the conclusion that the demurrer cannot be sustained upon this ground.

Nor can these remaindermen derive any benefit from such cases as *Tuttle v. First National Bank of Greenfield*, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420, *Loring v. Brodie*, 134 Mass. 453, *Dunham v. Blood* (Jan. 4, 1911) 93 N. E. 804, or the decision in which one who has made an unauthorized loan to a city or town has been denied recovery either upon the invalid note which he has taken or upon the money counts by proof that the money had been applied to the use of the town. The case at bar differs from those cases in the fact that here there was not an unauthorized loan to the trustees which created no liability against the trust estate, but there was an antecedent liability of the trust estate to the plaintiff which he might have recovered from that estate by appropriate proceedings and which never has been paid. If he had given no release, the fact that he had accepted a void note for the amount that was due to him would not have prevented him from enforcing the original obligation. *Leonard v. First Congregational Church*, 2 Cush. 462, 464; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Weddigon v. Boston Elastic Fiber Co.*, 100 Mass. 422; *National Granite Bank v. Tyndale*, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447; *Central National Bank v. Copp*, 184 Mass. 328, 63 N. E. 334. Nothing now stands in his way but the release which it is the object of his bill to set aside. That differentiates the case from the decisions upon which the remaindermen rely. Of course, so far as the enforcement against the trustees of the note bearing a fixed rate of interest was concerned, the plaintiff did stand in a position similar to that of the plaintiffs in the actions referred to. That is the reason of the language used in the opinion of the court in

Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381, in speaking of the transaction as a loan of money upon the note. But that was said with reference merely to the note itself and its enforcement against the trust estate, and not with reference at all to the question now considered. Whether the trustees could be held personally liable upon the note need not be considered.

We do not doubt that the bill presents a proper case for relief in equity. There needs no discussion or citation of authorities to show this. That there may have been a partial consideration for the giving of the release in the comparatively small amount paid in cash at the same time that the note for a much larger amount was delivered does not under the circumstances make it impossible to give relief. *Johnson v. Johnson*, 3 B. & P. 162. Nor does the bill show that it will be impossible upon rescission to put the parties in statu quo, as in *Clarke v. Dickson*, E. B. & E. 148. It was not necessary to offer to return the money which the plaintiff has received. What was paid at and before the giving of the release was rightly paid upon his original demand; what has been paid upon the note should in equity be applied upon the same demand. He need not go through the vain ceremony of repaying or offering to repay these sums, when it at once would become the duty of the trustees to return to him the amount of these payments with a much larger additional sum. And see *Beauchamp v. Winn*, L. R. 6 H. L. 223, 232; *Long v. Athol*, 196 Mass. 497, 506, 82 N. E. 665, 17 L. R. A. (N. S.) 96; *O'Shea v. Vaughn*, 201 Mass. 412, 422, 87 N. E. 616, et seq.

There is no ground upon which the demurrer can be sustained. What has been said upon the demurrer covers most of the points that have been raised upon the merits.

Upon careful examination of the evidence, we are of opinion that all the findings of fact made by the single justice must stand. In view of the relations between the parties and the existing circumstances, we doubt whether any contrary findings could have been supported.

There is nothing in the transactions relating to the Carney Building to prevent giving to the plaintiff the relief for which he asks. That was an independent matter, which has been fully heard, and it has been found that the trustees are not liable to the cestuis que trust by reason thereof. *Warren v. Pazolt*, 203 Mass. 328, 89 N. E. 381. Certainly we cannot hold them indirectly for what it has been held does not impose upon them any liability. Nor can we make the plaintiff suffer as a beneficiary for the errors of judgment in which he has shared as a trustee, but for which neither he nor the other trustees are to be held liable as trustees.

We do not deem it desirable to discuss further the considerations which have been sug-

gested by the ingenuity of counsel. We have weighed carefully all the arguments that have been addressed to us in behalf of these defendants and have examined all the decisions to which they have referred us, although all of these have not been cited. We have found nothing to lead our minds to a different conclusion from that which we have reached, or that can prevail against the manifest equities in favor of the plaintiff. A decree must be entered for the plaintiff as prayed for, with costs against the intervening defendants.

So ordered.

(207 Mass. 539)

LITTLEFIELD v. GILMAN.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 3, 1911.)

1. NEGLIGENCE (§ 98*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

Where plaintiff's intestate was injured through the negligence of a person with whom he was riding as guest and of a third person, the negligence of the driver was not imputable to intestate, if in the exercise of due care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

2. APPEAL AND ERROR (§ 173*)—REVIEW—QUESTIONS NOT RAISED IN TRIAL COURT.

Where, in an action for injuries to one through the concurrent negligence of defendant and of a third person, with whom the person injured was riding in an automobile as a guest, the only requests for instructions by defendant presented the doctrine of imputed negligence, the point that under St. 1903, c. 473, §§ 4, 5, requiring every driver for hire of an automobile to be licensed, the person injured was negligent, because the driver had no license, was not presented, and would not be considered on exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.*]

Exceptions from Superior Court, Middlesex County; Daniel W. Bond, Judge.

Action by William R. Littlefield, administrator of William H. Littlefield, deceased, against John Rae Gilman. There was a verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Francis Hurtubis, Jr., and G. H. Power, for plaintiff. J. C. & T. J. Hammond, R. W. Nason, and T. W. Proctor, for defendant.

RUGG, J. This is an action of tort to recover damages for the conscious suffering of one William H. Littlefield which resulted from the collision of an automobile driven by the defendant with that operated by one Murphy. The deceased was riding with Murphy as his guest, and there was evidence from which it might have been found that the injuries were caused by the concurrent negligence of the defendant and Murphy. The latter was employed as a repair man at a garage, and although not licensed as a

chauffeur was driving the automobile on the business of his employer. The only exception, not now waived, was to the refusal of the superior court to rule that "if the jury find that the driver was negligent in driving the automobile in which Littlefield was riding and such negligence was a contributory cause of the accident, then the plaintiff is bound by such negligence and cannot recover." This request is directly contrary to the law as laid down in *Shultz v. Old Colony Street Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, and the several cases following it to the effect that the negligence of the driver of a vehicle is not ordinarily to be imputed to one riding merely as guest, who is himself in the exercise of due care. The instructions given were clear and ample in accordance with this principle. It is now argued in support of the exception that because St. 1903, c. 473, §§ 4 and 5, required every driver for hire of an automobile to be licensed and display a distinguishing number or mark while acting as such driver and as Murphy had no such license, the deceased must be held as matter of law to have been negligent, and reliance is placed on *Dudley v. Northampton St. Ry. Co.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561, and *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156. This point was not called to the attention of the superior court by nor was it within the scope of the prayer presented by the defendant. The only question it fairly opened to consideration was the doctrine of imputed negligence. As to this subject the request was properly refused and accurate instructions were given.

Exceptions overruled.

(207 Mass. 539)

COMMONWEALTH v. JORDAN.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 3, 1911.)

1. INDICTMENT AND INFORMATION (§ 121*)—DISCOVERY—BILL OF PARTICULARS—DISCRETION OF COURT.

In a homicide case, a motion made by defendant on return of the indictment, and before he pleaded to it, that the district attorney be ordered to furnish him with a copy of the autopsy, and of the alleged confession made by defendant to the police, with a transcript of the evidence on which the grand jury found the indictment, and to afford defendant's attorneys an opportunity to inspect all weapons and other exhibits and things in the district attorney's possession, and also that the district attorney be ordered to furnish certain physicians portions of the body taken at the time of the autopsy, was not a motion for a bill of particulars, but an attempt to compel the commonwealth to disclose its evidence, in part, at least; and it was within the discretion of the court to grant or refuse it.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 121*) — "BILL OF PARTICULARS"—OFFICE—FORM.

The office of a "bill of particulars" is not to compel the commonwealth to disclose its evidence, but to give defendant such information, in addition to that contained in the complaint or indictment regarding the crime charged, as law and justice require that he should have in order to safeguard his constitutional rights, and to enable him to fully understand the crime, and to prepare his defense; and it should appear that without the desired information justice may not be done.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 1, pp. 795-797; vol. 8, p. 7590.]

3. HOMICIDE (§ 258*)—DISCOVERY—AUTOPSY—RIGHT OF DEFENDANT TO COPY.

There is no statute requiring the district attorney to furnish one accused of homicide with a copy of the autopsy, though he may do so if he sees fit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 258.*]

4. HOMICIDE (§ 135*)—MURDER—INDICTMENT—ESSENTIAL ELEMENTS OF CRIME.

Under Rev. Laws, c. 218, § 21, providing that the means by which a crime is committed need not be alleged in the indictment, unless they are an essential element of the crime, an indictment for murder need not allege the means by which the murder was committed; such means not constituting an essential part of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 215-223; Dec. Dig. § 135.*]

5. INDICTMENT AND INFORMATION (§ 56*)—CONSTITUTIONAL LAW (§§ 250, 265*)—MURDER—INDICTMENT—SUFFICIENCY—STATUTES—CONSTITUTIONALITY.

Since Rev. Laws, c. 218, § 39, gives accused an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense, his constitutional rights are fully protected; and hence such chapter, which prescribes a form of indictment for murder, without requiring a particular description of the manner in which and the means by which the crime was committed, does not violate Declaration of Rights, art. 12, providing that no subject shall be held to answer for any crime, unless the same is fully and plainly, etc., ascribed to him, or Const. U. S. Amend. 5, providing that no person shall be deprived of life, etc., without due process of law, or Const. U. S. Amend. 14, prohibiting any state from depriving any person of life, etc., without due process of law, or denying to any person the equal protection of the laws, etc.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 175, 176; Dec. Dig. § 56.* Constitutional Law, Cent. Dig. §§ 711-713, 765; Dec. Dig. §§ 250, 265.*]

6. GRAND JURY (§ 8*)—SELECTION—IRREGULARITIES.

An irregularity in submitting the lists of jurors from which grand jurors were to be drawn to the voters of certain towns did not affect the lists, where the voters voted to accept them.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. § 8.*]

7. GRAND JURY (§ 8*)—SUMMONING—LISTS—FILING—STATUTORY PROVISIONS.

The provisions of St. 1907, c. 848, § 5, requiring the selectmen to file with the town clerk and the clerk and assistant clerk of the Supreme Judicial Court or superior court lists of jurors, are directory, and not mandatory,

and failure to comply therewith does not affect the lists, since such failure could not affect the qualifications of the jurors, the preparation of the lists, or the constitution of the jury as finally determined.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16-20; Dec. Dig. § 8.*]

8. GRAND JURY (§ 5*)—JURORS—IRREGULARITIES—PRESENTMENT—VALIDITY.

Where one drawn as a juror thereafter moved from the town before the finding of the indictment, and his sitting on the grand jury was irregular, but it did not appear that he was disqualified, the presentment was valid.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 15; Dec. Dig. § 5.*]

9. CRIMINAL LAW (§ 439*)—EVIDENCE—MEDICAL BOOKS.

Medical books are not admissible in evidence for the purpose of showing the views entertained by their authors regarding the matters in dispute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1025; Dec. Dig. § 439.*]

10. HOMICIDE (§ 15*)—MURDER.

The exact manner in which defendant killed deceased was immaterial, and that it was impossible to determine the exact way in which she was killed would not acquit defendant, provided the act of killing constituted otherwise a crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 21; Dec. Dig. § 15.*]

11. CRIMINAL LAW (§ 956*)—NEW TRIAL—INSANITY OF JUROR—BURDEN OF PROOF.

An accused, claiming that one of the jurors was insane during the trial and when the verdict was rendered, had the burden of proving the same by a fair preponderance of the whole testimony, and not beyond reasonable doubt; the rules relating to criminal practice and pleading not applying.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2385; Dec. Dig. § 956.*]

12. CRIMINAL LAW (§ 956*)—NEW TRIAL—INSANITY OF JUROR—EVIDENCE.

Evidence held to support a finding that a juror in a criminal case was sane during the trial and when the verdict was rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2386; Dec. Dig. § 956.*]

Exceptions from Superior Court, Middlesex County; Wm. B. Stevens and Charles U. Bell, Judges.

Chester S. Jordan was convicted of murder, and excepts, and also appeals from an order sustaining a demurrer to his plea to the jurisdiction. Order sustaining demurrer affirmed, and exceptions overruled.

John J. Higgins, Dist. Atty., for the Commonwealth, C. W. Bartlett, H. H. Pratt, J. S. Sullivan, and A. T. Smith, for defendant.

MORTON, J. This was an indictment for the murder by the defendant of one Honora C. Jordan, who was his wife. There was a verdict of guilty of murder in the first degree, and the case is here on the defendant's exceptions and on his appeal from an order sustaining a demurrer to a plea to the jurisdiction. There are two bills of exceptions, the first relating to matters arising at and during the trial and prior thereto, and the

other to matters arising at the hearing on the motion for a new trial.

We take up first the first bill of exceptions, and shall consider the various exceptions so far as practicable in the order in which they were taken.

Upon the return of the indictment and before the defendant had pleaded to it he made a motion that the district attorney be ordered to furnish him with a copy of the autopsy made by Thomas M. Durell, M. D., the medical examiner, and of the alleged confession by the defendant to the police officers of Boston; also that he be ordered to furnish his attorneys with the names of all of the witnesses summoned before the grand jury when the indictment was found, and with a transcript of the evidence upon which the grand jury found the indictment, and to afford them an opportunity to inspect all weapons and other exhibits and things in the possession of the district attorney; and, lastly, that he be ordered to furnish to certain physicians designated by him portions of the body taken at the time of the autopsy by the medical examiner. Before the hearing upon the motion the district attorney in accordance with the practice which prevails here (*Commonwealth v. Edwards*, 4 Gray, 1) furnished the defendant with a list of the witnesses before the grand jury, but declined to do any of the other things specified in the motion. At the hearing the motion was denied except as to the list of witnesses before the grand jury which the district attorney had already furnished to the defendant. As to that it was granted. The defendant excepted to the refusal to allow the motion in respect to the other particulars specified. As to those matters it is plain, we think, that it was within the discretion of the court to grant or refuse the motion. The motion was not in any just or proper sense a motion for a bill of particulars, but was rather an attempt (we do not use the word "attempt" in any invidious sense) to compel the commonwealth to disclose in part at least the evidence on which it relied. There is no rule of law which requires the commonwealth to do that or which gives a defendant the right to ask it. So far as the information specified, or any other information in the possession of the commonwealth, was necessary in order to enable the defendant to understand the nature of the crime with which he was charged and to prepare his defense, he was entitled to have it furnished to him in the shape of a bill of particulars, upon a proper motion to that effect. But, as we have said, this was not such a motion. The office of a bill of particulars is not to compel the commonwealth to disclose its evidence but to give the defendant such information in addition to that contained in the complaint or indictment in regard to the crime with which he is charged as law and justice require that he should have in order to safeguard his constitutional

rights and to enable him fully to understand the crime with which he is charged and to prepare his defense. Undue stress should not be laid upon the form of the motion, but it should at least appear that without the information which is desired justice will not or may not be done. See *Com. v. Snelling*, 15 Pick. 321. There is no statutory provision requiring the district attorney to furnish the defendant with a copy of the autopsy, though of course he can do so if he sees fit. *Rev. Laws*, c. 24, § 10. In the present case, even if we assume in favor of the defendant, without so deciding, that we have power to revise the action of the superior court, we discover nothing that should lead us to do so. This exception must therefore be overruled.

At the same time that the defendant filed the motion which we have been considering, he also filed a motion to quash the indictment on the ground that the alleged offense was not fully, plainly, formally and substantially described, or described in such a manner as to apprise the defendant of the exact nature and cause of the offense intended to be charged, or to enable him to avail himself of his conviction or acquittal in a further prosecution for the same crime, or to inform the court of the facts alleged, so that it could decide whether they were sufficient to support a verdict if one was rendered against the defendant, and also on the ground that *Rev. Laws*, c. 218, under which the indictment was drawn, was unconstitutional and void under article 12 of the Massachusetts Declaration of Rights and articles 5 and 14 of the amendments to the Constitution of the United States. The motion to quash was overruled and the defendant excepted. The indictment is in the form prescribed for murder in the "schedule of Forms of Pleadings" annexed to *Rev. Laws*, c. 218. There is no count at common law, and that is said by the defendant to distinguish this case from other cases of indictment for murder in which similar questions as to the constitutionality of the statute have been raised. It is true, as the defendant contends, that in previous cases of murder there has been a count at common law added to the count under the statute; but nevertheless we think that the question as to the constitutionality of the statute must be regarded as having been settled by previous decisions in a variety of cases in the affirmative and, it seems to us, rightly so. *Com. v. McDonald*, 187 Mass. 581, 585, 73 N. E. 852; *Com. v. Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799; *Com. v. Bailey*, 199 Mass. 585, 85 N. E. 857; *Com. v. King*, 202 Mass. 379, 384, 88 N. E. 454. In *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021, the court expressly declined to give any countenance to the suggestion that the statute was unconstitutional. The purpose of the constitutional provisions relied on is to secure to the accused such a description of the offense with which he is

charged as will enable him fully to understand it and to prepare his defense. *Com. v. Robertson*, 162 Mass. 90, 88 N. E. 25. So far as enabling a defendant to understand the offense with which he is charged is concerned there can be no just ground of objection to the statutory form of indictment. If A. is charged in an indictment with having at a certain time and a certain place which are specified assaulted and beaten B. with the intent to murder him, and with having by such assault and beating killed and murdered the said B., A. cannot fail to understand from the indictment itself that the crime with which he is charged is the murder of B. at the time and place specified. Allegations as to how he killed B. would not help him to understand any better the crime with which he is charged than, as was said in substance by Wells, J., in *Com. v. Woodward*, 102 Mass. 155, 160, a particular description of the wound would help the defendant to understand for what injury he was called upon to answer. No question could arise as to the sufficiency of the facts alleged to support a conviction, or to embarrass the defendant if he should have occasion to file a plea of former conviction or acquittal. If the defendant should require a more particular description of the manner in which and the means by which the alleged crime was committed in order to enable him to prepare his defense, and the indictment could not for that reason be regarded as describing the crime charged "fully and plainly, substantially and formally," the statute (*Rev. Laws, c. 218, § 39*) gives him an absolute right to such particulars as it may be necessary for him to have in order to prepare his defense, and his constitutional rights are thus fully protected. *Com. v. Snell*, supra; *Com. v. McDonald*, supra; *Com. v. Sinclair*, supra; *Com. v. Bailey*, supra; *Com. v. King*, supra. The means by which a murder is committed do not constitute an essential part of the crime and therefore need not be alleged in the indictment under *Rev. Laws, c. 218, § 21*. It is no doubt true, as contended by the defendant, that allegations as to the means by which and the manner in which the homicide was effected were formerly regarded as essential to the validity of an indictment for murder. But the object of the statute is to simplify criminal pleading, and the question before us is whether, in its efforts to do so, the Legislature has gone so far as to infringe upon the constitutional rights of the accused. For reasons given above we do not think that it has. It follows from the construction and effect which we have given to the statute that, as was said by the Supreme Court of the United States in a case arising under a somewhat similar statute in New Jersey: "It cannot be held that he [the prisoner] was proceeded against under an indictment based upon statutes denying him the equal protection of the laws, or that

were inconsistent with due process of law as prescribed by the fourteenth amendment of the Constitution of the United States," or, we may add, by the fifth amendment. This exception also must be overruled.

The defendant seasonably filed a plea to the jurisdiction on the ground that the grand jury which returned the indictment was irregularly and unlawfully summoned and convened, in that in the towns of Bedford, Weston and Sudbury the list of persons prepared by the selectmen was unlawfully presented to and acted upon by the voters of said towns, and no lists of jurors from which jurors were to be drawn were prepared by the selectmen of said towns, and no lists were filed with either the town clerk of said towns or with the clerk or assistant clerk of the Supreme Judicial or the superior court for the county of Middlesex; and also by reason of the alleged fact that the selectmen of Ayer, Framingham and Westford from which members of said grand jury were drawn, had not filed with the clerk and assistant clerk of the Supreme Judicial and superior courts lists of jurors as required by law; and that one Norbert M. English, who had been summoned as a member of said grand jury from Bedford and was acting as such when the indictment was returned was not an inhabitant of Bedford, but of Lexington. The commonwealth demurred to the plea. The court sustained the demurrer and overruled the plea, and the defendant appealed. We think that the demurrer was rightly sustained. There is nothing to show and it is not claimed that any of the persons from the towns of Bedford, Weston and Sudbury, or from the other towns named were personally disqualified or unfit or incompetent to serve. Although the plea alleges that no lists of jurors were prepared by the selectmen of the towns of Bedford, Weston and Sudbury, or either of them, the affidavits annexed to the plea and referred to in it and made a part of it show that lists were prepared by the selectmen, and in two instances, Bedford and Sudbury, were submitted to and accepted by the voters, and that in the other, Weston, a list was submitted but not acted on by the voters, by reason of an amendment to the law in the preceding year. There is nothing to show that venirees were not regularly issued and served, or that the jurors were not drawn from the lists prepared by the selectmen in the manner provided by law, or that in preparing the lists the selectmen did not observe the statutory requirements in regard to the persons placed thereon. The irregularity which occurred in submitting the lists to the voters in the two towns of Bedford and Sudbury could have had no effect upon the lists because the voters voted to accept them. Nor were the lists affected in the case of those towns and the other towns named by the failure of the selectmen to file with the town clerk and the clerk and assistant clerk of the Supreme Ju-

dicial or superior court lists of jurors as required by statute. St. 1907, c. 348, § 5. Such failure did not and could not affect in any way the qualifications of the jurors or the preparation of the lists, or the manner of drawing jurors, or the constitution of the jury as finally determined, and the provisions referred to must therefore be regarded as directory and not mandatory; in other words, although it no doubt was expected that the scrutiny to which the lists would be thereby subjected would aid still further in the elimination of objectionable persons from juries, the requirements in question are to be regarded rather as incidental than as fundamental. In the matter of English it does not appear that the selectmen of Bedford knew when English was drawn as a juror from that town that he had removed to Lexington, if indeed he had. The allegation of the plea is that at the time of the finding and return of the indictment he was not an inhabitant of Bedford, nor that at the time when he was drawn he was not an inhabitant of Bedford. If he was an inhabitant of Bedford when drawn it would seem that that was enough, and that his subsequent removal before the finding and return of the indictment did not disqualify him from acting with the grand jury. But however that may be, and even if his action in sitting on the grand jury after his removal to Lexington was irregular and improper, the case comes clearly within the principle laid down in *Com. v. Brown*, 147 Mass. 585, 593, 18 N. E. 587, 1 L. R. A. 620, 9 Am. St. Rep. 736, where one whose name had been ordered by a vote of the town to be stricken from the list was nevertheless drawn as a juror by the selectmen and returned to court as such and was sworn as one of the grand jury and acted with them in their deliberations and the return of the indictment. It was held that as there was nothing to show that he was disqualified, or that his being drawn was anything more than an irregularity, a ruling of the trial court that the presentment was valid was correct. See, also, *Com. v. Moran*, 130 Mass. 281; *Com. v. Parker*, 2 Pick. 550; *Amherst v. Hadley*, 1 Pick. 38.

What we have said in regard to the matter of filing lists with the clerk or assistant clerk of the Supreme Judicial and superior courts applies to the case of the juror Wallace from Framingham, whom the defendant contended he had a right to challenge for cause, since it appeared that the list prepared by the selectmen of Framingham, upon which was his name, had not been filed with the clerk of the Supreme Judicial Court or with the clerk of the superior court within the time required by law, it appearing that the list should have been filed on or before the 1st day of August, 1908, but was not in fact filed until the 18th day of April, 1909. The court ruled that the failure to file the list was not cause for challenge, and the defendant excepted. Thereupon the ju-

ror was peremptorily challenged by the defendant, and it appeared that when the panel was completed the defendant had not exhausted his peremptory challenges. We doubt whether it can be said as contended by the commonwealth that the defendant was not harmed by the ruling. But however that may be, we think that for reasons previously stated in the case of the juror English the ruling was right. It follows that the order sustaining the demurrer and overruling the plea must be affirmed, and the exception to the ruling in regard to the juror Wallace must be overruled.

Certain exceptions which were taken to the admission of certain evidence have been waived, and therefore need not be considered. Other exceptions to the admission of evidence have not been waived, and are relied on, and we proceed to consider them. There was evidence that the head had been severed from the body by two cuts, one in the back of the neck and the other in the throat in front severing the arteries. It was in dispute whether the cut in the throat was made before or after death. One of the things relied on by the defendant to show that the cut was made after death and therefore was not a cause of death was that it was what was termed "inverted." In the course of the cross-examination by the defendant of Dr. Durell, the medical examiner for the first district of Middlesex county, he was asked, counsel at the time holding in his hand a book from which he was apparently framing the question, "If Professor Balch of the Albany Medical School said that the inverted edge was evidence of a cut after death, would that change the opinion which you now express that the [cut] may be ante mortem?" Upon objection by the district attorney the question was excluded and the defendant excepted. The question, though put perhaps *alto intuitu*, would if allowed to be answered have placed before the jury in an indirect manner the opinion of Professor Balch who was not a witness in the case or in any way connected with it, and was referred to simply as a medical authority, and was therefore rightly excluded. It is well settled in this commonwealth that medical books are not admissible in evidence for the purpose of showing the views entertained by their authors in regard to the matters in dispute. *Com. v. Sturtivant*, 117 Mass. 122, 139, 19 Am. Rep. 401. The exception is overruled.

It was for the jury to say whether there was evidence which warranted the sequence of events and the events assumed in the hypothetical question put on cross-examination by the district attorney to Dr. Councilman, an expert called by the defendant. It could not have been ruled as requested that there was no evidence warranting the question in the form in which it was finally put. The exception to its admission must, therefore, be overruled.

Numerous requests for instructions were

presented. Many of them were given in substance as requested. Others were given with some modification, and the rest were refused. A number of those refused have been waived or abandoned. It is necessary, therefore, that of those originally presented only the ones now relied on should be considered. Those are the requests numbered 15 to 23, inclusive, and the request numbered 36.

The commonwealth claimed that there was evidence of asphyxiation or strangulation, and of blows on the head, and also that there was evidence that the throat was cut during life. It also claimed that it was not obliged to show the exact sequence of the events which resulted in the homicide, or to show that death was due to any one particular cause, but that it was sufficient if the jury were satisfied beyond a reasonable doubt that death was caused by a combination of injuries inflicted by the defendant notwithstanding they were unable to determine the exact way in which the deceased was killed; and the court in substance so instructed the jury. What the court said was, after instructing the jury in regard to the effect to be given to the evidence of mutilation after death, and after giving the ruling requested by the defendant in relation thereto, "In this case the exact manner in which he [the defendant] killed his wife, I shall instruct you, is not material. The question is, Did he kill her, and was he sane when he killed her, and was it done with deliberately premeditated malice aforethought, or with malice afterthought? The exact mode it may be impossible for you or for any one else to determine, but the failure to determine the exact way in which she was killed is not to exempt this defendant from punishment provided he did kill her, and killed her with such intention and under such circumstances as to constitute a crime against the law." The court had previously instructed the jury in regard to the degrees of murder, and the burden of proof and the matter of reasonable doubt in a manner to which no exception was taken by the defendant. The requests relied on were to the effect in one form or another, according to the phase of the case with which they dealt, that it was not proved beyond a reasonable doubt that the deceased came to her death in any one of the possible ways testified to. The court was asked to rule, for instance, that "it is not proved beyond a reasonable doubt that the throat of the deceased was cut during life." And the same request was made in regard to death from the blows on the head, and death by strangulation—the defendant seeking thus to eliminate one by one, as causes of death, the cutting of the throat, the blows upon the head and strangulation, and then contending that inasmuch as it was not proved beyond a reasonable doubt that either one of those things was the cause of death, it followed that death could not have been occasioned by a combination of any or

all of them, and therefore (to carry out the reasoning to its logical conclusion) the commonwealth had failed to show that the defendant murdered his wife, although it was certain, according to his own confession, that he and no one else killed her. The error lies in the assumption which runs through all of the requests relied on that it was necessary for the commonwealth to show beyond a reasonable doubt the exact mode in which the deceased came to her death. The commonwealth was bound to show beyond a reasonable doubt that the deceased had been murdered and that the murder was committed by the defendant. It was also bound, as the court instructed the jury, to prove beyond a reasonable doubt every fact necessary to establish those conclusions. If the manner in and the means by which a murder is committed constitute an essential part of the crime, or if a jury could not as matter of fact or as matter of law find that a murder had been committed, if they were unable to find beyond a reasonable doubt the exact mode in which death had been caused, then the instructions requested should have been given. But neither one of the propositions thus suggested is true. The court correctly instructed the jury that the exact manner in which the defendant killed his wife was immaterial, and that the fact that it was impossible to determine the exact way in which she was killed would not serve to acquit the defendant provided the act of killing constituted otherwise a crime. It follows that the requests now relied on were rightly refused and that the defendant's exceptions to such refusal must be overruled.

The result is that we discover no error in the rulings and refusals to rule in regard to what took place at and during and before the trial.

We pass to the second bill of exceptions. The verdict was rendered on Tuesday, May 4, 1909, the case having been on trial since April 20th. On the 8th day of the same May, four days after the verdict, Willis A. White, who had been drawn as a juror from Maynard, and who was one of the panel during the trial and at the time when the verdict was rendered, was committed to the insane hospital at Worcester. On the 10th of May the defendant filed a motion for a new trial on the ground that said White was insane during the trial and when the verdict was rendered. There was a lengthy hearing upon the motion. At the conclusion of the testimony the defendant made a large number of requests for rulings and findings—72 in all. The presiding justices overruled the motion and found and ruled as follows: "We find by a fair preponderance of all the evidence as a fact that the juror Willis A. White was of sufficient mental capacity during the entire trial of Chester S. Jordan, until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the

charge of the court, and to arrive at a rational conclusion, and therefore we deny the motion. Having found the above facts, we deem it unnecessary to consider the requests for rulings."

The defendant appealed from and excepted to the order overruling the motion, to the findings aforesaid, and to the refusal to rule and find as requested in the 72 rulings and findings that were asked for. All of the material evidence taken at the hearing upon the motion is before us. Although the requests were so numerous and voluminous, the issues, as the defendant himself concedes, are comparatively simple.

The principal question relates to the burden of proof and the rule to be applied in weighing the evidence on the question of the juror White's sanity or insanity. If on an issue between the commonwealth and the defendant as to the sanity of a juror during the trial and at the time of the rendering of the verdict, raised by the defendant by a motion for a new trial, the burden is, as the defendant in substance asked the court to rule, on the commonwealth to show beyond a reasonable doubt that the juror was sane, then clearly some of the rulings asked for—it is not necessary to decide which—should have been given and the defendant's exceptions should be sustained. There can be no doubt that the defendant has a right to insist that the panel which tries him should consist of 12 sane jurors. And there can be no doubt that if without his knowledge or that of his counsel one of the jurors to whom his case was submitted was insane during the trial and at the time when the verdict was rendered he has not had such a trial as is guaranteed to him by the Constitution of this commonwealth and by the Constitution of the United States. It is practically agreed that neither the defendant nor his counsel had any knowledge of White's alleged insanity until after the verdict, and therefore no question can arise as to the defendant's right to avail himself of the alleged insanity.

Ordinarily the party asserting the affirmative of an issue has the burden of proof, and we do not see why the ordinary rule should not apply here. The defendant asserts that one of the jurors was insane during the trial and when the verdict was rendered, and that therefore the verdict should be set aside. It is for him to prove what he says, not beyond a reasonable doubt, but by a fair preponderance of the whole testimony. The inquiry into the sanity or insanity of the juror is not an investigation into an alleged crime, and has none of the elements of such an investigation, and the rules relating to criminal practice and pleading are, therefore, in no way applicable to it. Nor is the sanity or competency of the jury in any way involved in the question of the defendant's guilt or innocence. It is not in the remotest degree an issue in the case. If a question is raised as to the defendant's sanity, that becomes

thereby an issue, and the burden is on the commonwealth to show that he was sane. But that has nothing to do with the question whether a juror was sane or insane during the trial. The government was and is no more responsible for the presence upon the panel of the juror White than the defendant or the court. As finally constituted the jury was the tribunal appointed by law for the trial of the case. Its members were selected in the manner provided by law from the body of the citizens of the county, and in case a question arose during or after the trial as to the sanity or insanity of one of them the burden was upon the party alleging the insanity to prove it, by a fair preponderance of the evidence not upon the commonwealth to show that the juror was sane. It follows from what we have said that the only question that remains is whether there was evidence which warranted as matter of law the findings of fact made by the trial court upon the motion for a new trial. We assume in favor of the defendant that the presiding justices overruled the motion for a new trial, not merely in the exercise of their discretion, but because they found the facts which they did upon a fair preponderance of the evidence. We do not see how it can be said that there was not evidence warranting their findings.

When the time for the hearing upon the motion approached, counsel for the defendant addressed a communication to the court, stating that they deemed it advisable that all of the jurors except White should testify, and asking the direction of the court in regard to the matter. The court replied, saying that if any of the jurors were called all should be, and that they should be put upon the stand without any previous communication with any one. Thereupon the other 11 jurors were summoned and testified. Of the 11 jurors who thus testified 7 said in substance and effect that they saw nothing during the trial in the actions, speech, manner or conduct of White different from that of the ordinary, sane, normal man. The other 4 jurors were all cross-examined by the district attorney; one testified on such cross-examination that it did not occur to him at any time that Mr. White was insane or that he did not understand the proceedings; another, that until after the verdict he did not see anything in White's acts, speech or conduct that showed that he did not understand the proceedings and the part he took in them, or that his memory was defective; and a third that he did not notice anything about White's memory that was defective any more than that of any other of the jurors, and that he appeared to be as much interested in the trial as any other juror. In addition to the testimony of the jurors there was testimony from Dr. Quinby, the superintendent of the Worcester Asylum, to which White was committed, that in his opinion White was sane until the day after the verdict,

and that his insanity then was due to the reaction from the strain and stress of the trial and other matters. There was also testimony from the family physician and others tending to show that White was sane. On the other hand there was testimony from medical experts on insanity, including Dr. Jelly, Dr. Sanborn, superintendent of the State Asylum at Augusta, Me., and Dr. McDonald, formerly at the Butler Asylum for the Insane at Providence, to the effect that in their opinion he was insane during the trial and when the verdict was rendered. There was also testimony tending to show that insanity was hereditary in the family; and there was testimony from neighbors and friends tending to show that he was insane. Letters written by him during the trial which, it was maintained, also tended to show that he was insane, were introduced in evidence. The question before us, however, is not as to the weight of the evidence, but whether it can be said as matter of law that the findings were not warranted by the evidence. It is plain, it seems to us, that it cannot be so ruled. It follows that the exceptions to findings and rulings and refusals to rule on the motion for a new trial must be overruled.

Order sustaining demurrer to the plea to the jurisdiction affirmed. Exceptions contained in both bills of exceptions overruled.

(207 Mass. 340)

COMMONWEALTH v. RICHMOND.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 3, 1911.)

1. CRIMINAL LAW (§ 1044*)—APPEAL—QUESTIONS REVIEWABLE.

Where defendant filed no motion to quash the indictment, she could not, on appeal, claim that it was defective, in that it was uncertain whether the assault and murder were charged of one and the same person, because "said" did not precede the second mention of the name of deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.*]

2. HOMICIDE (§ 287*)—EVIDENCE—MOTIVE—INSTRUCTIONS.

In a homicide case, where there was evidence that prior to the killing defendant was heavily in debt and in need of ready money, and that immediately thereafter she had bills in her possession, instructions that the evidence was admitted only as bearing on defendant's motive, etc., that evidence to show motive was competent, and that, in order to consider the evidence, the jury must be satisfied that deceased had money in his possession immediately before his death, and that thereafter defendant had such money in her possession, were correct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 592; Dec. Dig. § 287.*]

3. HOMICIDE (§ 234*) — EVIDENCE — SUFFICIENCY.

In a homicide case, certain evidence held to warrant a finding that deceased had money

to the amount of which defendant was possessed after the killing.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 234.*]

4. CRIMINAL LAW (§ 1037*)—APPEAL—HARMLESS ERROR.

In a homicide case, where evidence as to the possession by deceased of money prior to the killing and its subsequent possession by defendant was introduced to show motive, remarks of the district attorney that deceased had been working for \$30 per month were harmless, though there was no evidence of it, where the argument was not interrupted, no ruling was requested on the point, and no exception taken respecting it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

5. CRIMINAL LAW (§ 338*)—EVIDENCE.

In a homicide case, where the presence of defendant in one of her connecting rooms was a material fact on the trial, testimony of a witness that she overheard one P., while standing near the bedroom door, and after defendant had been called without response, say in the course of a talk with a servant of defendant, in which he demanded money or some satisfaction as to a disagreement about the hire of a room, "I shall bring an officer," and that next morning defendant asked witness not to let P. bring an officer, and stated that there was no need of any officer being brought about the room rent, was competent as tending to prove that defendant was in the rooms when P. spoke of calling an officer.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

6. WITNESSES (§ 406*) — EVIDENCE — CONTRADICTING WITNESS.

Under Rev. Laws, c. 175, § 24, providing that one may not impeach the credit of his witness by evidence of bad character, but may contradict him by other evidence, etc., that evidence in a criminal case tended to contradict that of other witnesses introduced by the same party was not ground for its exclusion, where it was competent for other purposes.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. § 406.*]

7. CRIMINAL LAW (§ 338*)—EVIDENCE.

In a homicide case, a witness for the commonwealth, having testified at length concerning the people in the house where deceased met his death, and their actions, and some of their conversation, and that one D. had said, in reply to his question a short time before the body of deceased was discovered, that deceased was in the house, was asked on cross-examination: "When was deceased again mentioned by any of you?" Held, that the question was properly excluded, being indefinite as to persons and appearing to bear no relation to any issue in the case.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 338.*]

8. WITNESSES (§ 268*)—EXAMINATION.

In a homicide case, a question, asked the inspector of police by defendant, if, after defendant was indicted, he had not procured the putting of one of the government witnesses on probation after he had pleaded guilty to a crime, was properly excluded; it being unsupported by any suggestion of inducement to a definite person, and being objectionable in form, since the placing on probation of one charged with crime is the independent act of the court, and cannot be "procured" by anybody.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

9. WITNESSES (§ 287*)—EXAMINATION.

In a homicide case, where it appeared by the cross-examination of a police officer called by the commonwealth that certain men in defendant's house were arrested on the day deceased's body was found, the arresting officer was properly permitted to testify on redirect examination, subject to defendant's exception, that the men were arrested for witnesses; the inquiry being permissible, in the court's discretion, to refute any inference that the men were suspected of the crime.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1000-1002; Dec. Dig. § 287.*]

10. CRIMINAL LAW (§ 517*)—EVIDENCE—CONFESSIONS.

Statements voluntarily made to officers by defendant after her arrest and after a caution were admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1146-1156; Dec. Dig. § 517.*]

11. CRIMINAL LAW (§ 552*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence may be a thoroughly satisfactory basis for conviction of the highest crimes.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.*]

12. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—INSTRUCTIONS COVERED.

In a criminal case, it was proper to refuse requested instructions, where they were covered by the charge to the extent that they were sound in law and necessary to the decision of the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

13. CRIMINAL LAW (§ 799*)—TRIAL—ARGUMENTS OF COUNSEL.

The rule that the attention of the court should be at once called to an improper argument addressed to the jury, and that the subject must be adequately covered in the charge, with such emphasis as will correct any erroneous effect applies to unwarranted arguments by a district attorney respecting accused's failure to take the stand in her own behalf.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1944-1946; Dec. Dig. § 799.*]

14. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENTS OF COUNSEL—COMMENT ON FAILURE OF ACCUSED TO TESTIFY.

In a homicide case, where the district attorney commented on the fact that every one, so far as known, save defendant, who had been in such relation to the premises where deceased was found as to have had an opportunity to commit the crime, had testified, but on defendant's objection immediately disclaimed intent to urge any inferences from defendant's failure to testify, and the court plainly instructed that defendant's refusal to testify could not create any presumption against her, and could not prejudice her, her rights were amply protected.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Exceptions from Superior Court, Middlesex County; John C. Crosby and Wm. F. Dana, Judges.

Elizabeth Richmond was convicted of murder, and excepts. Exceptions overruled.

J. J. Higgins, Dist. Atty., for the Commonwealth. R. W. Gloag, for defendant.

RUGG, J. The defendant was indicted for murder.

1. The defendant filed no motion to quash the indictment. Hence the faint suggestion now made that it is defective, in that it is uncertain whether the assault and murder are charged of one and the same person, because "said" does not precede the second mention of the name of the person alleged to have been murdered, is not open to her. We do not intimate that there would be anything in the point even if seasonably presented. The indictment followed the form prescribed in Rev. Laws, c. 218, § 67. *Com. v. Min Sing*, 202 Mass. 121-132, 88 N. E. 918; *Com. v. Jordan*, 93 N. E. 809.

2. One motive suggested for the commission of the crime was robbery. A considerable amount of evidence was introduced by the commonwealth tending to show that prior to the alleged homicide the defendant was heavily in debt and in need of ready money, and that immediately thereafter she had bills in her possession. When the evidence as to the financial embarrassment of the defendant was offered, although not objected to, the jurors were instructed in substance that it was admitted only as bearing upon the motive of the defendant in the commission of the offense charged, and that, in order to be material for their final consideration, "certain other evidence must appear, and if that evidence does not appear, then this evidence which is now being admitted should be disregarded." No exception was taken, but at the close of the evidence the defendant asked for an instruction that this evidence should be disregarded. Subject to exception, this prayer was denied, and the instruction was given that although the commonwealth was not required to show any motive for the commission of the crime, evidence tending to show such motive was always competent. After referring to evidence that "the prisoner was pressed for money prior to the finding of the body of the deceased," and "that on that day she had a roll of bills," the court further instructed the jurors that in order to consider the evidence at all they must be satisfied that the deceased had money in his possession immediately before his death, and thereafter the defendant had this money in her possession. These instructions were in accordance with well-settled principles. *Com. v. O'Neil*, 169 Mass. 394, 48 N. E. 134; *Com. v. Williams*, 171 Mass. 461, 50 N. E. 1035; *Com. v. Devaney*, 182 Mass. 33, 64 N. E. 402; *Com. v. Tucker*, 189 Mass. 457-467, 76 N. E. 127, 7 L. R. A. (N. S.) 1056. The chief argument urged is that there was no sufficient evidence that the deceased possessed any money shortly before his death. But this contention cannot be sustained. It might have been found that the murdered man was

young, active, able-bodied, and had been at work for many months in a state institution in a country town. Although the amount of his compensation was not shown the jury might have used their general knowledge in drawing an inference in this respect. *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1-8, 85 N. E. 877. There was also evidence that he was in Cambridge for the purpose of attending the wedding of his sister, was on his way to spend a vacation in Prince Edward's Island, whither he had checked his trunk and had bought his ticket, was a guest at a public house where he had given coin as a gratuity to a waiter, had manifested great care to keep near him a dress suit case, had said to a friend that he was sorry he had before asked him for money, that he had money "enough to see him through," and that no money whatever was found upon his remains. If these circumstances were found by the jury, the inference would have been warranted that the deceased had money to the amount of which the defendant was possessed after the homicide. It is argued also that there was error because the district attorney said in his argument to the jury that the deceased had been working for \$30 per month when there was no evidence of it. But the argument was not interrupted, and no ruling was requested on this point, and no exception taken respecting it. Under these circumstances, it cannot be assumed that the defendant suffered any harm of which she can now complain.

3. The presence of the defendant in her bed room or parlor, rooms which were connected, in the early evening of a certain day, was a material fact upon the trial. Against the exception of the defendant one Hannigan was permitted to testify that she overheard one Paige while standing near the bedroom door, and after the defendant had been called without any response, say, in a loud voice, in the course of talk with a servant of the defendant in which he demanded money or some satisfaction as to a disagreement about the hire of a room, "I shall bring an officer," and that next morning the defendant asked the witness not to let Paige bring an officer, and that "there was no need of any officer being brought about the room rent." There was no evidence that the defendant learned of this threat as to an officer in any other way than by being in the bedroom or parlor at the time it was uttered and thus hearing it. The evidence plainly had some tendency to prove that she was there. It was competent to this end, and was carefully limited by the court to this purpose. If there were inconsistencies in some details of the testimony, its weight only and not its competency were affected. It is also urged that this testimony tended to contradict that given by other witnesses called by the commonwealth. It was not introduced for that pur-

pose, but was the direct statement of the witness of the records of her own senses. Even if pointedly contradicting other evidence, it was still competent. *Rev. Laws, c. 175, § 24.*

4. One Clifford, a witness called by the commonwealth, having testified at length concerning the people in the house where the deceased met his death, and their actions and some of their conversation, and that one Drohan had said in reply to his question a short time before the lifeless body of the deceased was discovered that MacTavish was in the house, was asked on cross-examination, "When was MacTavish again mentioned by any of you?" This question was properly excluded. It was indefinite as to persons, and appears to bear no relation to any issue in the case.

5. The chief inspector of police of Cambridge, who had been active in the investigation of the crime, was asked by the defendant if after the defendant was indicted he had not "procured the putting of one of the government witnesses on probation after he had pleaded guilty to a crime." There was no error in the exclusion of this inquiry unsupported by any suggestion of inducement to a definite person. It was objectionable in form. The placing on probation of one charged with crime is the independent act of the court, and cannot be "procured" by anybody.

6. It was developed by the cross-examination of one Shannon, a police officer called by the commonwealth, that certain men in the house of the defendant were placed under arrest on the day when the body of MacTavish was found. The arresting officer was permitted to testify on redirect examination, subject to the defendant's exception, that the purpose of putting them under arrest was for witnesses. This inquiry was permissible in the discretion of the court for the purpose of refuting any inference that they were suspected of having committed the murder.

7. Other exceptions as to evidence were taken, which have not been argued, although it is stated that none of them are waived. They have all been examined with care, and no error appears to have been committed in respect to any of them. The statements made by the defendant to the officers after her arrest appear to have been made voluntarily after a caution, and were admissible. The instructions that they could not be considered unless made freely and without inducement were ample and correct. *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021; *Com. v. Killion*, 194 Mass. 153, 80 N. E. 222.

8. At the close of the evidence the defendant requested that a verdict of not guilty be ordered. The evidence connecting the defendant with the commission of the crime was not from any eyewitness, but was made up of many different facts, which linked

themselves together in a chain so strong as to convince the jury of her guilt under adequate instructions as to the degree of certainty to which their minds must be led before they could reach that result. Circumstantial evidence may be a thoroughly satisfactory basis for conviction of the highest crimes. Men commonly act in the most important concerns of life upon that kind of evidence. It is constantly applied in courts of justice, and has been commended by most eminent judges. *Com. v. Webster*, 5 Cush. 295-310, 52 Am. Dec. 711 et seq.; *Com. v. Williams*, 171 Mass. 481, 50 N. E. 1035; *Perovich v. U. S.*, 205 U. S. 88-91, 27 Sup. Ct. 456, 51 L. Ed. 722. It is not necessary to state in detail the circumstances which pointed to the guilt of this defendant. They were numerous, closely connected and might well have persuaded a jury. A minute analysis of the entire record shows that this prayer was properly refused. The chief argument urged in its support is that it might have been found that others had an opportunity, and that there were contradictions and inconsistencies in the testimony of witnesses called by the commonwealth, who were frequenting the house at about the time the murder was committed. These considerations could only affect the weight of the evidence, and were proper for the jury to pass upon. They fall far short of impairing as matter of law the controlling inferences which might be drawn from all the circumstances.

9. Several other requests for instructions were presented. They have not been argued by the defendant and they do not require discussion one by one. It is enough to say that they were covered by the charge to the extent that they were sound in law and necessary to the decision of the case.

10. A number of people were in the house of the defendant during the period of time within which the decedent might have met his death. It was claimed that all of these persons had been called as witnesses. Commenting on this in the course of his argument the district attorney used this language: "Is there anybody in this case whose presence or absence is unaccounted for except the one party charged with the crime? My brother * * * urges upon you the utter futility of our putting these people on the stand and asking them the pregnant question: 'Did you kill Stewart MacTavish?' * * * He utterly failed to apprehend the significance of that question, for every person that was in that house that we could find—and he candidly and frankly says we have brought them all before you—every person but one has told you under oath that they did not kill Stewart MacTavish. This is significant." Objection was made to this argument by counsel for the defendant, and the court stated: "That will be taken care of in the charge." Thereupon the district attorney proceeded: "You have been told that

the defendant is not to be prejudiced because she did not take the stand. * * * That is the last thing in the world I shall ask of you—to infer anything from the fact that she did not take the stand. And what I have just said has no relation to that except the bare fact that everybody but she has testified under oath that they did not kill MacTavish." Defendant's counsel again addressed the court, asking that the argument be stopped. The district attorney proceeded: "If she has in her power or control any evidence which will explain where she was on Thursday night, if she has any friends that could come here and tell you where she was and what she was doing, if she has any means whatever of putting before you any evidence showing where she was and she fails to do it, we are entitled to call your attention to that failure, and you are entitled to use it as you see fit. * * * I am not asking you to infer anything from the fact that she did not take the stand. You have no right to do that. * * * But if she has within her possession or control any evidence to show that she is innocent, if she has such evidence that an innocent person would produce I am authorized to call your attention to her failure to do so, and you are entitled to consider it in this case."

In the charge the jury were instructed that although the defendant was permitted to testify in her own behalf at her own request, she was not obliged to do so, and her failure to do so did not create any presumption against her and should not prejudice her in any way. Accurate instructions were given as to inferences which might be drawn from the defendant's failure to call other witnesses whose evidence might tend to exonerate her. At the close of the charge the defendant's counsel asked a specific ruling that the district attorney had no right to make the argument above quoted, but the court refused to give it.

Under the federal Constitution and that of this commonwealth, no person can be compelled in a criminal case to be a witness or furnish evidence against himself. *Const. U. S. Amend. art. 5*; *Const. Mass. pt. I, art. 12*. *Rev. Laws, c. 175, § 20, cl. 3*, provides that a defendant in any "criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him."

The fact that any defendant declines to avail himself of the privilege of testifying conferred by the statute cannot be permitted to create any presumption against him. Courts guard sedulously the constitutional and statutory rights of defendants in this respect. Attempts to infringe upon the privilege of silence thus secured to persons charged with crime are carefully checked. *Com. v. Harlow*, 110 Mass. 411; *Com. v. Ma-*

loney, 113 Mass. 211; *Com. v. Costley*, 118 Mass. 1-27; *Com. v. Scott*, 123 Mass. 238, 25 Am. Rep. 81; *Com. v. Finnerty*, 148 Mass. 162, 19 N. E. 215; *Com. v. Smith*, 163 Mass. 411-433, 40 N. E. 189; *Com. v. Johnson*, 175 Mass. 152, 55 N. E. 804. Two different courses of dealing with cases, where there has been any infraction of this rule, appear to be followed by the courts of the several states. Some hold that any reference to the subject in argument must be presumed to do irreparable harm to the defendant, and that there must be a new trial granted unless by conduct or consent there has been a waiver of the right. The industry of the counsel for defendant has collected a large number of such cases, leading ones being collected in a footnote.¹ It will be found on examination that most of these decisions rest on a statute which in express terms forbids any comment or reference to the fact in argument by either counsel. Some courts, which have adopted this rule, seem to be breaking away from it and following a less stringent one. *Blume v. State*, 154 Ind. 343-354, 56 N. E. 771, and cases cited.

Other courts hold that, where such reference has been made and is either withdrawn or is corrected by the charge of the court, then it does not constitute reversible error.² It is the general rule in trials of both criminal and civil causes that where an improper argument is addressed to a jury the attention of the court should be called to it at once. Unless it is a plain breach of pro-

priety, the court may in his discretion either direct the objectionable argument to end forthwith or permit it to proceed, but in any event the subject must be adequately covered in the charge with such emphasis as will correct any erroneous effect. *Com. v. Worcester*, 141 Mass. 58, 6 N. E. 700; *Com. v. Poisson*, 157 Mass. 510-513, 32 N. E. 906; *Com. v. People's Express Co.*, 201 Mass. 564-580, 88 N. E. 420, 131 Am. St. Rep. 416; *Com. v. Coughlin*, 182 Mass. 558-563, 66 N. E. 207; *Sayles v. Quinn*, 196 Mass. 492, 82 N. E. 713; *O'Driscoll v. Lynn & Boston R. R. Co.*, 180 Mass. 187-190, 62 N. E. 3. No sound reason appears why this rule of practice should not apply to unwarranted arguments by a district attorney, even in respect of a failure by a defendant to take the stand in his own behalf. It is a common knowledge that defendants may testify if they desire. Where they do not take advantage of this privilege, frequently counsel for defendants refer to the statute and to the constitutional provisions, in order to explain conduct which might otherwise seem strange to the jurors. While this does not open the door to the district attorney to reply, it shows that the subject itself is one which does not have inherent tendency to harm a defendant. The fact that a defendant has not testified cannot be banished from the observation of the jury, and it is proper that his counsel may suggest the reason for it. It is always the duty of the court to state the law touching the matter.

It is possible that the argument of the district attorney inferentially called attention to the fact that the defendant had not testified; but it was a pertinent proposition for him to discuss that every person, so far as known, save her, had testified, who had been in such relation to the premises where the remains of the murdered man were found as to have had opportunity to commit the crime. This was germane not for the purpose of creating a presumption against the defendant by reason of her failure to testify, but to the end that the jury might consider the circumstance that everybody else, who could have done the deed, was accounted for, if the testimony was believed. The immediate disclaimer of the district attorney of intent to urge any inferences from her failure to testify, coupled with the plain instruction of the court in the charge in accordance with the statute and decisions abundantly protected the rights of the defendant. It must be assumed that the jury understood and acted upon the directions given by the court. *Com. v. Cunningham*, 104 Mass. 545. Exceptions overruled.

¹ *Austin v. State*, 102 Ill. 261; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *State v. Ryan*, 70 Iowa, 156, 30 N. W. 397; *Quinn v. State*, 123 Ill. 346, 15 N. E. 46; *Hunt v. State*, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815; *State v. Baldoser*, 88 Iowa, 55, 55 N. W. 97; *Yarbrough v. State*, 70 Miss. 593, 12 South. 551; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *State v. Marceaux*, 50 La. Ann. 1138, 24 South. 611; *State v. Williams*, 11 S. D. 64, 75 N. W. 815; *Showalter v. Indiana*, 84 Ind. 562; *State v. Payne*, 131 Mich. 474, 91 N. W. 739; *Jackson v. State*, 45 Fla. 38, 34 South. 243; *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675; *State v. Snyder*, 182 Mo. 523, 82 S. W. 12; *Barnard v. State*, 48 Tex. Cr. R. 111, 86 S. W. 760, 122 Am. St. Rep. 736; *State v. Robinson*, 112 Ia. 989, 36 South. 811; *State v. Foley*, 24 Pa. Super. Ct. 414; *Perkins v. State*, 17 Okl. 82, 87 Pac. 297; *Prince v. State*, 93 Miss. 266, 46 South. 537.

² *Wilson v. U. S.*, 149 U. S. 60-67, 13 Sup. Ct. 765, 37 L. Ed. 650; *People v. Hock*, 150 N. Y. 291-304, 44 N. E. 976; *State v. Chisnell*, 86 W. Va. 659-665, 15 S. E. 412; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *State v. Buxton*, 79 Conn. 477, 65 Atl. 957; *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577; *Minor v. State*, 120 Ga. 490, 48 S. E. 198; *Dunn v. State*, 118 Wis. 82, 94 N. W. 646; *People v. Hess*, 85 Mich. 128, 48 N. W. 181; *Petite v. State*, 8 Colo. 518, 9 Pac. 622.

(207 Mass. 506)

BOOK et al. v. WALL.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 6, 1911.)

1. EVIDENCE (§ 108*)—MOTIVE.

When it is disputed whether certain persons have done a certain act, the existence of a motive on their part to do or to refrain from doing that act is relevant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 202-212; Dec. Dig. § 108.*]

2. WATERS AND WATER COURSES (§ 179*) —
OVERFLOWING LANDS—EVIDENCE.

In an action for damages for the overflowing of plaintiff's land, where the question was whether defendant's dam had been maintained at its present height for more than 20 years before the bringing of the action, and it appeared that more than 20 years prior thereto one C. owned defendant's premises and an adjacent piece of land, on which a pond had been created by the dam, evidence of a deed of such adjacent land, wherein C. covenanted for himself and his heirs and assigns to maintain the dam "to at least its present height," was admissible to show that he and his successors had a motive to do what defendant claimed they did do, and thus to corroborate other evidence on which she relied.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 179.*]

Exceptions from Superior Court, Norfolk County; Wm. Cushing Wait, Judge.

Petition under the mill act by John Bock and others against Kittle C. Wall to recover damages for the overflowing of plaintiffs' land which was on a stream above defendant, who claimed a prescriptive right to maintain the dam at its present height. Verdict for defendant, and petitioners excepted. Exceptions overruled.

J. J. Feely and Roger Clapp, for petitioners. H. E. Ruggles, for defendant.

SHELDON, J. The question contested was whether the respondent's dam had been maintained at its present height for more than 20 years before the bringing of the petition. The evidence was conflicting. There was evidence that in 1876 one Campbell owned the respondent's premises and an adjacent piece of land upon which a pond had been created by this dam. The respondent was allowed to put in evidence a deed of the adjacent land given in March, 1876, by Campbell to the New York & New England Railroad Company, in which deed Campbell covenanted for himself and his heirs and assigns to maintain this dam "to at least its present height," so that the water in the pond should not be drawn down below its level then existing. The petitioner contends that this was erroneous.

In our opinion the deed was rightly admitted. It created, or could be found to have created, an obligation upon Campbell and his successors in title to keep the dam at the same height that it then was; and there was evidence that this was the same height at which it had been ever since maintained. The deed brought about a permanent condi-

tion of affairs affecting the use of Campbell's estate and imposing a duty upon all future owners thereof. The existence of such a duty and obligation furnished a motive, perhaps a strong motive, on the part of Campbell and his successors to comply with its requirements and thus avoid the liability under which they otherwise might be placed. But when it is disputed whether certain persons have done a certain act, the existence of a motive on their part to do or to refrain from doing that act is relevant. *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 327, 91 N. E. 883. This is the underlying element in such cases as *Clark v. Brown*, 120 Mass. 206, and those cited in *Conklin v. Consolidated Railway*, 196 Mass. 302, 306, 82 N. E. 23. The rule has been frequently applied in criminal cases, in which it is held that while the prosecution is not obliged to show a motive for the commission of an alleged crime, evidence of the existence of such a motive is competent and material. *Com. v. Richmond* (Suffolk, Jan. 3, 1911) 98 N. E. 816; *Commonwealth v. Jeffries*, 7 Allen, 548, 566, 83 Am. Dec. 712. The rule is stated and the authorities are collected in 12 Cyc. 149, 150. It follows that this deed was rightly admitted, not as a declaration of the grantor, but to show that he and his successors had a motive to do what the respondent claimed that they did do, and thus to corroborate the other evidence upon which she relied.

The petitioners did not care to press their exception to the admission of the letter from the secretary of the receivers of the railroad company, if the deed was rightly admitted.

The circumstances before us and the ground of our decision differ entirely from those that appeared in the cases relied on by the petitioners.

Exceptions overruled.

(207 Mass. 577)

RICE v. DRAPER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1911.)1. MANDAMUS (§ 68*)—OFFICERS—OFFICIAL
CHARACTER OF ACTS—PERFORMANCE BY GOVERNOR.

Under Act Cong. March 3, 1899, c. 445, 30 Stat. 1356, amending an act approved July 8, 1898 (30 Stat. 730, c. 647), to reimburse the Governors of the states for expenses incurred in aiding the United States to organize a volunteer army in the Spanish War, and requiring the money to be paid by the states directly to the officers and men, and not to be placed in the state treasury, a sum was paid to a former Governor, defendant's predecessor, to be paid to the officers and men who served in the Spanish War, and was accepted for that purpose both by defendant and his predecessor. Held, that defendant held the money in his official capacity, and mandamus to compel him to pay a part thereof to one claiming to be entitled thereto would not lie.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 68.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. MANDAMUS (§ 72*)—DISCRETIONARY ACT.

Mandamus will not issue to compel performance of a particular act involving the exercise of discretion by a public officer, but will ordinarily lie to compel him to take some action, to the extent of exercising his discretion as to whether he will do the act in the performance of his public duty.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.*]

3. MANDAMUS (§ 64*)—PURPOSES OF WRIT—PERFORMANCE OF OFFICIAL DUTY—GOVERNOR OF STATE.

Mandamus will not lie to compel the Governor to perform any part of his official duties.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 129; Dec. Dig. § 64.*]

Report from Supreme Judicial Court, Suffolk County.

Petition for mandamus by Charles W. Rice against Eben S. Draper. Petition dismissed.

Henry T. Richardson, for petitioner. Dana Malone, Atty. Gen., and Frederic B. Greenhalge, Asst. Atty. Gen., for respondent.

KNOWLTON, C. J. Under the act of Congress of March 3, 1899, (Act March 3, 1899, c. 445, 30 Stat. 1856), which is amendatory of "An act to reimburse the Governors of states and territories for expenses incurred by them in aiding the United States to raise and organize and supply and equip the volunteer army of the United States in the existing war with Spain," approved July 8, 1898, a sum of money was paid to Curtis Guild, Jr., then Governor of Massachusetts, to be paid to officers and men, referred to in the act, who served in the war with Spain. This money passed into the hands of his successor, the present Governor, and is now subject to his control. By the terms of the act such money, under the circumstances that existed in this state, was "to be paid by the states and territories direct to the officers and men," and none of it was "to be covered into the treasury of the state or territory." The petitioner claims a part of the money under assignments from 32 soldiers, the validity of which is questioned under section 3477 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2320), and he has brought this petition for a writ of mandamus to compel the respondent to pay it over.

It is plain that the money came into the hands of the respondent in his official capacity, as Governor of the commonwealth, and that his only relations to it arose under the act of Congress which dealt with the Governors as the executive representatives of the states, and, in states where no payments had been made to the men for the services for which the money was awarded, the act sought to impose upon the Governors an official duty to pay the money to the men who were entitled to receive it. This duty having been accepted by Gov. Guild, and afterwards having been transferred to his suc-

cessor, the respondent, and having also been accepted by him, the action which the petitioner seeks to compel is in no sense personal, but is strictly official. The most important question in the case is whether a writ of mandamus should be issued against the Governor of the commonwealth, to compel the performance of an official duty.

This question has been considered in many cases in other states, and the decisions are far from uniform. It is well established that a writ of mandamus will not be issued to compel the doing of a particular act that involves the exercise of judgment or discretion by a public officer. *People ex rel. v. Morton*, 156 N. Y. 136, 50 N. E. 791; *State v. Chase*, 5 Ohio St. 528. But, ordinarily, a public officer may be compelled to take some action, so far as to exercise his judgment and discretion in determining whether he ought to do or refrain from doing that which the petitioner desires of him in the performance of an alleged public duty.

The Governor of this commonwealth, under our Constitution, is the "supreme executive magistrate." He is the commander in chief of the military and naval forces of the state. In our Constitution the division of the government into three departments, each independent of the other, is provided for in language picturesque and emphatic, "to the end that it may be a government of laws and not of men." Const. Mass. part 1, art. 80. In other states whose Constitutions recognize a similar division of the government, it is generally, if not universally, held that, in the performance of his political duties as the highest executive officer, the Governor is not subject to supervision or direction by the courts. But in some jurisdictions there are decisions that, in the performance of strictly ministerial duties which might have been imposed upon some other officer, the Governor may be compelled to act by a writ of mandamus. See *Railroad Co. v. Moore*, 36 Ala. 371; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162; *Magruder v. Swann*, 25 Md. 173; *Chumasero v. Potts*, 2 Mont. 242; *Cotten v. Ellis*, 52 N. C. 545; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284; *Chamberlain v. Sibley*, 4 Minn. 309 (Gil. 228); *State v. Chase*, 5 Ohio St. 528. But the weight of authority, furnished by decisions in a larger number of states, and supported, as we think, by stronger reasons, is in favor of the proposition that Governors of states are not amenable to the courts for their conduct in the performance of any part of their official duties. *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 348; *State v. Drew*, 17 Fla. 67; *Low v. Towns, Governor*, 8 Ga. 360; *People v. Cullom*, 100 Ill. 472; *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *Hovey v. State*, 127 Ind. 588,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

27 N. E. 175, 11 L. R. A. 763, 22 Am. St. Rep. 663; *State v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *In re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *Sutherland v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *State v. Stone*, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; *State v. Governor*, 25 N. J. Law, 331; *People ex rel. v. Morton*, 156 N. Y. 136, 50 N. E. 791; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 268, 3 L. R. A. 316; *Teat v. McGaughey*, 85 Tex. 478, 22 S. W. 302; *Houston, etc., Railroad v. Randolph*, 24 Tex. 317. The subject is discussed learnedly by Mr. Justice Cooley in *Sutherland v. Governor*, 29 Mich. 320-323, 18 Am. Rep. 89, where he says: "What is claimed is that, where the act is purely ministerial and the right of the citizen to have it performed is absolute, the Governor, no more than any other officer, is above the laws, and the obligation of the courts on a proper application to require him to obey the laws is the same that exists in any other case where an official ministerial duty is disregarded. * * * There is no clear and palpable line of distinction between those duties of the Governor which are political and those which are to be considered ministerial merely, and if we should undertake to draw one, and to declare that in all cases falling on one side of the line the Governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation. * * * The apportionment of authority and duty to the Governor is either made by the people in the Constitution, or by the Legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and, consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from these checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

Similar doctrine is stated in other cases cited above. We think it would be an unfortunate rule of law that would require this court, at the request of a petitioner, to scrutinize the official conduct of the Governor, in order to determine whether certain of his acts or omissions were in matters merely ministerial, or in the exercise of executive functions which properly pertained to his office. An order under a writ of mandamus against the Governor, if he should refuse to obey it, might present the strange spectacle of a direction by the court to the executive forces of the government, to coerce and punish the chief executive officer of the state, who commands and controls the military forces that are ultimately relied upon for the maintenance of law and order. It seems better to hold that, for whatever he does officially, the Governor shall answer only to his own conscience, to the people who elected him, and in case of the possible commission of a high crime or misdemeanor, to a court of impeachment. For these reasons we are of opinion that the petition should be dismissed.

In the view we have taken of the case, we cannot determine judicially which of the parties is right in his contention as to the validity of the assignments under which the petitioner claims.

Petition dismissed.

(207 Mass. 573)

COMMONWEALTH v. ELLIS.

SAME v. KELLY.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 9, 1911.)

1. INDICTMENT AND INFORMATION (§ 125*)—COMPLAINT—DUPLICITY—VAGRANCY.

Under Rev. Laws, c. 212, § 61, declaring that a person who is known to be a pickpocket, thief, or burglar, and having no visible or lawful means of support, if found prowling around any enumerated public place, shall be deemed a vagabond, a complaint alleging that accused on a designated date, "and on divers other dates and times," was a person known to be a pickpocket and thief, without any visible and lawful means of support, and that "on said days and times aforesaid" he was found prowling around a railroad depot in a city, whereby he was "and still is" a vagabond, does not charge distinct offenses, but charges a continuing offense and sufficiently charges an offense on the designated date, and the quoted words may be stricken as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.*]

2. INDICTMENT AND INFORMATION (§ 110*)—STATUTORY CRIMES—VAGRANCY—COMPLAINT—SUFFICIENCY.

A complaint, following the language of Rev. Laws, c. 212, § 61, defining and punishing vagabonds, is sufficiently certain.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

3. VAGRANCY (§ 2*) — COMPLAINT — SUFFICIENCY.

A complaint, which alleges that accused was a person known to be a pickpocket and

thief, without any visible and lawful means of support, and that he was found prowling around a railroad depot in a city, whereby he was a vagabond, charges a violation of Rev. Laws, c. 212, § 61, defining and punishing vagabonds, and not a violation of section 46, punishing rogues and vagabonds.

[Ed. Note.—For other cases, see Vagrancy, Dec. Dig. § 2.*]

4. VAGRANCY (§ 1*)—STATUTES—OFFENSES.

To convict one under Rev. Laws, c. 212, § 61, defining and punishing vagabonds, it must appear that he was found prowling around one of the public places mentioned, and that he was doing this while having no visible and lawful means of support, and that he was a person known to be a pickpocket, thief, or burglar.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. CONSTITUTIONAL LAW (§ 200*)—EX POST FACTO LAWS—STATUTES.

Rev. Laws, c. 212, § 61, providing that a person who is known to be a pickpocket, thief, or burglar, and having no visible or lawful means of support, if found prowling around enumerated public places, shall be deemed a vagabond, makes one liable for his act in prowling around a public place, without any visible or lawful means of support; and the commission of the crimes referred to is not a misdemeanor, for which prosecution may be had, but the previous crimes are only considered in creating the offense, so that the statute is not invalid as an ex post facto law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 570-575; Dec. Dig. § 200.*]

6. INDICTMENT AND INFORMATION (§ 121*)—COMPLAINT—BILL OF PARTICULARS.

Under Rev. Laws, c. 218, § 89, authorizing a bill of particulars when the charge is not otherwise plainly set out, or when it is necessary to give accused and the court reasonable knowledge of the nature and grounds of the crime charged, one charged with being a vagabond, in violation of chapter 212, § 61, based on his prowling around a railroad depot in a city, without any visible or lawful means of support, being known to be a pickpocket, thief, or burglar, cannot complain of the refusal of the court to require a bill of particulars demanded "in accordance with his rights under the Revised Laws," without pointing out any part of the complaint about the meaning of which he is uncertain.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 318; Dec. Dig. § 121.*]

Appeal from Superior Court, Middlesex County.

John W. Ellis and Thomas Kelly were each convicted of crime, and they bring exceptions, and appeal from orders denying motions for bills of particulars. Judgment and orders affirmed.

John J. Higgins, for the Commonwealth. P. H. Kelley and Jos. M. Sullivan, for defendants.

KNOWLTON, C. J. These two cases were argued together, and they present precisely the same questions. In each a complaint was made against the defendant under Rev. Laws, c. 212, § 61, charging that he was "a person known to be a pickpocket and thief, and then and there having no visible and

lawful means of support, and was then and there, on said days and times aforesaid, found prowling around a certain railroad depot in said Lowell, whereby and by force of the statute in such case made and provided," he "was and still is a vagabond," etc. A motion to quash was filed in each case, in which six reasons for the motion were stated.

The complaint is not bad for duplicity. It does not charge distinct offenses. The charge is of a continuing offense, and the time well might have been alleged as within a certain period beginning on a day named and ending on a later day named. But, in the form in which this complaint is made, the allegation sufficiently charges an offense on the 1st day of June, 1910, and the words, "and on divers other dates and times at said Lowell," add nothing to it. These words, and the later words, "on said days and times aforesaid," and also the words, "and still is," may be stricken out as surplusage. Com. v. Sullivan, 5 Allen, 511; Com. v. Gardner, 7 Gray, 494; Com. v. Ellwell, 1 Gray, 463.

The complaint is sufficiently certain. It follows the language of the statute, and in a case of this kind that is sufficient. Com. v. Ashley, 2 Gray, 356; Com. v. Dyer, 128 Mass. 70; Com. v. Brown, 141 Mass. 78, 6 N. E. 377.

It is plain that the charge is of being a vagabond under the provisions of Rev. Laws, c. 212, § 61, and not under the provisions of section 46 of the same chapter.

The defendants' counsel have argued at length that the statute is unconstitutional, because of the nature of the allegations that together charge the offense. The statute makes certain conduct punishable, as producing in a man a condition and character that render him an objectionable member of society, whose acts and influence are detrimental to the community. To convict him under this section, it must be shown that he was found prowling around one of the public places mentioned in the statute, and that he was doing this while having no visible and lawful means of support. It must also be shown that he was a person known to be a pickpocket, thief or burglar. His prowling around a public place is active conduct for which he is directly responsible. So too in ordinary cases, in a less marked degree, is his having no visible or lawful means of support. These are matters of conduct and behavior. When they coexist in a person known to be a pickpocket, thief or burglar, they constitute an offense for which he well may be subjected to punishment. The commission of the previous crimes referred to in the statute does not constitute a misdemeanor or for which he may be prosecuted. To a certain extent they are indications of present character, and they serve to give color to conduct that otherwise might be less pro-

nounced in its indications. That the previous commission of crimes may be considered in determining the punishment to be imposed, and in the creation of certain kinds of statutory offenses, without rendering a statute an *ex post facto* law; has repeatedly been adjudged. *McDonald v. Com.*, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; *Com. v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Sturtevant v. Com.*, 158 Mass. 598, 33 N. E. 648; *Com. v. Phillips*, 11 Pick. 28; *Plumbly v. Com.*, 2 Metc. 413; *Tuttle v. Com.*, 2 Gray, 506.

The defendant in each case filed a motion for a bill of particulars and appealed from an order overruling it. In the substantive part of the motion he merely "demands that a bill of particulars be furnished him in accordance with his rights under the Revised Laws." If he had pointed out any part of the complaint, about the meaning of which he was uncertain and needed information to enable him to prepare his defense, doubtless the court would have ordered the filing of specifications. He might have needed to be told what railroad depot was referred to in the complaint, or what were the particulars of the knowledge that he was a pickpocket and thief; but it does not appear that he needed or desired information of this kind.

The defendants' "rights under the Revised Laws" entitle them to a bill of particulars only when "the charge would not be otherwise fully, plainly, substantially and formally set out," or when it is "necessary to give the defendant and the court reasonable knowledge of the nature and grounds of the crime charged." *Rev. Laws*, c. 218, § 39; *Com. v. Snell*, 189 Mass. 12-19, 75 N. E. 75, 3 L. R. A. (N. S.) 1019.

Judgment and orders affirmed.

(207 Mass. 563)

COMMONWEALTH v. STUART et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1911.)

1. CRIMINAL LAW (§ 423*)—DECLARATIONS OF CONSPIRATOR—TIME OF MAKING.

Where accused is charged with conspiring with others to induce the owner of a store to sell his property and take worthless security in payment, and to dispose of the property before the person selling the property should have taken any action to defeat the conspiracy, a declaration by one of the conspirators is admissible in a prosecution for the conspiracy, although made after the property had been transferred by the original owner, but before the conspirators had disposed of the property.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

2. CRIMINAL LAW (§ 369*)—EVIDENCE.

In a prosecution for conspiring to steal property, evidence of one who was a confederate of one of the conspirators, although not included in the indictment, as to his business relations with accused, was competent, where the jury could find that the transactions tes-

tified to were a part of the general unlawful scheme in which accused and his confederates were engaged, although the evidence may have tended incidentally to show the commission by accused of other specific crimes.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

3. CRIMINAL LAW (§ 680*)—TRIAL—ORDER OF INTRODUCING EVIDENCE.

In a prosecution for conspiracy, the order of introducing the evidence is wholly in the discretion of the judge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1609, 1610, 1613; Dec. Dig. § 680.*]

4. CONSPIRACY (§ 45*)—ADMISSIBILITY OF EVIDENCE.

Accused was charged with conspiring with others to obtain property by purchase from the owners and inducing them to accept worthless security for the price by false assurances of its value. *Held*, that evidence was admissible, in examination of a person who sold his property to the conspirators, that he relied on the statements of two of the conspirators as to the value of the land which he had been persuaded to take as security for the price; and such evidence was not excluded by the rule that lies about the value of property are mere dealer's talk, as confidential relations existed between one of the conspirators and the witness, and the latter was persuaded to rely upon the pretended opinion of that conspirator and his confederates.

[Ed. Note.—For other cases, see *Conspiracy*, Dec. Dig. § 45.*]

5. CONSPIRACY (§ 26*)—NATURE OF OFFENSE.

A conspiracy for the attainment of an unlawful end is none the less a criminal offense because some means employed, though essentially dishonest, could not by themselves be made the subject of a criminal prosecution.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. § 37; Dec. Dig. § 26.*]

6. CONSPIRACY (§ 45*)—ADMISSIBILITY OF EVIDENCE.

In a prosecution for conspiring to purchase property and induce the seller to accept worthless security for the price, deeds made by the alleged conspirators of land to be used as security in the purchases intended to be made are competent evidence of acts done in furtherance of the conspiracy.

[Ed. Note.—For other cases, see *Conspiracy*, Dec. Dig. § 45.*]

7. CONSPIRACY (§ 45*)—ADMISSIBILITY OF EVIDENCE.

Accused was charged with conspiring with others to purchase property and induce the owners to accept worthless security for the price, and one owner was induced to take a second mortgage as security. *Held*, that it was competent to prove the foreclosure of the first mortgage upon the property, as it tended to show that the property was exhausted in payment of the prior incumbrance, and the foreclosure could be proved by introducing the mortgagee's deed.

[Ed. Note.—For other cases, see *Conspiracy*, Dec. Dig. § 45.*]

8. CRIMINAL LAW (§ 369*)—EVIDENCE.

In a prosecution for conspiring to induce the owners of property to sell their property and take worthless security for the price, evidence by one of the conspirators that a few years before he had been swindled by one of the persons accused and others in a transaction which might be found to have been in furtherance of the alleged conspiracy, and to indicate that it was then under way, and that he was thereafter induced to join in the conspiracy and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

assist in defrauding others, was admissible as a part of the history of the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

9. LARCENY (§ 14*)—SUFFICIENCY OF EVIDENCE.

An indictment charged certain persons named on a specified date with stealing the property of a person named. The evidence showed that one of the persons charged had obtained the money that they were charged with stealing for one-half interest in a pretended business, by means of false representations as to the extent and profits of that business. *Held*, that the court properly refused to order an acquittal, as the evidence was sufficient to show larceny, if done with the fraudulent intent charged, under Rev. Laws, c. 208, § 26, providing that whoever, with intent to defraud, obtains by a false pretense money of another, shall be guilty of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.*]

10. CONSPIRACY (§ 37*)—MERGER OF CRIMES.

The offense of conspiracy is not merged in specific crimes afterwards committed in pursuance thereof, although the conspiracy was only a misdemeanor, and the subsequent crimes were felonies.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 68-70; Dec. Dig. § 37.*]

Exceptions from Superior Court, Suffolk County.

Charles S. Stuart and others were convicted of conspiracy to steal property, and Stuart brings exceptions. Exceptions overruled.

One count of the indictment charged them with larceny of the property of a person named.

Michael J. Dwyer, Asst. Dist. Atty., for the Commonwealth. Robert W. Nason and Thos. W. Proctor, for defendants.

SHELDON, J. 1. As the district attorney entered a nol. pros. upon all but the first and tenth counts of the indictment, the defendant's motion to quash has not been argued, and need not be considered.

Several exceptions were taken by this defendant to the admission of evidence. We discuss those which have been argued by his counsel.

2. The government contended that one White, the owner of a small grocery, had been induced to sell his store and business to Gaffney and to take as security for the price thereof a second mortgage upon property in Holliston, which was represented to be of abundant value for that purpose, but which the government claimed was worthless. White was permitted against the exception of the defendant to testify that after he had transferred his store to Gaffney, and while Gaffney was still in possession thereof, he had a conversation with Gaffney, in which the latter said that he never had seen the Holliston property, that he had got it from Stuart, and could not tell anything about it except that it was in Holliston. There was evidence to show the existence of

the conspiracy charged in the first count of the indictment, and that both Stuart and Gaffney, as well as others, were parties thereto.

The defendant concedes that the acts and declarations of one conspirator, made in pursuance of the common object while the conspiracy is still pending, may be proved against all the conspirators; but he contends that this evidence was incompetent because the statements were made by Gaffney after the transaction with White had been completed, when the object of the conspiracy had been attained as to him, and so that they were the mere declarations of one conspirator, not a party to the trial (Gaffney, though indicted, had died before the trial took place), and were narrative statements of past events and not in any way relevant against the defendant. 1 Greenl. on Ev. § 111; Stephen's Digest of the Law of Evidence, art. 4. But this contention is based upon too narrow a view of the scope of the conspiracy which was claimed by the government and which the evidence tended to show. Its object was not simply to lure the owners of small stores or business enterprises into parting with their property in exchange for a worthless promise backed by equally worthless security; it was part of the scheme also, after the vendors had been thus cheated, to keep them at peace and inactive until the booty acquired from them had been disposed of and the conspirators had been thus enabled to enjoy the fruits of their unlawful enterprise. All the statements of Gaffney, the admission of which was excepted to, could be found to have been made while the conspiracy was still pending and in furtherance of its criminal object. Accordingly the evidence was competent. *Com. v. Clancy*, 187 Mass. 191, 196, 72 N. E. 842; *Com. v. Waterman*, 122 Mass. 43; *Com. v. Brown*, 14 Gray, 419.

Even if the declarations had been made after the paramount object of the conspiracy had been attained, and had related merely to the concealment and safe disposal of the property which had been obtained by its execution, there is sufficient authority for saying that they might have been put in evidence against fellow conspirators not present when they were made. But we need not spend time upon this consideration, as it is merely a development of that already stated. It is enough to refer to a few of the cases in which it has been applied. *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677; *Com. v. Devaney*, 182 Mass. 33, 33, 64 N. E. 402; *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 63 L. R. A. 871, 4 Am. & Eng. Ann. Cas. 960; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Scott v. State*, 30 Ala. 508, 509. Other cases are collected in 12 Cyc. 438, 439.

3. The testimony of Lindauer as to Gaff-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ney's other declarations made to him was competent for the same reasons.

We do not consider the question whether Gaffney's declarations could have been admitted on the ground of his having deceased before the trial. Rev. Laws, c. 175, § 66; St. 1898, c. 535. It has been doubted among the profession whether the statute is applicable to criminal proceedings. Apparently it has been assumed not to be so in the trial of an indictment for unlawfully procuring a miscarriage. *Com. v. Bishop*, 165 Mass. 148, 152, 42 N. E. 560; *Com. v. Sinclair*, 195 Mass. 100, 109, 80 N. E. 799. These cases were decided under Rev. Laws, c. 175, § 65. The question is not presented here, and is mentioned only because of suggestions made by counsel at the argument. It does not appear, and is not probable, that the presiding judge found these declarations of Gaffney to have been made in good faith; and this was a condition precedent to their admissibility even if otherwise competent.

4. The testimony of Griffin as to his business relations with Stuart was competent. The jury could find that the transactions testified to were a part of the general unlawful scheme in which Stuart and his confederates were engaged. They were not, or rather the evidence indicated that they were not, independent acts of wrongdoing, as in *Com. v. Jackson*, 132 Mass. 16. That case is explained and the rule for cases like the one at bar is stated in *Com. v. Clancy*, 187 Mass. 191, 196, 72 N. E. 842, and *Com. v. Blood*, 141 Mass. 571, 576, 6 N. E. 769. See, also, *Com. v. Lubinsky*, 182 Mass. 142, 64 N. E. 966; *Com. v. Smith*, 163 Mass. 411, 417, 418, 40 N. E. 189. That this evidence may have tended incidentally to show the commission by Stuart of other specific crimes is no objection to its being received for the purposes for which it was competent, to show the intent with which he acted and the scope and character of the conspiracy into which he had entered and in furtherance of which these particular acts could be found to have been committed. Nor was it material that Griffin and Joyce were not included in the indictment. *Graff v. People*, 208 Ill. 312, 319, 70 N. E. 299; *People v. Smith*, 144 Ill. App. 129, 159, affirmed in 239 Ill. 91, 87 N. E. 885; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678. That Griffin was apparently a confederate of Stuart does not affect his competence as a witness. *Bean v. Bean*, 12 Mass. 20. Nor do we find that Griffin testified to the contents of the deed given to him. His testimony that the land was in Walpole was directed to the real location of the land, not to what was said about it on the deed.

5. For the reasons already stated, it was competent to prove the dealings of Ramsey and Nutt with Yull. The testimony was not made too remote by the fact that it related to a transaction in 1903. The conspiracy was a continuing one. It might be found that it began as early as 1901, and continued,

though with the addition of some new confederates, into 1906. The exception to the testimony of these witnesses cannot be sustained.

6. The defendant had no right of exception to the ruling that Lindauer might testify in redirect examination that he relied on the statements of Stuart and Gaffney as to the value of the land which he had been persuaded to take as security for the price of his restaurant. The order of the evidence was wholly in the discretion of the judge. The evidence was material (*Com. v. O'Brien*, 172 Mass. 248, 254, 52 N. E. 77; *Com. v. Drew*, 153 Mass. 588, 595, 27 N. E. 593), because it was one of the objects of the conspiracy to palm off worthless security upon sellers by false assurances of its value. The ordinary doctrine (*Com. v. Wood*, 142 Mass. 459, 8 N. E. 482; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623) that lies about the value of property are mere dealer's talk does not apply to a case like this, where it could be found that there were confidential relations between Stuart and the victim whom it was intended to defraud, and that the latter was persuaded to rely upon the pretended opinion of Stuart and his confederates. See *Medbury v. Watson*, 6 Metc. 246, 260, 39 Am. Dec. 726; *Dawe v. Morris*, 149 Mass. 188, 192, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Kilgore v. Bruce*, 166 Mass. 186, 188, 44 N. E. 108; *Andrews v. Jackson*, 169 Mass. 268, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; *Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307; *Gurney v. Tenney*, 197 Mass. 457, 465, 84 N. E. 428; *Rollins v. Quimby*, 200 Mass. 162, 164, 86 N. E. 350.

We may add that a conspiracy for the attainment of an unlawful end is none the less a criminal offense because some of the means employed, though essentially dishonest, could not by themselves be made the subject of a criminal prosecution. *Com. v. Althause*, 207 Mass. 32, 93 N. E. 202.

7. The deeds of the Walpole land from Faust to Griffin and from Griffin to Barnes were properly admitted. This land was intended to be used, it could be found, as security in the fraudulent purchases intended to be made. The deeds afforded competent evidence of acts done by two of the alleged conspirators in furtherance of the common design. Faust was one of the defendants named in the indictment. Griffin, as we have seen, could be found to have joined in the conspiracy.

8. The foreclosure of the first mortgage upon the property on which Walton had taken a second mortgage as security for the price of his restaurant was a fact competent to be proved. It tended to show that the property was exhausted in payment of the prior incumbrance, and so to support the claim of the government that the security was worthless from the beginning. The mortgagee's deed was competent to prove the

fact of the foreclosure. It does not appear that the deed was allowed to be used as evidence of the truth of the recitals made therein.

9. The parts of Ferguson's testimony which were excepted to cannot be said to have been incompetent. In substance, he testified that in 1901 he was made a victim of Stuart and others in a transaction which might be found to have been in furtherance of the alleged conspiracy, and to indicate that this was then under way. His testimony tended also to show that immediately after suffering himself he was induced by Stuart to join in the conspiracy and to assist in defrauding others. All this was admissible. As was said in *Com. v. Scott*, 123 Mass. 222, 234, 235, 25 Am. Rep. 81, the government had a right to show the whole history of the conspiracy from its commencement to its consummation. And see *Com. v. Howard*, 205 Mass. 128, 148, 91 N. E. 397. It tended to show the preparations made by Stuart and the beginning and development of his scheme. It was like the evidence which always has been held to be competent that one charged with a crime had made preparations for its commission, or had by word or deed manifested an intention to commit that crime. *Com. v. Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019; *Com. v. Robinson*, 146 Mass. 571, 577, 16 N. E. 432; *Conklin v. Consolidated Ry.*, 196 Mass. 302, 306, 82 N. E. 23, and cases there cited.

10. The judge was right in refusing to order an acquittal on the tenth count. There was evidence that Stuart had obtained Turner's money for a half interest in Sweett's pretended business, by means of false representations as to the extent and profits of that business. This was enough to constitute larceny, if done with the fraudulent intent claimed by the government. Rev. Laws, c. 208, § 26. And the similar transactions with Severance, Merrow and Day, which were in evidence, could be found to have been done as parts of the same general scheme which was carried out with Turner. *Com. v. Lubinsky*, 182 Mass. 142, 64 N. E. 966; *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769; *Jordan v. Osgood*, 109 Mass. 457, 461, 12 Am. Rep. 731; *Horton v. Weiner*, 124 Mass. 92; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308. It is of course plain that the conduct and statements of Stuart himself in the other matters which were in evidence, if these were found to have been done in the execution of one and the same unlawful scheme, as the evidence indicated, furnished strong evidence against himself. *Com. v. Bond*, 188 Mass. 91, 74 N. E. 293.

11. The offense of conspiracy was not merged in the specific crimes afterwards committed in pursuance thereof, although the conspiracy was only a misdemeanor and

the subsequent crimes were felonies. *Com. v. Walker*, 108 Mass. 309, 814; *Com. v. Andrews*, 132 Mass. 263, 265.

We have examined all the exceptions in the case which do not appear to have been waived, and most if not all of those which have not been specifically mentioned are covered by what has been said. We discover no error in the rulings excepted to.

Exceptions overruled.

(307 Mass. 424)

HAWKES v. LACKEY et al. (Two cases).
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1911.)

1. **EQUITY (§ 88*)—LACHES—TIME TO OBJECT.**
Where defendant failed to plead laches, it is too late, after the master's report has been filed, for him as a matter of right to ask a dismissal on that ground.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 245; Dec. Dig. § 88.*]

2. **EQUITY (§ 80*)—LACHES.**

A defendant, who has not changed his position, nor lost anything because suit was not brought earlier, cannot urge laches as a defense, where the delay was largely due to misplaced confidence reposed in him by plaintiff, who stood in a confidential relation to him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 237; Dec. Dig. § 80.*]

3. **EQUITY (§ 411*)—REPORT BY MASTER—RIGHT OF JUDGE TO MAKE FURTHER FINDINGS.**

The judge may make further or different findings by inferences drawn from the facts reported by the master.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 919; Dec. Dig. § 411.*]

4. **FRAUD (§ 7*)—VIOLATION OF CONFIDENTIAL RELATION.**

Where two persons stand in a relation such that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and the confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding person, the person so availing himself of his position cannot retain the advantage, though the transaction could not have been impeached if no such relation had existed.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 7.*]

5. **EQUITY (§ 348*)—TRIAL—FINDINGS—EVIDENCE.**

In a suit for an accounting, the master's report, finding that plaintiff and her sister, each over 60 years of age, though intelligent and well educated, had no business experience and were almost like children in money matters; that defendant knew such facts; that they trusted defendant implicitly, and apparently always did what he asked or advised, he being a relative of theirs and intimate with them; that he received large sums of money from them for alleged investments, and knowing and intending that they should act from a feeling of blind and unquestioning trust in him, and with a desire of accommodating him, without considering the possible effect of their action, partly from a desire on their part to help his speculations and participate in them, gave them, in return for property transferred to him, his 10-year notes bearing 4 per cent. interest, for his own benefit, and to their hazard and detri-

ment with reference to the fiduciary obligations which he owed them, warranted a finding by the judge that plaintiff and her sister were induced to receive the payments of interest upon such notes by undue influence of defendant.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 348.*]

6. EVIDENCE (§ 265*)—ADMISSIONS—EFFECT.

That plaintiff and her sister had received some payments of interest upon the notes was not conclusive evidence of their election to confirm the taking of them but amounted only to an admission by them, which was merely evidence upon such question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.*]

7. APPEAL AND ERROR (§ 704*)—REVIEW—MASTER'S FINDING.

A master's findings of fact upon evidence, some of which is not in the record, cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2989-2941; Dec. Dig. § 704.*]

8. INTEREST (§ 89*)—COMPUTATION.

Under Rev. Laws, c. 177, § 8, providing that, when judgment is made up upon the report of a master, in chancery, interest shall be computed upon the amount of the report from the time when made to the time of making up the judgment, it was proper to include in final decrees interest upon the aggregate sum found by the master, though the amounts reported were made up in part of interest reckoned up to the date of the report.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.*]

Exceptions from Superior Court, Suffolk County.

Actions by Mary J. Hawkes against William A. Lackey and others. Decrees for plaintiff, and defendants except. Modified and affirmed.

B. B. Jones and Grosvenor Calkins, for plaintiff. Frank Paul, for defendants.

SHELDON, J. The first contention made by the defendant Lackey, hereinafter called the defendant, is that these bills ought to be dismissed by reason of laches on the part of the plaintiff. That defense was not set up in the pleadings, and is not now open to the defendant as of right. *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 618. Nor, considering the character of the actions, and the facts found by the master, ought such a defense to be sustained. As to most of the transactions complained of, the delay in bringing suit has been largely due to the misplaced confidence reposed in the defendant by the plaintiff and her aunt and sister, in whose right the second suit is brought. The defendant has not changed his position or lost anything from the fact that the suits were not brought earlier. *Stewart v. Finkelstone*, 206 Mass. 28, 86, 92 N. E. 37. As to some of the complaints made against him, he rests his defense on the ground that the bills were prematurely brought.

The judge of the superior court sustained the defendant's exceptions numbered 13 to 20 inclusive, so far as they related to the

master's assumption of law that there was no merger of the defendant's obligation of \$2,050 to Elizabeth S. Hawkes by the two 10-year notes, each for half that sum, which the defendant gave respectively to the plaintiff and her sister Sarah. The plaintiff did not appeal, and the correctness of this ruling is not before us. But the judge also found as a conclusion of fact and law from the whole of the master's report that the plaintiff and her sister were induced to receive the payments of interest upon these notes by undue influence of the defendant, and that the notes should be reformed into demand notes carrying interest at 4 per cent. to the date of the filing of the bill and thereafter at 6 per cent. The right of the judge to make further or different findings by inferences drawn from the facts reported by the master is settled. *Rosenberg v. Schraer*, 200 Mass. 218, 86 N. E. 816; *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 200, 84 N. E. 133, 126 Am. St. Rep. 409, and cases cited. And see *Knowles v. Knowles*, 205 Mass. 290, 294, 91 N. E. 213. But the defendant contends that this finding, that the conduct of the plaintiff and her sister was induced by the undue influence of the defendant, was unsupported by the facts found and reported by the master and was unwarranted. This contention makes it necessary to examine the master's report.

He has found that at the time of the transactions in question the plaintiff and her sister were each more than 50 years of age, with no property except what had come to them from their aunt, Elizabeth S. Hawkes. They were intelligent and well educated and knew the character and meaning of interest on money and of the time at which a note was payable. But they had scarcely any business experience, and at the beginning of the time in question were almost like children in money matters; and these facts were known to the defendant. They trusted him implicitly, and apparently always did what he asked or advised, although the legal matters connected with their aunt's estate were, as the defendant knew, in the hands of an attorney, who had not been consulted about these notes and was not present when they were given. The defendant was a relative of these ladies, was intimate with them, and they had confidence in him. He was about 30 years of age and a college graduate. He had had little business experience except through his speculations in stocks, which seem to have been extensive and long continued, and apparently were finally disastrous. For about two years he had acted for these sisters, and for their aunt in her lifetime, making some investments for them with a part of the money which he procured from them. That fiduciary relation and their confidence in him continued until some months before the first of the suits was brought. He

asked for the 10-year extension of the notes, for his own advantage and not in the interest of their aunt's estate, which had become practically theirs. He did not make any false or fraudulent representation of fact to them in connection with this matter. They acted, and it is a fair and really a necessary inference from the findings of the master that he knew that they acted and intended that they should act, from a feeling of blind and unquestioning trust in him, and also of accommodation towards him, apparently without considering or appreciating the possible effect of their accepting the notes; partly also from a desire which began in them soon after their aunt's death to help his speculations and themselves to participate in these, as they afterwards did in one of them. But they acted in taking these notes and in receiving payments of interest thereon without any coercion or inducement on his part, unless his letting them do so without any special warning or discussion or any suggestion that they should consult their attorney, and knowing their trust and confidence in him, constitute in law such inducement or coercion. In other words, owing to them the duties which grew out of the fiduciary relations that existed between them and him, he acted, and availed himself of their trust and confidence in him to lead them to act, for his own benefit and advantage and to their hazard and detriment with reference to the fiduciary obligations which he owed to them.

The law in relation to such transactions is well settled. It was succinctly stated by Lord Chelmsford in *Tate v. Williamson*, L. R. 2 Ch. 55: "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." The principle has been affirmed by this court in many cases where, under diverse circumstances and by reason of different relations, a special duty was owed by one party to another, either by reason of confidence having been reposed in the former or because of a duty having been created by law. It was applied to dealings between attorney and client in *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; to trustees in *Hayes v. Hall*, 188 Mass. 510, 74 N. E. 935; to executors in *Bowen v. Richardson*, 133 Mass. 293; to brokers, as to matters within the scope of their agency, in *Quinn v. Burton*, 195 Mass. 277, 279, 81 N. E. 257; to directors of a corporation in *Parker v. Nickerson*, 112 Mass. 195; to promoters in *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 658, 49 L. R. A. 725, and *Old Dominion Copper Co. v. Bigelow*,

188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479, and 203 Mass. 159, 89 N. E. 193. Although the court were divided in opinion in the final decision of the case last cited, there was no disagreement as to the general principle stated. See, further, *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; *Lane v. Moore*, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430, and in *re Garnett*, 81 Ch. Div. 1. This is a question of the violation of the duties owed by one who stands in a relation of trust and confidence, not the exertion of undue influence by one who owed no special duty and who sought to gain his end either by actual deception or by means of a domination over the mind of the person practiced upon, as in *Howe v. Howe*, 99 Mass. 88, and similar cases.

We are clearly of opinion that the conclusion of the judge as to this matter was well warranted by the master's report.

The fact that the plaintiff and her sister had received some payments of interest upon these notes was not under the circumstances conclusive evidence of an election on their part to confirm the taking of the notes. Pressed to its strongest, this could not amount to more than an admission by them. Like all bare admissions, it was merely evidence to be considered, as it has been considered, by the master.

The fact that *Elizabeth S. Hawkes* passed the title to the check for \$1,600 to the defendant through his father, and that the attempt was made to indorse it first to the father, then to be indorsed by the father to the defendant, does not make it necessary to find that this was a loan by her to the father and not to the defendant. This, too, was a piece of evidence, upon which the master was to pass. He has done so, with other evidence which is not before us. We cannot revise his finding.

Upon examination of the master's report, the defendant's exceptions thereto, and the interlocutory and final decrees entered thereon, we find no error in the allowances of interest that finally were made, and only one matter that calls for any discussion. The master reported the sums found due from the defendant in each transaction, and reckoned interest thereon in various ways to meet the different rules of law that might be found to be applicable. The judge sustained the defendant's contention that he should be charged only with simple interest, and as to some matters with interest to be computed at the rate of only 4 per cent. up to the dates of filing the respective bills. But the defendant claims that in the final decrees interest was charged upon the aggregate sums found by the master, and that the result of this was to charge him with interest at least once compounded, because the amounts reported were made up in part of interest reckoned up to the date of the report. It might be doubted whether upon this record such a position is open to the defendant. *Young v.*

Winkley, 191 Mass. 570, 78 N. E. 377. We assume, however, that he may contend that the final decree was erroneous in any particular disclosed by the record. *Nelson v. Winchell & Co.*, 203 Mass. 75, 93, 89 N. E. 180, 23 L. R. A. (N. S.) 1150.

It was early decided that where the plaintiff in an action upon a contract was delayed in obtaining judgment by an unsuccessful effort of the defendant to obtain a new trial, his judgment should include interest upon the amount of the verdict from the time that it was rendered. *Vail v. Nickerson*, 6 Mass. 262. This rule has since been extended by statute and applied to all awards of county commissioners, committees, or referees, and reports of auditors or masters in chancery, as well as to all verdicts of juries. *Rev. Laws*, c. 177, § 8. That is decisive of the present contention. It was the plaintiff's right to have interest computed as the defendant claims was done. See *East Tennessee Land Co. v. Leeson*, 185 Mass. 4, 69 N. E. 351; *Jackson v. Brockton*, 182 Mass. 26, 64 N. E. 418, 94 Am. St. Rep. 635.

All the points that were argued before us are covered by what has been said. In each case the decrees appealed from, unless the superior court should see fit to revise the computations of interest upon which the final decrees were based, must be modified by charging the defendant with additional interest for the time that has since passed and with the costs of this appeal, and so modified must be affirmed.

So ordered.

(207 Mass. 381)

BALTIC MINING CO. v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

COMMERCE (§ 74*)—INTERSTATE COMMERCE—TAXATION.

A foreign mining corporation maintained an office at Boston for the financial management of the company. The concern was engaged in interstate commerce, in selling its ore, and it sold ore in Massachusetts; but the office was neither necessary to nor maintained because of such sales. The company was taxed under St. 1909, c. 490, pt. 3, §§ 54-56, which imposes taxes upon foreign business corporations which maintain a usual place of business within the state, which taxes are based upon the par value of their capital stock. *Held*, that the tax upon this company was not an interference with interstate commerce, for it could give up its office in Boston without affecting its interstate commerce, and by giving up such office it could avoid paying the tax; the tax being merely an excise tax imposed upon the privilege of maintaining an office in Massachusetts.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 124-133; Dec. Dig. § 74.*]

Report from Superior Court, Suffolk County.

Petition by the Baltic Mining Company against the Commonwealth to secure the

abatement of a certain tax. On report from superior court. Petition denied.

C. A. Snow, J. H. Knight, and W. P. Evans, for petitioner. Dana Malone, Atty. Gen., and Andrew Marshall, Asst. Atty. Gen., for the Commonwealth.

KNOWLTON, C. J. This is a petition in equity, brought under St. 1909, c. 490, pt. 3, § 70, for an abatement of an excise tax of \$500 paid by the petitioner under section 56 of this chapter. The petitioner's contention is that the statute under which the tax was imposed is in violation of the Constitution of the United States.

The question presented is the same that was decided by this court, after full consideration and the citation of many authorities, in *Attorney General v. Electric Storage Battery Company*, 188 Mass. 239, 74 N. E. 467, when it was held that the statute was constitutional. Since this decision the cases of *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and *Pullman Company v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, have been decided by the Supreme Court of the United States, in which it was held that a statute of Kansas imposing a tax upon foreign corporations was unconstitutional. The petitioner contends that these cases require us to overrule our former decision. In the first of the two cases the decision was by five of the nine justices, the other four dissenting. In the decision of the second some of the justices did not participate, but those who took part were divided in opinion as in the first case. The question before us is whether the law laid down by the majority of the Supreme Court of the United States shows that the excise tax in the present case was unlawfully imposed.

When we considered the statute in the former case we held that it was inapplicable to corporations that maintain a place of business within the commonwealth only for interstate commerce, and the opinion recognized the fact that no corporation or individual could be prevented from engaging in interstate commerce within the commonwealth, by ordering that the injunction against the defendant, forbidding the prosecution of its business so long as it disobeyed the law, should except so much of its business as was a part of interstate commerce. The statute was construed as contemplating only this kind of an injunction.

It becomes necessary to consider the substance of the law established by the two decisions of the Supreme Court, in its application to a case like the present. In each of the cases three opinions were written, one by Mr. Justice Harlan and one by Mr. Justice White, these two concurring in the judgment of the court, and one by Mr. Justice Holmes, dissenting. We do not under-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

stand that the majority of the court intended to change the law laid down in former decisions; but the difference of opinion among the justices seems to have arisen chiefly from their different views of the two cases then before the court, as to the effect of the proper application to them of established rules of law.

We understand that the majority agree in the following views: A state may impose any terms it chooses as a condition of permitting a foreign corporation to do business in it, so long as it does not deprive the corporation of any rights secured to it by the Constitution of the United States. Subject to this limitation of its power, a state may arbitrarily prevent any foreign corporation from doing business within it. To every person and corporation, the right of engaging in interstate commerce in every state, subject only to regulation of the business by Congress, is secured by the Constitution of the United States. States can pass no laws for the direct regulation of interstate commerce, although under the police power they may legislate in the public interest in any matter of local concern upon which there is no congressional legislation, even though the state's action affects interstate commerce indirectly and incidentally. The courts will look through the form of legislation to ascertain its true meaning and effect. In the two cases before the court, in which the statute purported to require a fee only in reference to the privilege of engaging in local business within the state, the question was whether the enforcement of the statute would directly interfere with interstate commerce and impose a burden upon it, so that, in substance and effect, the statute was different from the purport of the form of its language.

We understand that the court regarded the functions of each of the corporations as such that, practically, it could not give up its business within the state, for the prosecution of which the fee was exacted, without a very great injury to its interstate business, because the two classes of business were so connected that it was very difficult if not impracticable to separate them, and that therefore the state could not arbitrarily deprive these two corporations of the privilege of doing a local business without inflicting great wrong upon them by diminishing or destroying the interstate business that each of them had a right to do. As against each of these two corporations, carrying on the business for which they were respectively incorporated, the state had not an arbitrary right to impose such a burden on the local business as practically would compel it to abandon its interstate business. Looking then to the question whether the fee charged for the privilege of doing the local business was lawful as a reasonable tax or demand for the benefit conferred, the court held that, as against corporations like these,

the mode of determining it showed it to be unreasonable, and therefore unwarrantable.

The corporation before us in the present case is of a very different kind, and the legislation of this commonwealth differs much from that of Kansas. No such question as that considered in *Western Union Telegraph Company v. Kansas*, *ubi supra*, could arise under our statutes in reference to the taxation of a telegraph company or a railroad company. Upon such companies an excise tax is imposed, determined by taking a part of their capital stock proportioned to the length of their lines in this commonwealth, as compared with the length of all their lines. St. 1909, c. 490, pt. 3, §§ 40, 41, 43, 52, 72.

The taxation in question in this case is only that upon foreign corporations. Sections 54-56. The term "foreign corporations" means those established under laws other than those of this commonwealth, for purposes for which domestic corporations may be organized under the provisions of St. 1903, c. 437, § 7. St. 1903, c. 437, § 56. These are corporations formed for any lawful purpose which is not excluded by the provisions of section 1 of this chapter, with certain named exceptions. Those excluded under section 1 are banks, savings banks, co-operative banks, trust companies, surety or indemnity companies, safe deposit companies, insurance companies, railroad or street railway companies, telegraph or telephone companies, gas or electric light and heat or power companies, canal, aqueduct or water companies, cemetery or crematory companies, and all corporations which now have or may hereafter have the right to take or demand land, or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town. The foreign corporations which are subject to taxation under St. 1909, c. 490, pt. 3, § 56, in the manner in which the petitioner was taxed, are those having a usual place of business in this commonwealth, or engaged permanently or temporarily, with or without a usual place of business therein, in the construction, alteration or repair of a building, bridge, railroad, railway or structure of any kind, except those for the taxation of which special provision is made. St. 1903, c. 437, §§ 58-60. Express provision is made for the taxation of express companies, foreign and domestic. See St. 1909, c. 490, pt. 3, §§ 72-76.

It is not the policy of our law, in dealing with corporations, foreign or domestic, whose purpose is to furnish an agency for the transaction of commercial business by making transfers for pay through transportation or the transmission of intelligence from state to state, as well as in a single state, to impose a tax estimated upon the basis of earnings or property in other states. Our statutes relative to the taxation of railroad, telegraph and express companies illustrate our methods.

The plaintiff corporation is not of the same class as a telegraph company or the Pullman Company. It is a mining company. Its business is mining copper and preparing it for the market. It is a producer of a valuable commodity. If it is not in a strict sense a manufacturing corporation, it is like one. It has no more connection with interstate commerce than other manufacturing corporations that prepare property for sale in the market. The sale of its product in different states and the transportation of it from one state to another are mere incidents of the business of producing it for sale. Seemingly this corporation derives little, if any, profit from that part of its business which is strictly interstate commerce. The profit from transportation goes to the carriers. The difference between the price of copper sold and delivered at a place remote from the mine and that of copper sold at the mine is presumably the sum paid for carrying it. It is agreed that about 5 per cent. of the plaintiff's sales of copper have been made in Massachusetts, for delivery here. If a profit is derived from the business of negotiating sales and making deliveries in states remote from the mine, it seems that this goes, for the most part or altogether, to the United Metals Selling Agency, a corporation having its offices in New York City, to which the plaintiff granted an exclusive agency for the sale of its copper. It would be difficult, if not impossible, for the plaintiff to show that any considerable part of its income is derived from interstate commerce.

The plaintiff's regular place of business in Boston is not used in interstate commerce, as are the passenger stations and freight houses of railroad companies. It is used as a home in Massachusetts for this foreign corporation, for the financial management and direction of the company's affairs, where the president and treasurer have their offices, and the meetings of the board of directors are held. It could be given up or removed to any other state without affecting in any way the plaintiff's income from interstate commerce. If there were an arbitrary exclusion of the plaintiff from the commonwealth, except so far as it conducted the business of interstate commerce within the state, it would put no burden upon its commerce, either in Massachusetts or elsewhere. Whatever view be taken of this imposition of an excise tax, it is difficult to see how it has any direct relation to the petitioner's income from interstate commerce.

The required payment is strictly of an excise tax, and not of a tax upon property. The fact that it is estimated upon the par value of the capital stock, with a maximum limit of \$2,000 as the highest tax that can be imposed upon the largest corporation, does not make it a tax upon property. Attorney General v. Bay State Mining Company, 99 Mass. 148, 96 Am. Dec. 717; Com. v. Lancaster Savings Bank, 123 Mass. 493-495;

Pratt v. Street Commissioners of Boston, 139 Mass. 559-562, 2 N. E. 675; Provident Institution v. Massachusetts, 6 Wall. 611, 18 L. Ed. 907; Hamilton Company v. Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Society for Savings v. Colte, 6 Wall. 594-608, 18 L. Ed. 897. This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here. Attorney General v. Electric Storage Battery Company, 188 Mass. 239, 240, 74 N. E. 467. Such a place of business has no necessary connection with the earning of profits in interstate commerce.

In Western Union Telegraph Company v. Kansas, 216 U. S. 1-33, 30 Sup. Ct. 190, 200 (54 L. Ed. 355), Mr. Justice Harlan said: "It is true that in many cases the general rule is laid down that a state may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the state as in its judgment may be consistent with the interests of the people. But these were cases in which a particular foreign corporation before the court engaged in ordinary business, and not directly or regularly in interstate or foreign commerce." This is such a corporation.

In Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 583, the court held that the imposition of a tax upon a corporation engaged in both intrastate and interstate commerce was legal, as the company could "conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the state." The same condition exists here. If the plaintiff should choose to give up the advantages of a place of business in Boston, it might disregard the statute, and abandon its office or take the consequences of an injunction, without affecting in the slightest degree the profits derived from its interstate business, if it receives any. The opinion in Pullman Company v. Adams, 189 U. S. 420-422, 23 Sup. Ct. 494, 495 (47 L. Ed. 877) contains this language: "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." This is true in the light of the latest decisions, when the case is like the present, where the renunciation of a local business would not affect its interstate business. See also Allen v. Pullman Palace Car Company, 191 U. S. 171, 24 Sup. Ct. 39, 49 L. Ed. 134.

The present case seems to be covered by the decision in Horn Silver Mining Company v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164. This plaintiff is just such a corporation as the present petitioner. It is called a manufacturing corporation.

The argument in its behalf presented the question whether the statute was unconstitutional as an interference with interstate commerce. It seems to have been contended, if we may judge from the opinion, that the "facts ought to be considered as showing only transactions of interstate commerce." But the statute was held constitutional, notwithstanding that its relation to the interstate commerce conducted by that company was substantially the same as appears in the present case.

The plaintiff in *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 81 L. Ed. 650, seems to have been engaged in the same business, having the same relations to interstate commerce, as the present plaintiff. The ground set up against the statute in the answer was that it was in violation of the commerce clause of the Constitution. Mr. Justice Field said in the opinion of the court, at page 184 of 125 U. S., and page 738 of 8 Sup. Ct. (31 L. Ed. 650): "It is not perceived in what way the statute impinges upon the commercial clause of the federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the commonwealth. It only exacts a license tax from the corporation when it has an office in the commonwealth for the use of its officers, stockholders, agents or employés." We have the following language of Mr. Justice Miller in *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530-550, 8 Sup. Ct. 961, 964, 81 L. Ed. 790: "It cannot be said that a state tax which remotely affects the efficient exercise of a federal power, is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property." Without referring to the many other cases in the Supreme Court of the United States that tend to support the contention of the commonwealth, we hold that the recent decisions of that court, relied on by the petitioner, do not indicate that the statute before us is unconstitutional.

In our former adjudication upon it we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the commonwealth. We have already referred to the policy of our law in reference to such corporations as railroads, telegraph companies, electric railways, express companies, and the like. In view of these legislative expressions of policy and in view also of the late decisions relied on by the petitioner, we hold that the statute before us would be inapplicable to a foreign corporation for the taxation of which there is no

special provision in our statutes, if it should be engaged in the work of conducting some kind of interstate commerce for hire as its principal function, and at the same time should be engaged in intrastate business so closely connected with the interstate commerce that it could not be given up without serious detriment to the interstate commerce, so that its condition in this respect would be like that of the Western Union Telegraph Company.

Petition dismissed.

(207 Mass. 514)

NATICK & C. ST. RY. CO. v. TOWN OF WELLESLEY.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 6, 1911.)

1. TAXATION (§ 366*)—MODE OF ASSESSMENT OF CORPORATE PROPERTY AND RECEIPTS—STATUTORY PROVISIONS—CONSTRUCTION.

Under St. 1906, c. 463, pt. 3, §§ 133, 134, and St. 1909, c. 490, pt. 3, §§ 47-51, which assess excise taxes upon certain street railways in proportion to their length of track and their gross earnings for the benefit of the towns through which they pass, and direct that by October 15th such companies must make a report stating their gross earnings and length of track in various places, as determined by St. 1906, c. 463, pt. 3, § 125, and St. 1909, c. 490, pt. 3, § 40, which sections provide that the length of track in each city or town operated by such companies on September 30th shall be the basis for the tax, the plain intent is that the track which is in operation on September 30th shall be measured, and not an average length operated throughout the year, though by consolidation or new construction some towns will under this measurement reap an undeserved benefit.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 366.*]

2. TAXATION (§ 366*)—LEVY AND ASSESSMENT—STATUTORY PROVISIONS—CONSTRUCTION—EARNINGS.

Under such statutes a consolidated company must report its own earnings, and not those of the constituent companies.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 366.*]

Exceptions from Superior Court, Norfolk County; Henry A. King, Judge.

Proceedings by the Natick & Cochituate Street Railway Company against the Inhabitants of the Town of Wellesley for the abatement of an excise tax. Judgment for petitioner, and respondent excepts. Exceptions overruled.

Gaston, Snow & Saltonstall and A. A. Ballantine, for petitioner. George A. Sweetser, for Town of Wellesley.

SHELDON, J. The difficulty here arises from the fact that the Legislature has not in terms provided for a case in which the mileage of a street railway has been of different lengths at different times of the year, according as it has been increased or diminished by new construction or abandon-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment, by purchases or sales, or, as here, by consolidations of different companies.

It was provided by St. 1906, c. 463, pt. 3, § 133, as follows: "A street railway company, including a company whose lines are located partly within and partly without the limits of the commonwealth, whether chartered or organized under the laws of this commonwealth or elsewhere, shall annually, on or before the fifteenth day of October, make and file in the office of the board of assessors of every city and town in which any part of the railway operated by it is situated a return signed and sworn to by its president and treasurer stating the length of track operated by it in public ways and places in such city or town and also the total length of track operated by it in public ways and places, determined as provided in section 125, and also the amount of its gross receipts during the year ending on the preceding thirtieth day of September, including therein all amounts received by it from the operation of its railway, but excluding income derived from sale of power, rental of tracks or other sources." And by section 134 it was provided that on or before the 1st day of November annually, the assessors of every city or town in which a street railway was operated should assess upon the company operating the railway an excise tax, to be assessed upon the average gross receipts per mile according to the proportions between the length of tracks operated by it in public ways and places in such city or town and the total length of tracks operated by it in public ways or places. This tax is assessed in lieu of the obligations formerly imposed on street railway companies to keep in repair certain parts of the public ways and places in which their tracks are laid. *Greenfield & Turner's Falls St. Ry. v. Greenfield*, 187 Mass. 352, 73 N. E. 477. A method was provided therefore by petition to the board of railroad commissioners for the revision of the amount of this excise or commutation tax; and it was enacted by section 137 of the same statute, as amended by St. 1907, c. 318, that the total amount of this tax received by a city or town should be applied towards the repair and maintenance of its public ways and the removal of snow therefrom. See now St. 1909, c. 490, pt. 3, §§ 47-51.

The petitioner's contention, which was adopted in the superior court, is that in such a case as this the statute requires each one of the original companies to make a return to each city or town for the period during which it actually operated tracks in such city or town before the consolidation; that the consolidated company must make a return of the gross earnings actually received by it during the year and of the length of its trackage on the 30th day of September; and that the tax of each company is to be determined by dividing its gross earnings by the number of miles operated by it on the

last day of the period of its earnings—that is, upon the 30th day of September if the company was then in existence and operating its road. It is only the last part of this contention however that it now is necessary for us to pass upon; for the parties have agreed that the assessment here in question, although made to the petitioner, may be treated as if it had been made to the consolidated company, the Middlesex & Boston Street Railway Company, and that if upon the agreed facts the assessors of Wellesley could upon any theory have assessed the tax which they did assess, the tax is to stand. And likewise it is not disputed that if the correct divisor of the total gross receipts of the consolidated company for the year ending September 30, 1909, was the number of miles operated by it on that day, the abatement made by the superior court was proper.

The respondent makes two alternative contentions: First, it claims that the proper divisor of the total earnings of the consolidated company for the year ending September 30th was not the number of miles operated by the company on that day, a number much increased by the consolidations which had been made during the year, but the average number of miles of track operated during the year. This contention is presented to the judge at the trial directly by its fourth and sixth requests for rulings, and indirectly by its eleventh request. Its second contention was that the entire system of the consolidated company as it existed on September 30th, 1909, should be taken as one system for the entire year ending on that day, for the purpose of assessing this excise or commutation tax—in other words, that a tax should be assessed upon the consolidated company as if the consolidations had been made before the beginning of the tax year instead of having been made during the year, and should be assessed upon the total earnings received during the year by the constituent companies and the consolidated company taken together. It presented this contention to the judge by its fifth, tenth and twelfth requests and part of its seventh request. Its first and thirteenth requests were made upon both of its contentions. Its first, third and eleventh requests were for rulings adverse to the petitioner's contention. Its second and most of its seventh requests were given. Its eighth request becomes immaterial when the others shall have been passed upon.

The section (St. 1906, c. 463, pt. 3, § 133; St. 1909, c. 490, pt. 3, § 47) which requires a return of the total length of track operated does not fix the date upon which that length is to be taken, unless by inference. It is obvious that the length might be different at different periods of the year. But the section contains two provisions which throw some light upon the question to be decided. The return is to be made on or before the 15th day of October, and it is to state the length

of the tracks in the particular city or town to whose assessors the report is required to be made; and the total length of tracks operated by it in other public ways and places, and also the amount of the gross receipts during the year ending on the preceding 30th day of September. That is, the statutory command contemplates a closing of the accounts of the company so as to show the gross receipts of the year as of a fixed date. In the absence of any fixing of the day on which the length of the tracks was to be determined, it would be natural to say that the same day was contemplated for this purpose as was fixed for the statement of the gross receipts. The day intended could not be a day either before or after the 30th day of September; and it seems to us, when there is no such expression of the legislative will, that it would be putting a strained construction upon the words of the statute to say that they required a computation of the average number of miles operated during the year in each city or town and in the aggregate line of the road. But another criterion is furnished by the statute. It prescribes as a rule for determining the length of track that it is to be "determined as provided for in section 125" [of St. 1906, pt. 3; § 40 of part 3 of St. 1909, c. 490]. Referring to these two sections, we find that in slightly different words, but with manifestly the same meaning, they require street railway companies to state in their returns the length of track operated by them in each city or town on the 30th of September, to be determined by measuring as single track the total length of all tracks operated by them, including sidings and turnouts, whether owned or leased by them, or over which they have trackage rights only. It is plain that under the rule here prescribed the companies must not only measure the length of their tracks by including all sidings and turnouts and by treating all tracks, whether single or double, as single tracks, but this method of measurement must be applied to the state of things existing on the 30th day of September. A return of measurements made on any other day, or of the average length of tracks where there had been during the year any new construction or abandonment or any other change of trackage, would not comply with the requirements of the statute. The fact that in practice the fixing of the day upon which the facts are to be ascertained is of quite as much importance as determining the mode of measurement to be adopted, makes it at least probable that the reference in the one section to the other was intended to include the first element as well as the second. Both of these elements are alike essential in making a true statement of the length of trackage operated.

It is said in behalf of the town that taking the mileage as of the last day of the tax year works an injustice, in that the gross earnings per mile of track are unduly de-

creased by dividing the total earnings by a length of mileage of which a part, possibly a large part, has not been in existence and has earned nothing during perhaps a large part of the year. But the same argument might be made as to the distribution of the corporate franchise tax provided for by St. 1909, c. 490, pt. 3, § 43, which under section 64 of the same act is to be "apportioned among the several cities and towns in proportion to the length of tracks operated by such company in said cities and towns respectively." This length of tracks must by the terms of section 40 of the same act be the length measured as therein prescribed upon the 30th day of September; and any city or town in which there had been a large increase of trackage during the preceding year, or a great diminution of trackage during that time, would receive proportionally an increased or diminished share of the corporate franchise tax to the corresponding loss or gain of the other cities or towns in which the same company had tracks. The truth seems to be that to avoid the necessity of making unduly complicated computations and because in the long run there seemed no likelihood of serious injustice even if there might be some temporary inequalities, the Legislature saw fit to provide that in those matters the determination should be made in all respects as of a fixed day, just as in the assessment of ordinary taxes individuals are to be taxed upon such taxable property as they are found to possess upon a day certain, although when the amount of their tax has been ascertained and becomes payable, it generally will be the case that some persons will have to pay a tax upon an amount in excess of what they are worth while others will find that large amounts of property which they have acquired since the day of assessment have wholly escaped the burden of taxation. In each case, the Legislature has reasonably determined that in this way the private burden and the public benefit of taxation will be distributed and received as justly and proportionately as is really practicable; and this contention we cannot revise.

For similar reasons, we cannot adopt the second contention made by the town. We find nowhere in the statutes any reference to such a mode of computation or any indication that this was intended by the Legislature. A consolidated company does succeed to all the liabilities and obligations of its constituent companies. It must pay the taxes for which they were liable. It must make its own returns and pay its own taxes. But we know of no authority and no ground of principle for saying that consolidations which took place respectively in December of 1908 and July of 1909 can be treated by assessors of taxes as having taken place before September 30, 1908. What we have said as to a disregard by the Legislature of some temporary inequalities in the assessment and distribution of this excise or commutation

tax by the assumption of a day certain for the making up of all accounts and the ascertainment of the then existing state of affairs, applies also to this contention.

Moreover it must be borne in mind that this claim of the town, if adopted, would be applicable, not only to a case of consolidation such as is here presented, but to cases where the road of one company has been purchased or acquired under adversary proceedings by another. We gather from an opinion of the attorney general, to which we have been referred by counsel (Attorney General's Report for 1908, p. 2), that a part of the system of the present consolidated company was purchased by it in July, 1907, from the receiver of another company. If so, the receiver, who doubtless would need the books of the insolvent company for his own purposes, probably did not turn them over to the purchasing company, and that company would be unable to make in the next October the returns as to the operations of the insolvent company between September 30, 1906, and July, 1907, which according to the present contention of the town it would be bound to make under a penalty. Other situations readily can be imagined in which a company would be unable to give the prior gross receipts of other companies whose lines it had acquired. Nor if the officers of those acquired companies had failed to keep proper books of account or had falsified their accounts, would it be just to visit a penalty for such wrong doings upon the acquiring company, which presumably acted with complete innocence. We ought not to suppose, in the absence of provisions of the statutes, that the Legislature intended to impose a penalty upon a corporation for anything but its own act or the act of its authorized officers or agents.

We are led to the conclusion that the contention of the petitioner is correct, that the gross earnings per mile of a street railway company under our statutes, certainly of such a company actually operating its road on the 30th day of September, must be ascertained by dividing its total gross receipts for the year by the number of miles of its trackage upon that day.

It follows that the respondent's exceptions must be overruled.

So ordered.

(207 Mass. 467)

GREENE v. BOSTON ELEVATED RY. CO.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1911.)

1. MASTER AND SERVANT (§ 276*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE—CAUSE OF ACCIDENT.

In an action for an employé's death while engaged in changing four feed cables on an elevated railway structure, claimed to have been caused by the end of a monkey wrench, which decedent was using in turning a bolt, touching

a 2,000,000 cable strung above it and making a circuit in some manner, so as to shock decedent, evidence held to sustain a finding that the 2,000,000 cable hung within the radius of the circle described by the end of the monkey wrench, so that it could have touched that cable as claimed by plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.*]

2. EVIDENCE (§ 550*)—OPINION EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.

In an action for damages for decedent's death while engaged in changing four cables strung on an elevated railroad structure, claimed to have been caused by the end of a monkey wrench, which decedent was using in screwing a bolt, coming in contact with a cable and shocking decedent, a witness testified that decedent said before his death that when he was injured he was tightening or loosening a rivet, and that the monkey wrench he was using struck a cable in revolving, and dented it at a point where it was newly spliced, and that there was a flash, and he fell to the ground. Held, that it was within the court's discretion to permit an expert to be asked as to the possibility of a short circuit being made "by swinging over a monkey wrench as has been described," referring to the testimony as to decedent's account of the accident.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2366, 2367; Dec. Dig. § 550.*]

3. EVIDENCE (§§ 558, 558*)—OPINION EVIDENCE—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—PARTICULAR MATTERS.

It is within the court's discretion to permit an expert to give his opinion upon separate matters, instead of in answer to a hypothetical question involving all the facts of the case; the other party being entitled to show on cross-examination in such case that there were conceded facts which were not considered or accounted for in the expert's opinion on the particular matter involved in the question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374, 2377, 2379; Dec. Dig. §§ 553, 558.*]

4. MASTER AND SERVANT (§ 219*)—ASSUMPTION OF RISK—LATENT DANGER.

An experienced telegraph lineman does not assume the risk of injury from a splice negligently made by his employer in one of its cables, where nothing on the outside of the cable indicates any defect in the splice.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

5. MASTER AND SERVANT (§ 289*)—INJURIES—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action for a telegraph lineman's death while engaged in changing certain cables on an elevated railway structure, claimed to have been caused by a monkey wrench which he was using striking one of the cables in revolving and making a short circuit, expert testimony showed that the striking of a properly made splice in a cable with the end of a monkey wrench would not have any effect. The splice in the cable which it was claimed the monkey wrench struck was newly made, which was apparent from the fresh paint on the cable. Held, that the question of decedent's contributory negligence in striking the splice was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1182; Dec. Dig. § 289.*]

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Ellen F. Greene, administratrix, against the Boston Elevated Railway Company. Verdict for plaintiff, and the case reported to the Supreme Judicial Court. Judgment ordered on verdict.

Tort for personal injuries to and the death of plaintiff's intestate. The trial court ordered verdicts for the defendant on the second, third and fifth counts, and submitted to the jury the first and third counts. On the first, which was to recover for the conscious suffering of the deceased, there was a verdict of \$3,000, and on the second, for his death, there was a verdict of \$2,000.

Coakley & Sherman, D. H. Coakley, and Wm. Flaherty, for plaintiff. W. G. Thompson and G. E. Kimball, for defendant.

LORING, J. 1. To find for the plaintiff under the charge of the presiding judge the jury had to find that the 2,000,000 cable hung within the circle described by the end of the monkey wrench as it revolved with its jaws engaged on the end of the bolt of the dog clamp.

The defendant's first contention is that the evidence did not warrant a finding to that effect.

The intestate and one Powers were engaged in boring a hole through a T-iron which ran between two girders at the bottom of one of the underneath trusses of the defendant's elevated structure. The work of the defendant company, of which the boring of the hole was a part, consisted in changing over four feed cables. These had been strung on brackets extending out horizontally over the street from the side of the elevated structure. They were to be strung on wooden stanchions extending from the bottom to the top of one of the underneath trusses of the elevated structure so that they would hang in a vertical plane within the sides of the truss. At the time here in question the four feed cables were temporarily hung by ropes substantially in their new position and one stanchion at least had been bolted onto the structure. The hole in question was being bored in one of the lower cross-irons of the truss between the two bottom girders of it. This was a T-iron, the crosspiece of the T being at the bottom of the iron as it was affixed to the girders. The plaintiff's intestate was standing on an ordinary ladder with his chest about opposite to the hole which he was boring. He had his right hand on a "dog clamp." This "dog clamp" was a heavy iron clamp, shaped somewhat like a horse-shoe, with a bolt through the opening. There was a thread cut around the outside of the bolt, with a nut on the end of it. This clamp was over the top of the cross-iron and was holding in position next to it what is called in the bill of exceptions an "old man." An old man consists of flat pieces of iron with two shorter pieces at each end of the main piece at right angles to it and running in

opposite directions. The purpose of the old man was to afford a bearing for a ratchet used in boring the hole through the cross-iron. At the time in question the position of the ratchet had to be changed and the intestate was holding with his right hand the clamp (which held the crosspiece of the old man next to the cross-iron) and was about to loosen the bolt of the clamp with a monkey wrench when the accident happened. Powers (who was working with the intestate and was working the ratchet) was sitting on a piece of wood running from girder to girder, parallel to the cross-iron here in question and separated from it by the "old man." Powers testified that the intestate had been to the water-closet, that he had returned, had ascended the ladder and had grasped the clamp with his right hand; that he (Powers) saw him reach for his monkey wrench, which was hanging from a round of the ladder by a wire hook; that he (Powers) then turned one side to spit out some tobacco juice when there was a flash which burned his face; that he fell to the ground and that the plaintiff also slid down the ladder to the ground feet foremost. The monkey wrench was made of iron from end to end, with wooden faces clamped on the sides at the upper end to make a handle. The plaintiff's theory was that as her intestate turned the monkey wrench to loosen the bolt of the clamp it came in contact with a defective splice in a 2,000,000 cable which hung above it. The 2,000,000 cable was the next one to the lowest of the four cables as they hung at that time over the bolt. The defendant's contention is that on the evidence this cable was outside the circle described by the end of the wrench as it revolved with jaws engaged on the end of the bolt. The intestate was badly burned about the face, chest, arms and hands, and died of these wounds seven days after the accident. Before his death he told his doctor how the accident happened. His doctor testified that he said that "he was either tightening or loosening a rivet in a machine called the old man * * * and that the monkey wrench that he was using, in coming around, struck the cable and it dented, there was a flash and he slid down the ladder * * * to the ground." He said "that it was a new splice at that point;" "that it looked all right." The witness added that it was his "impression" that the intestate said that when his monkey wrench struck the cable "it caved in." It appeared that the elevated structure at the point here in question is on a curve, and that the brackets on which the feed cables here in question had been previously strung were on the inside of this curve. For that reason the cables had to be lengthened. The splice mentioned above had been made in the 2,000,000 cable within a few days, to lengthen that cable for the reason stated above. There was testimony from an expert that there

were marks on the monkey wrench which indicated that the electricity which made the short circuit might have entered from the upper end of the wrench.

What the defendant relies on (in its contention that the evidence did not warrant a finding that the 2,000,000 spliced cable was within the circle of the monkey wrench with its jaws engaged on the end of the bolt) is the testimony elicited by it on the cross-examination of Powers. Powers testified that the cables were above the cross-iron and not in contact with it. He said that he did not know how far they were above the top of the cross-iron, but on being pressed he reluctantly gave as an estimate that the 1,000,000 cable (the lowest of the four) was 6 inches above the top of the iron, that the 2,000,000 cable was 6 inches above that and that the nut on the end of the bolt of the clamp was 3 to 4 inches below the top of the iron. This estimate made the 2,000,000 cable 15 to 16 inches above the nut. The length of the wrench from the inner face of the lower jaw to the upper end of it was 11 inches.

The short answer to this contention of the defendant is that if the jury believed that the doctor was accurate in his testimony of what the intestate said and that the intestate told the truth, Powers' estimate of these distances was wrong. For although the intestate spoke of one cable only, the cable he spoke of was the spliced cable and there was no splice in the 1,000,000 cable. He said that the monkey wrench hit the spliced cable. In addition there was evidence from an expert that if the tape with which a splice is wrapped had been carelessly wound about the splice a hole might be left which would be covered from view by the paint with which the whole is coated, and so, if a wrench were to come up against such a weak spot in the taping of it, the splice would "cave in."

It had to be admitted that the lower cable burned through and parted while the spliced cable did not, that the iron of the monkey wrench back of the jaws was in part melted, and that the top of the clamp was melted. With these facts in the case it was hard to believe that Powers' estimates of the distances were wrong and that the intestate made a short circuit in the spliced cable in the way he was made by the doctor to say that he did, and that he could and did strike it with the wrench while its jaws were engaged on the bolt of the clamp. But he said that he did, or what he said could be found by the jury to have meant that. In this conflict of evidence it was for the jury to decide what the fact was.

2. The defendant next contended that a material part of the testimony of the expert was admitted under its exception and was "wrongly admitted." It appears from the report that the case was sent to the jury on

the first and fourth counts "on the stipulation of counsel for the plaintiff that if the Supreme [Judicial] Court should decide that upon all the evidence, excluding such evidence, if any, as was wrongly admitted by me over the defendant's objection and exception, I was wrong in sending the case to the jury," judgment should be entered for the defendant.

The first contention of the defendant in this connection is that the presiding judge allowed the expert to testify on matters of common knowledge that such evidence was "wrongly admitted" within the meaning of the above stipulation and therefore must be excluded. The defendant complains of the answers to certain questions specified in his brief numbered 5, 7 and 8. We are of opinion that none of these questions is open to this objection, and if they were the expert answered them rightly. The jury were entitled to consider the facts whether they were testified to by the expert or were matters of common knowledge. It follows that the judge was not "wrong in sending the case to the jury" so far as these facts are concerned.

The defendant has put great reliance upon the case of *Gilbert v. Guild*, 144 Mass. 601, 12 N. E. 368. In that case a question to an expert was excluded by the presiding judge on the ground that it was a matter of inference to be decided by the jury on the facts in evidence and the opinion of the expert. That does not help this defendant in this contention.

The defendant's second contention in this connection is that the assumptions of fact upon which the opinion of an expert is asked and based should be reasonably clear, and that where certain facts are agreed and are also obviously necessary as a premise to the formation of any instructive opinion upon the expert question presented, the question put to the expert should include such agreed fact or facts, or at least, should not be inconsistent with them. The defendant complains that this rule was not observed in the answers to questions numbered in its brief 1, 2, 3, 6, 7 and 8. We are of opinion that the presiding judge in his discretion had a right to allow the plaintiff to ask the expert as to the possibility of a short circuit being made "by swinging over a monkey wrench, as has been described," meaning as has been described in Greene's statement testified to by the doctor, and that the same is true of questions 1, 2, 3, 7 and 8, and that in doing so he did not violate the rule stated above.

The defendant in this connection also contends that in questions 3, 6, 7 and 8 the expert was allowed to give his opinion on a hypothetical case without taking into consideration facts which it was conceded existed in the cause at bar. The question numbered 3 may be taken as an example. By allowing that question to be put and answered, the presiding judge allowed the expert to

testify to the significance of the fact (if the jury should find it to be the fact) that the splice "caved in" when "a blow [was] struck upon a tape wound round a joint [splice] similar to this." If a presiding judge thinks that the jury will get more help upon a matter which is the subject for expert testimony, by allowing the expert to give his opinion upon separate matters than by answering a hypothetical question involving all the facts in the case, it is within his discretion to do so. See in this connection *Phillips v. Lockey Piano Case Co.*, 205 Mass. 59, 90 N. E. 981. If the party producing the expert is allowed to proceed in that way in the examination of his expert witness, it is open to the other party to show on the cross-examination of the expert that there are conceded facts in the case which have to be accounted for and which were not accounted for in the opinion expressed by him on the single point on which he had given an opinion in his direct examination.

3. The next contention of the defendant is on the merits of the case. It was conceded that as a result of the short circuit here in question the 1,000,000 cable burned apart and the 2,000,000 cable although burned did not drop. It was also conceded that the intestate, being an experienced lineman, assumed the risk of the insulation of the 1,000,000 cable having become worn out, and therefore if the short circuit was made by the monkey wrench striking the 1,000,000 cable at a point where the insulation was weak no case was made out. See *Chisholm v. New England Telephone & Telegraph Co.*, 176 Mass. 125, 57 N. E. 383. The defendant's contention is that on the evidence it is at the best a matter of conjecture which cable was touched by the monkey wrench, and so no case was made out by the plaintiff within cases like *Jameson v. Boston Elevated Railway*, 193 Mass. 500, 79 N. E. 750, and *Horne v. Boston Elevated Railway*, 206 Mass. 231, 92 N. E. 223. The answer to that is that the intestate said that "the matter with the cable" which he hit with the monkey wrench was "that it was a new splice at that point."

4. The defendant has also contended that an experienced lineman assumes the risk of danger coming from a splice negligently made by the defendant in one of its cables (part of its ways, works and machinery), when there is nothing on the surface of the cable to indicate that fact. We are of opinion that he does not, and for that reason the presiding judge was right in refusing to give the ruling asked for by the defendant.

5. The expert testified that striking a properly made splice in a feed cable with a monkey wrench would not have any effect. The intestate said that the splice was a new one and it seems to have been conceded that this was apparent from the fresh paint which was upon it. In the face of this testimony

and this fact the question of the intestate's due care was for the jury.

The entry must be:

Judgment on the verdicts.

(207 Mass. 460)

WRIGHT v. CITY OF CHELSEA.

MURRAY v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1911.)

1. APPEAL AND ERROR (§ 193*)—PRESENTATION OF GROUND IN COURT BELOW—OBJECTIONS TO PLEADINGS.

A defendant, who failed to call attention to technical defects in a declaration until the close of the evidence, cannot rely on such defects in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193; * *Pleading*, Cent. Dig. §§ 1355-1374.]

2. APPEAL AND ERROR (§ 1063*)—REVIEW—HARMLESS ERROR—CONSTRUCTION OF STATUTES.

Defendant cannot on appeal complain of a construction of statutes which is more favorable to him than the correct construction would be.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

3. MUNICIPAL CORPORATIONS (§ 779*)—DEFECTS IN STREETS—DUTY—DANGEROUS TREES.

Where a shade tree in a city street has plainly for over a year, been in a condition making it a menace to the public and the defect can only be remedied by removal of the tree, and not by trimming it, and the officer charged with care of the streets takes no steps to report the defect to the proper authorities, looking to its removal, as required by Rev. Laws, c. 51, § 10, nor to warn the public of the danger, the city is liable for injuries to a traveler by the fall of a limb.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1633; Dec. Dig. § 779.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTS IN STREETS—QUESTIONS FOR JURY.

Whether a tree was dangerous because of decay and liability to fall, and whether a city has used due care to protect the public, as required by Rev. Laws, c. 51, § 10, providing for the removal of such trees, are jury questions, in an action against the city for injuries received by the falling of such tree.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1747, 1748; Dec. Dig. § 821.*]

5. TRIAL (§ 47*)—OBJECTIONS TO EXCLUSION OF EVIDENCE—OFFER OF PROOF.

A party, to avail himself of an exception to the refusal of the court to permit a witness to answer a certain question, must make an offer of proof.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 118, 119; Dec. Dig. § 47.*]

6. MUNICIPAL CORPORATIONS (§ 818*)—INJURIES FROM DEFECTS IN STREET—SIMILAR TRANSACTIONS—COLLATERAL MATTERS.

In an action against a city for injury caused by a decayed tree being blown down in a wind, where a witness testified that four others were blown down during the same storm, and was asked whether more than that were ever blown down in one day, the trial court could,

in its discretion, refuse to allow the question, as likely to lead into collateral matters.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.*]

Exceptions from Superior Court, Suffolk County; George A. Sanderson, Judge.

Actions by Lucy Wright and by Bertha Murray against the City of Chelsea. Verdicts for both plaintiffs, to which defendant excepts. Exceptions overruled.

W. H. Brown and J. H. Coakley, for plaintiffs. S. R. Cutler and H. W. James, for defendant.

RUGG, J. These are actions to recover for injuries received by the plaintiffs while traveling upon a public way in the defendant city by the fall of a limb of a shade tree which stood within the limits of a public way, and which had been for more than 30 years under the care of the defendant. There was evidence sufficient to support a finding that the plaintiffs were in the exercise of due care, and that the limb had been so dangerous by reason of decay and consequent liability to be blown down by ordinary winds as to attract attention for more than a year. While the declaration might have been more exact in its averments, it is susceptible of the construction that the plaintiffs claimed as the ground of their actions a defective condition of a public way arising from the long continuance of a tree dangerous in respect of a decayed limb, the fall of which injured them. In the absence of a demurrer or motion for specifications by the defendant, it cannot now rely upon technical irregularities in the form of a declaration, to which attention is not called until the close of the evidence.

Statutes respecting the care and responsibility for the condition of shade trees by municipalities have been several times the subject of judicial inquiry. In *Chase v. Lowell*, 149 Mass. 85, 21 N. E. 233, all the statutes up to that time, including St. 1885, c. 123, were reviewed, and the conclusion was reached that a highway surveyor in a city or town had no power summarily to remove a shade tree standing in the highway, but that the question whether such tree incommoded or endangered travelers, and ought to be removed, should be determined by the adjudication of a tribunal designated by the statute for that purpose. The same case was again before the court in 151 Mass. 422, 24 N. E. 212, where the duty of the highway surveyor, as to a dangerous shade tree in a public way, to apply to the authorities for an adjudication was emphasized, and the municipality was held liable for injury to a traveler if, after notice of such dangerous tree, the highway surveyor took no action. This case related to the removal and not to the trimming of a shade tree. The subject

was again discussed in *Washburn v. Easton*, 172 Mass. 525, 52 N. E. 1070, where the town was exonerated from liability for injuries resulting from shade trees in healthy condition set out under the direction of public authorities. Statutes respecting shade trees have been enacted since 1885, some of which were adverted to in *Sharon v. Smith*, 180 Mass. 539, 62 N. E. 981, *Hall v. Wakefield*, 184 Mass. 147, 68 N. E. 15, *Com. v. Morrison*, 197 Mass. 199, 205, 83 N. E. 415, 14 L. R. A. (N. S.) 194, 125 Am. St. Rep. 338, and *Com. v. Byard*, 200 Mass. 175, 86 N. E. 285, 20 L. R. A. (N. S.) 814. St. 1890, c. 196, St. 1891, c. 49, St. 1892, c. 147, and St. 1893, c. 403, relate only to the designation and marking of trees, standing in highways, as public shade trees, by boards of aldermen and selectmen, and to penalties for injuries to trees. St. 1893, c. 423, § 26, committed to the superintendent of streets in towns, under the direction of the selectmen, "the care and preservation of shade trees." St. 1896, c. 190, was an enabling act merely, and authorized towns to elect a tree warden, and conferred upon him, if elected, "full care and control of all public shade trees." St. 1897, c. 254, was also permissive, and by section 2 provided for the appointment of a forester in towns which accepted its provisions, to have "charge of all trees within the public ways, whether shade trees or not, with all the powers of a tree warden." St. 1897, c. 428, imposed "upon tree wardens or park commissioners, when chosen in towns, * * * full care of all public shade trees." It would not have been strange if voters and officers in towns may have been somewhat perplexed as to the effect of these several enactments. But it is not necessary to harmonize them, for by St. 1899, c. 330, certain laws relating to shade trees were codified. The election of a tree warden by towns was made compulsory, and his duties and powers were enlarged and defined. By implication St. 1893, c. 423, § 26, St. 1896, c. 190, and St. 1897, c. 428, were repealed. St. 1890, c. 196, and St. 1891, c. 49, were repealed as to towns, because by St. 1899, c. 330, § 2, all shade trees standing within the limits of ways in towns were made public shade trees, and hence there was no occasion for special provision as to designating and marking. St. 1899, c. 330, however, conferred upon the tree warden jurisdiction of public shade trees alone. Hence in towns which had accepted St. 1897, c. 254, respecting a forester, that officer still had charge of bushes and trees other than shade trees within public ways, but in towns where there was no forester, the tree warden alone had authority to trim, cut down and remove such other trees and bushes by virtue of Pub. St. 1882, c. 52, § 10, as amended by St. 1885, c. 123, § 2, and upon the conditions therein pointed out. With the exception of St. 1885, c. 123, these acts in the respects enumerated

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

related to towns only, and had no effect upon cities. The cutting or removing of public shade trees in cities was still regulated by Pub. St. c. 54, § 10. This possible uncertainty in the effect of numerous statutes was perceived by "the commissioners for consolidating and arranging the Public Statutes," as appears by note to chapter 53 of their report (on which the Revised Laws are based), and they attempted to remove it. With the exception of state highways, which it is not necessary to discuss (see Rev. Laws, c. 47, § 21, St. 1905, c. 279, St. 1908, c. 297, St. 1890, c. 196, and St. 1891, c. 49, which are not material upon this point) the provisions of law relating to the care of shade trees in towns were embodied in Rev. Laws, c. 53, §§ 12 to 15, both inclusive, and in chapter 28, § 4, according to which park commissioners, wherever there were such officers, had control of shade trees in places under their jurisdiction; those touching the planting of shade trees, both in cities and towns, in chapter 53, § 6; and those as to the cutting down or removal of such trees in cities in chapter 53, §§ 7 and 8. Provisions common to cities and towns as to trees and bushes which obstruct and endanger public travel are in Rev. Laws, c. 51, § 10. This last section, however, makes important differences between the powers of city and town officers. Its portions material to this inquiry are: "The officer who has the care of trees belonging to a city or town * * * may, and if required by the surveyors or road commissioners shall, trim or lop off trees, except public shade trees in towns, and bushes standing in ways, and if ordered by vote of the mayor and aldermen, selectmen or road commissioners passed after public notice and hearing, shall cut down and remove such trees and bushes." By this statute it is mandatory upon the officer having charge of public shade trees in cities to trim or lop off all trees, whether shade trees or not, standing in ways, upon the request of the officer having charge of public ways. See *Chase v. Lowell*, 149 Mass. 85, at page 91, 21 N. E. 233. No such provision is made as to towns for in them the entire jurisdiction over public shade trees is vested in the tree warden, and as by Rev. Laws, c. 53, § 12, all shade trees within the limits of public ways are public shade trees, his jurisdiction extends over all shade trees in towns except such as by Rev. Laws, c. 28, § 4, is given to park commissioners. The discretion and sound judgment of the town tree warden alone determines whether a shade tree shall be trimmed or lopped, and he is not subject to the control of the surveyor or road commissioners. But in towns, the tree warden, or forester where there is one, is obliged to trim or lop trees other than shade trees, standing within public ways, upon demand of the surveyor or road commissioners. It follows as a necessary result of this provision that in cities not governed by some special charter or other statutory provision to the

contrary (see, for example, St. 1866, c. 199, § 21; St. 1885, c. 163), it is the duty of the officer in charge of streets to ascertain the safety of limbs of trees, and to require dangerous branches to be removed immediately by the officer having charge of shade trees. The city official having charge of trees is bound at once and without hearing to act in accordance with such demand. It may be assumed that the Legislature made this provision in order that the trimming should be done, not by the road officer inexperienced in such matters, but by the scientific judgment of a forester or other official familiar with trees, and that thus the beauty and preservation of shade trees be conserved. At the same time it recognized that the safety of the traveling public is the paramount consideration, and placed upon the officer charged with responsibility of maintaining all public ways reasonably safe and convenient for travel, the duty of determining whether any branches should be removed. The cutting down of shade trees can be done in cities, as well as in towns, only after an adjudication as provided in Rev. Laws, c. 51, § 10. As the present causes of action accrued in 1907, it is not pertinent to inquire what changes have been wrought by St. 1908, c. 296, and St. 1910, c. 363. The case was not tried in the superior court upon this interpretation of the statutes, but the defendant suffered no harm because the rules laid down were more favorable to it than those here stated.

If, however, it be assumed that the injury to the plaintiffs was due to a dangerous tree which could have been remedied only by its removal, and not by its trimming, the defendant has shown no error in the trial. There was testimony from several witnesses that the threatening condition of the tree had been plain for more than a year. On this showing, which the jury by their verdict under the instructions given must have found to be true, the officer charged with the care of the streets forthwith ought to have instituted proceedings before the appropriate public board to have the tree removed, and in the meantime by signs or otherwise to have warned the traveling public of the danger. It would have become the immediate duty of the public board to adjudicate that the tree should be removed. It must be assumed that such public board would act promptly and in accordance with the evidence. Seemingly no effort to this end had been made. On the contrary, the officer, whose duty it was to report any such danger to the proper city department, testified that he had never done so. No attempt to guard the place or inform the public of the peril appears to have been made. The defense rested as to evidence on the contention that there was no defect. This case does not raise any question as to what might be the law in the event of a claim for injuries received while the condition of the shade tree was the same as that which the public board

had adjudged to be safe. But it is a case where there was evidence to support a finding that there had been for a long time a dangerous tree with no action whatever by the city officers respecting it. As pointed out by Mr. Justice Hammond in *Washburn v. Easton*, 172 Mass. 525, at page 529, 52 N. E. 1070, the questions whether the tree was dangerous, by reason of decay and consequent liability to fall, and whether the municipality has used due care to protect the public from it while thus dangerous are ordinarily to be submitted to a jury. *Nestor v. Fall River*, 183 Mass. 285, 67 N. E. 248. This case called for the application of that rule. It was stated with sufficient amplification in the charge. The prayers of the defendant were rightly refused except the second which was given in substance. The defendant suffered no injury by portions of the charge, to which exceptions were taken, for they were correct as applied to the theory on which the case was tried.

The foreman of the defendant's street department, after testifying that four trees were blown down during the storm in which the plaintiffs were injured, was asked, "Has there ever been a time when there was more than four trees blown down in the city in any one day?" This was excluded against the defendant's exception. No offer was made of what answer was expected, and the exception should be overruled on this ground. But, assuming it would have been favorable to the defendant, the inquiry was properly excluded in the discretion of the trial court as likely to lead aside into collateral matters and divert attention unduly from the main issue.

Exceptions overruled.

(207 Mass. 291)

LANTIN v. GOODNOW et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 4, 1911.)

1. FRAUD (§ 27*)—ACTS CONSTITUTING.

G., ostensibly doing business as a banker and broker, but actually conducting a bucket shop, formed a partnership with two of his employes to continue the business under the firm name without change for two years after his death. At the time of his death, the obligations of the firm were about \$400,000, and the available assets \$125,000. The firm gave no notice of his death, but continued business as before. G. had invested a large amount in property outside of the firm business. A customer, who had dealt with the firm a few months before G.'s death, continued to deal with it without notice thereof, believing that the transactions involved the actual purchase and sale of stock. An advertisement in a newspaper calling attention to the amount of real estate owned by G., the broker, was continued after his death. *Held*, that the surviving partners were guilty of fraud on the customer, and were liable to him for the wrong resulting.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. § 27.*]

2. FRAUD (§ 27*)—ACTS CONSTITUTING.

There was evidence that G. believed that the debts of the business would exceed its assets, and that he formed the scheme to form a partnership to defraud creditors and to secure to his family property that otherwise would be used in paying his debts. His executors made payments to the firm out of insurance moneys as directed by the will, but there was evidence that the payments were made as beneficiaries under the will in their own interest, knowing that the execution of the will was a part of the fraudulent scheme to conduct the business of the firm so as to defraud creditors for the benefit of the beneficiaries. *Held*, that the beneficiaries under the will were guilty of fraud as against a customer who dealt with the firm in the lifetime of the testator, and who continued to deal with the firm without notice of his death under the belief that the transactions involved the actual purchase and sale of stock, though the debt existing in his favor at testator's death had been paid.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 8; Dec. Dig. § 27.*]

Exceptions from Superior Court, Norfolk County; Charles U. Bell, Judge.

Action by Max Lantin against Edward B. Goodnow and others. There was a verdict for plaintiff against certain of the defendants, and a directed verdict for other defendants, and plaintiff brings exceptions. Sustained.

D. A. Ellis and S. M. Whalen, for plaintiff.
J. B. Hannigan and O. G. Bancroft, for defendants.

KNOWLTON, C. J. This is an action to recover damages for frauds practiced upon the plaintiff in connection with the business of the firm of N. B. Goodnow & Co., who advertised as bankers and brokers doing business in Boston and New York. The defendants are one Kennedy and one Worth, the surviving members of this firm, and the widow and son and daughter of N. B. Goodnow, who were the principal legatees and devisees under his will. The plaintiff obtained a verdict against Kennedy and Worth. A verdict for the other defendants was directed by the presiding justice. The case is here on the plaintiff's exception to the direction of this verdict. There was an auditor's report from which we make extracts as follows:

"Nathan B. Goodnow did business in Boston for a number of years prior to 1900, ostensibly as a banker and broker. The defendants Kennedy and Worth were in his employ for a number of years. Worth, who is now 42 years of age, entered Mr. Goodnow's employ when he was 21, as a clerk, and worked up to the position of managing the finances of the business under Mr. Goodnow's personal supervision. Mr. Kennedy, who is now 65, entered Mr. Goodnow's employ in 1883. His previous experience had been on a farm, in teaching school, and as a bookkeeper and clerk for some book publishers. For some years previous to his death, Mr. Goodnow had shown signs of an appre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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hension of impending death through some trouble with his heart. Having been a heavy smoker, he practically gave up smoking, was careful in his habits of exercise, and, while he said nothing about his own condition, spoke of members of his family as having had difficulty in that way, and that he might go as they did. Somewhere about the year 1900 he called Kennedy and Worth into his office and told them that he was going to take them into partnership, saying that they had been faithful, and that they ought to share in the business. He said that they ought to make enough in a few years to enable them to retire, and named a sum with which they ought to be satisfied, and that they might take one-third and he would take two-thirds, and said that he would allow the use of his name for two years, should he die. He told them further that he wanted them to agree to carry the business on after his death, as he did not want his family to know the kind of business he had been doing, which was what is technically known as a bucket shop, where, when a customer gives an order to sell or purchase shares of stock, the broker does not carry out the order, but credits or charges the customer with the price at which the stock may be selling upon the stock exchange at that particular time. He said further that his son lived in Detroit and was sickly, and he did not want him to carry on the business. At his request they promised to continue the business. No partnership papers were then drawn up, and the business went on under an oral partnership, the parties performing the same duties they had previously performed, and in the same manner, with substantially the same salaries, and with no more real control over the business. Notices were, however, sent out that such a partnership had been formed. Mr. Goodnow made a will which was dated October 4, 1902, and at or about that time, informed Kennedy and Worth of the provisions therein for their benefit which were contained in the seventh clause of the will, and were to the effect that all his interest in the business of Nathan B. Goodnow & Co. was to be given to his partners, and that they were to have half of his life insurance, which amounted to \$68,000, absolutely, and the other half was to be loaned to them at 3 per cent. interest without security, and to be repaid in five equal annual installments. * * * In March, 1903, formal articles of copartnership were drawn up and signed. Mr. Goodnow prepared a draft in his own handwriting and read it to Kennedy and Worth, and subsequently had the matter put in type-written form, when it was executed by them all." Under these articles Goodnow was to contribute the established business of Nathan B. Goodnow & Co., conducted in Boston and New York, with all the property in the business, and it was provided that Goodnow should draw from the firm \$3,300 per annum, and each of the others \$1,300 per an-

num; that profits might be drawn upon the consent of the parties in writing, and that they should be divided in the proportion of one-half to Goodnow and one-fourth to each of the others; that at the death of either partner, his interest should cease, and his legal representatives should not receive anything from the firm, and that the firm name of Nathan B. Goodnow & Co. should be discontinued within two years of his retirement or decease.

"Mr. Goodnow told Kennedy and Worth that he saw no reason why they all could not get rich out of it, and that in two years' time they ought to be in very good condition, and that he would let them have the use of his name for that time and at the end of it they could quietly change the name of the business so that it would not make any difference with customers, and that he did this so that the customers would not come upon them suddenly for their balances. He did not want them to be embarrassed. He again told them what provision he had made for them in the will by his insurance, and with what money there was coming in they ought to be able to carry on the business without trouble. He again reiterated that he did not want his son or daughter to know the character of the business, but they (the son and daughter) thoroughly understood that if Kennedy and Worth wanted more money, they could have it. No other reason was given by Mr. Goodnow for limiting the use of his name to two years, and nothing was said about any liability of his estate for the debts of the business. Somewhere about 1893 Mr. Goodnow had built the Grand Opera House in Boston, which cost him about \$250,000, and the funds thereof had been drawn by him from the business. Some time before 1900 he had furnished money for the support of a theatrical company, and later had furnished the financial backing for Alexander Salvini, both of which had been losing ventures. The funds for these had been taken from the business, and as a result the business had been very seriously crippled, at one time the concern having but \$10,000 of available assets in the business.

"Mr. Goodnow, apparently realizing this situation, had published and sent to customers a circular in which he called attention to the amount of real estate standing in his name, assessed at \$235,000, which was part of his assets, and therefore the assets of the firm; and an advertisement to substantially the same effect was inserted in the Boston Journal, and ran regularly for a number of years, once every two weeks. Mr. Goodnow's nominal capital on the books of the firm was carried at \$200,000, and upon this he drew 2 per cent. per annum.

"A few days before Mr. Goodnow died Mr. Worth had a conversation with him in which Mr. Goodnow recognized his impending death, and when Mr. Worth reminded him of the condition of the business, and that there were

not assets immediately available in the business sufficient to pay this indebtedness in full, said that he was aware of that, but that he had a thorough understanding with his heirs, and, that Kennedy and Worth were to have money to run the business if he was taken away. At that time the obligations of the firm were about \$400,000, and the amount of available securities in their hands for the payment of such obligations was only about \$125,000."

The inventory filed after Goodnow's death showed personal property appraised at \$138,855.86 and real estate appraised at \$167,450, not including any interest in the firm, nor certain property owned by him in Detroit. He died on November 6, 1903; and on December 2, 1903, his widow, son and daughter qualified as executors of his will. The firm gave no notice of his death, but Kennedy and Worth continued the business under the same firm name and in the same way, as in his lifetime, until their failure in January, 1906. The plaintiff continued to do business with the firm, and had no knowledge of any change in it until the bankruptcy of Kennedy and Worth. Long before that time he had received a copy of the circular stating Goodnow's investment in real estate. His first transaction with the firm was on July 2, 1903, when he ordered the purchase of 100 shares of a certain stock, and at intervals he ordered other purchases and sales, and sent and received money, so that, at the time of the firm's failure, they owed him a balance of \$4,569.85 in money, and he was entitled to receive from them shares of different stocks worth \$5,237.50, which they did not have in possession and could not deliver. He received from them accounts of their dealings from time to time, which represented that they had made real purchases and sales on his account, and, until their failure, he supposed that such purchases and sales had been made.

There was some delay in furnishing Kennedy and Worth with the insurance money to be paid them under the will. They received the amount which was payable to them absolutely in sums of \$5,000 or \$10,000 at a time, which were paid through the son Edward B. Goodnow; but up to September, 1905, they had received but little of the part to be lent to them. In this month of September, in connection with other requests for money, a conference was had between them and an attorney who had acted for N. B. Goodnow in his lifetime and who represented the executors after his death, and Goddard, who was the husband of the testator's daughter. At this interview Goddard and the attorney were told of the embarrassed condition of the firm at the time of Nathan B. Goodnow's death; that it was and always had been a bucket shop, meaning that it made fictitious purchases and sales of stock and false returns to customers that purchases and sales were actually made, and

that it was then in an embarrassed condition. At another interview, a little later, when these persons and Edward B. Goodnow and his father-in-law, a lawyer, from Detroit, were present, the same matters were talked over. According to the testimony, Goddard said that they would have to take care of them (the firm) until the two years expired. "He said, 'Of course we will let you have money.' * * * 'We are obliged to. We will have to until the two years are up, at any rate.'" He said: "Yes, we will have to give you money. They are bound to take care of you." There was evidence that after that one of the partners went to the attorney's office almost every afternoon, at his request, to let him know how things were, and that, after the firm got into difficulty, there were no cases that he did not report. In one matter a letter was dictated by the attorney and signed by the firm. There was evidence that at one of these interviews the defendant Edward B. Goodnow said, "I shall advise putting every cent into this—every cent of the estate, to keep father's name from being ground in the dust." Payments were made at different times after this to the members of the firm before the expiration of two years from the appointment and qualification of the executors. A payment of \$2,000 was also made on December 2, 1905, the day on which the two years expired, one of \$3,000 on December 18, 1905, and one of \$1,000 on January 2, 1906. The defendants then refused to pay anything more, and on January 6, 1906, the firm stopped business.

There was testimony that, while he was in the hospital, just before he died, N. B. Goodnow, in reply to an inquiry from them as to whether he realized how things were in the business if anything happened to him, said: "Yes, I have made provision for that. I think my heirs thoroughly understand, and will advance money to take care of anything that comes up." He said of the money in the business: "That and the insurance that you will get ought to tide things along for some time. Ned and Joe (meaning his son and son-in-law) thoroughly understand the situation, and will help you to a certain amount," stating the amount as \$20,000 or \$30,000 which was not included in the insurance.

The business of the firm, as it was conducted, was unquestionably a fraud upon the plaintiff, which made the defendants Kennedy and Worth liable to him for the wrong. *Todd v. Bishop*, 138 Mass. 388-391; *Tallant v. Stedman*, 176 Mass. 460, 57 N. E. 683. There was evidence proper for the consideration of the jury upon the question whether N. B. Goodnow, having invested a large amount of property outside of his business and apprehending his early death, and knowing that there was a great risk, if not a strong probability, that the debts of the business at the time of his death would greatly exceed its assets, formed a scheme to take

Kennedy and Worth into partnership with him, and to arrange with them to carry on the business without change for two years after his death, while many of the creditors would remain ignorant of his death and be lulled into security until their claims would be barred by the special statute of limitations. It was consistent with such a scheme that the advertisement in the Boston Journal containing the substance of the circular setting forth the strength of the firm and its large investments in real estate, was continued without change until January, 1906. The provision in the will as to the life insurance was such that the whole of it would be available for use in the business "to tide things along for some time," while half of it would be a debt in favor of his family if the business should turn out fortunately. Worth testified as to what he said about the use of the firm name for two years: "That was, of course, not to arouse the suspicions or the anxiety of our customers, so that they would not make any great demands on us." He also testified that when the papers were first drawn up there was nothing about the insurance, but that afterwards Goodnow told him "he had written up a new clause, and he was going to leave the whole of the insurance with us," etc.

If the testator devised this scheme to defraud his creditors, and to secure to his family a large amount of property that otherwise would have been used in paying his debts, the scheme contemplated the probability that their customers might continue doing business with the firm, relying upon the indications and representations of its financial strength, and be defrauded by transactions of the bucket shop which they supposed were real purchases and sales. It contemplated the continuance of his fraud, as he planned it, for two years. It looked to a possible loss to the plaintiff and other creditors, as a consequence of the execution of the plan. The fraud was that of the testator through the whole two years while it was in the course of execution by his representatives as he intended it to be executed. If the statute provided for the survival of such a cause of action, the estate of the testator would be liable for the fraud.

There was evidence for the consideration of the jury on the question whether these defendants, the sole beneficiaries of the fraud, adopted it and participated in it for their own benefit, after they became aware of its nature. There were circumstances from which the jury might infer that all of the defendants learned of the facts and knew of the fraud in the autumn of 1905. There was evidence tending to show that the female defendants authorized the attorney and Goddard to do anything that they thought for the interest of these beneficiaries in the management of the business. Not-

withstanding that the will called for loans from the insurance money to the firm by the executors, the jury might find that these defendants became convinced that these provisions of the will were a part of a plan to defraud creditors of the firm, and made the payments in their own interest to consummate the fraud, although the payments were in the form of loans. If they adopted this fraud with knowledge of its nature, and assisted in carrying it through to execution for their own benefit, they are liable to the plaintiff for all damages suffered from it. *Patten v. Gurney*, 17 Mass. 182-185, 9 Am. Dec. 141; *Brown v. Perkins*, 1 Allen, 89-98; *Boston v. Simmons*, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230; *Oullghan v. Butler*, 189 Mass. 287-293, 75 N. E. 728. The fact that the debt existing in the plaintiff's favor when the testator died was paid does not relieve them from liability for the consequences which resulted directly to the plaintiff from the execution of the fraud, and which presumably was contemplated by the testator as likely to result.

The fact that a will had been proved, of which the defendants were executors, and that the payments were such as the executors were directed to make is no justification of the payments, if they were made by the beneficiaries under the will in their own interest, when they knew that the making of the will was a part of a fraudulent scheme to continue the business in such a way as to defraud creditors and others for the benefit of these defendants, and if they made the payments to assist in the consummation of the fraud. Even as executors they might have been justified in disregarding the directions of the will and declaring the estate insolvent, or taking other measures to give creditors the benefit of payment from the testator's property.

We are of opinion that the evidence against these defendants should have been submitted to the jury.

Exceptions sustained.

(207 Mass. 581)

TRAYNE v. BOARDMAN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1911.)

1. FRAUD (§ 25*)—INJURY FROM FRAUD.

A purchaser, induced by the fraud of the vendor to purchase worthless property, may sue the vendor for fraud and recover substantial damages, though he obtained the price from a third person, pursuant to an arrangement whereby the property should be conveyed to a newly organized corporation, in consideration of the purchaser receiving a part of the stock.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. § 25.*]

2. FRAUD (§ 38*)—ACTION FOR FRAUD—ACCRUAL OF ACTION.

An action for deceit, founded on the fraudulent representations of a vendor, inducing one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to purchase worthless property, accrues as soon as the purchaser receives the deed to the property, though he obtained the price from a third person, under an arrangement whereby the property should be conveyed to a newly organized corporation, in consideration of the purchaser receiving part of the stock.

[Ed. Note.—For other cases, see *Fraud*, Dec. Dig. § 38.*]

Exceptions from Superior Court, Suffolk County; Wm. F. Dana, Judge.

Action by John H. Trayne against Winslow B. Boardman. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

W. Hubert Wood, for plaintiff. Currier, Rollins, Young & Pillsbury and Richard Y. Fitzgerald, for defendant.

KNOWLTON, C. J. This is an action of tort for deceit, founded on the fraudulent representations of the defendant in regard to a mining claim sold by him to the plaintiff. It is agreed that, for the purposes of this decision, the fraud is to be taken as proved. Exceptions were taken to the refusal of the judge to give the following rulings requested by the defendant:

"(1) If the plaintiff has advanced no money he cannot recover anything in this action.

"(2) If the plaintiff has not repaid Ward, he cannot recover anything in this action. The plaintiff's action is premature.

"(3) On all the evidence, the plaintiff is not entitled to recover."

It appears that the plaintiff negotiated with the defendant for the purchase of a mining claim, and agreed to pay \$500 for it. The deed of it was sent by the defendant to the plaintiff, attached to a draft for \$500, to be paid on delivery of the deed. The draft was not paid, and afterwards \$500 was sent by one Ward and the deed to the plaintiff was delivered. The evidence tended to show that this money was advanced by Ward, under an arrangement with the plaintiff whereby a corporation was to be formed, the plaintiff turning over the mining claim, and Ward and others furnishing the \$500 which the plaintiff was to pay the defendant for it, and the plaintiff was to receive a part of the stock in the corporation for furnishing the mining claim at this price. There is nothing in this arrangement that deprives the plaintiff of his right of action for the defendant's fraud. No question of law was saved in regard to the amount of his damages. It is fairly to be presumed that his arrangements with Ward and others, in reference to the proposed corporation, were such that he suffered substantial damages from the fact that the mining claim was worthless, as it seems to have been. If the defendant's representations had been true, it probably would have had a substantial value.

The plaintiff was the only one who entered into contractual relations with the defend-

ant in regard to the mining claim, and the only one to whom the fraudulent representations were made.

The action was not prematurely brought. The plaintiff's damage accrued as soon as he received the deed, which should have given him a good mining claim, but was in fact, as we suppose, a worthless piece of paper.

Exceptions overruled.

(207 Mass. 583)

McGURK v. STANDARD PLATE GLASS CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 9, 1911.)

MASTER AND SERVANT (§ 21*)—ARBITRATION CONTRACT—CONSTRUCTION.

A contract executed by plaintiff and defendant recited that its purpose was plaintiff's employment by defendant as sales manager, and provided that either party could after a certain date terminate the agreement by giving the other 60 days' notice in writing, accompanied by a signed statement of the cause for terminating the agreement, which should bear the written indorsement of two persons named that they were informed of the facts referred to in such cause and considered them sufficient. *Held*, that the agreement contemplated that the persons designated be sufficiently informed of the facts to justify their decision, but did not require a formal hearing, conducted judicially or otherwise; and where, after defendant gave notice to plaintiff of his intention to terminate the contract, both parties submitted to the arbitrators their contentions on the question, the arbitrators could decide that they were sufficiently informed to make a decision.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 20, 21; Dec. Dig. § 21.*]

Report from Superior Court, Suffolk County; Lloyd E. White, Judge.

Action by William J. McGurk against the Standard Plate Glass Company. Verdict for defendant. Case reported. Judgment on verdict.

Butler, Cox, Murchie & Bacon and Jas. F. Bacon, for plaintiff. John Gordon, for defendant.

KNOWLTON, C. J. The plaintiff and the defendant entered into a contract in writing which, omitting the merely formal parts, is as follows: "The purpose of this agreement is the employment, by the Standard Plate Glass Company, of William J. McGurk as sales manager of their New England branch at Boston, Massachusetts, during the period from January 1, 1907 to December 3, 1908, at a salary of thirty-six hundred dollars per year, payable in equal monthly installments, provided that either party may, after January 31, 1907, terminate this agreement, by giving to the other party sixty days' notice in writing, and accompanying such notice by a signed statement of the cause for terminating the agreement, said statement of cause to bear the written indorsement of J. H.

Troutman and W. D. Brandon, of Butler, Pennsylvania, that they are informed of the facts referred to in the cause set forth, and consider them sufficient justification for the termination of the agreement under this provision." The defendant terminated the agreement according to its terms by giving the plaintiff 60 days' notice, accompanying the notice by a signed statement of the cause for terminating the agreement, which cause was stated to be "insolence and insubordination." That statement bore the written indorsement of J. H. Troutman and W. D. Brandon, duly signed by them, as follows: "We are informed of the facts referred to, in the causes above set forth for the termination of the contract of the Standard Plate Glass Company with William J. McGurk, and consider them sufficient justification for the termination of said agreement." This suit is brought to recover damages for a breach of the contract.

The principal contention of the plaintiff is that, under this agreement, Troutman and Brandon could not make the required indorsement without first having a hearing of the parties, conducted judicially, at which they might present their respective views with arguments. The decision of the case depends upon the construction to be put upon this contract. It does not refer to a hearing to be had by these two persons. It simply calls for an indorsement in writing, upon the statement of causes, that they are informed of the facts and deem them sufficient. It neither states nor implies anything more than that the two persons, who in a certain sense may be called arbitrators, shall be informed of the facts in some way that they think should give them a sufficient understanding of the facts to justify their action. The contract implies that the extent of their information, and the manner of obtaining it, as a ground for their indorsement, should be left to their judgment and sense of right. There is nothing in it to indicate that a formal hearing of the parties would be needed if the arbitrators thought that they had all necessary information without it.

The following language of the opinion in *Palmer v. Clark*, 106 Mass. 373-389, is applicable to the conditions in the present case. "By the agreement, he is the sole, final judge in a matter where it was evidently considered difficult to attain entire accuracy. This

agreement, made by competent parties upon a good consideration, it is the duty of the court to enforce. A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisal of property, and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice be required by express provision or reasonable implication, and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive. * * * It (his decision) cannot be impeached for mistake arising in the judgment of the referee, or in drawing conclusions from evidence and observation. To avoid it, the mistake must be one which shows that he was misled, and so far misapprehended the case that he failed to exercise his judgment upon it, as where he is imposed upon by false measures or false weights, or there is obvious error in figures. * * * Fraud practiced upon him or by him will of course defeat it." See, also, *Robbins v. Clark*, 129 Mass. 145; *Flint v. Gibson*, 106 Mass. 391-395; *New England Trust Company v. Abbott*, 162 Mass. 148-154, 38 N. E. 432, 27 L. R. A. 271.

In the present case there is no suggestion of fraud or mistake which prevented the arbitrators from exercising their judgment fairly. Both parties sent to each of them a communication in writing, presenting their respective views in reference to the subject of terminating the agreement, and there was sufficient foundation for the statement of the arbitrators that they were informed of the facts. There is nothing to indicate that they failed to act fairly and in good faith, according to their understanding.

The record shows an agreement, deliberately entered into, which left the subject of a termination of the agreement by either party to the decision of the two men named, to be made upon such information, so obtained, as they should think sufficient to enable them to act properly, and to reach a just conclusion. Action has been taken under it in strict compliance with its terms.

Judgment on the verdict.

(175 Ind. 157)

HODGIN et al. v. HODGIN et al.
(No. 21,628.)

(Supreme Court of Indiana. Feb. 2, 1911.)

1. APPEAL AND ERROR (§ 1043*).

Denial of a motion to dismiss an amended petition for a receiver does not constitute error warranting reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.*]

2. PARTITION (§ 58*)—GROUND OF APPOINTMENT—PRESERVATION OF PROPERTY—MISCONDUCT OF PARTY IN POSSESSION.

Where one tenant in common excludes his cotenant from possession, refuses to pay rents, lets the property go without repair, fails to pay the taxes and assessments when due, and is wholly insolvent, a receiver may be appointed pending a suit for partition and an accounting for rents.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 147; Dec. Dig. § 53.*]

3. APPEAL AND ERROR (§ 662*)—CONCLUSIVE-NESS OF RECORD.

On appeal from an interlocutory order appointing a receiver, where the record affirmatively showed appellant's appearance, the record imports absolute verity, and is conclusive against contradiction in the reviewing court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.*]

4. APPEAL AND ERROR (§ 653*)—RECORD—AMENDMENT OF RECORD.

The remedy for the correction of a record is by motion in the court below to correct it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2816-2818; Dec. Dig. § 653.*]

5. ACTION (§ 57*)—CONSOLIDATION OF ACTIONS.

Where a suit to foreclose a mortgage on land is pending in the same court as a suit for partition of the same land, brought by one of the defendants in the foreclosure suit, the same persons being the parties in each case, the two actions are properly consolidated.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. § 57.*]

Appeal from Superior Court, Marion County; J. M. Leathers, Judge.

Action by the Plymouth Saving & Loan Association against Leonard A. Hodgin and wife, Josie Hodgin, and another, with which was consolidated an action by Josie Hodgin against Leonard A. Hodgin and others. A petition by Josie Hodgin for a receiver was granted, and Leonard A. Hodgin and wife appeal. Affirmed.

Chas. B. Clarke and Walter C. Clarke, for appellants. Wilson S. Doan and Charles J. Orbison, for appellees.

MORRIS, J. The appellant Leonard A. Hodgin and appellee Josie Hodgin, then his wife, in March, 1908, executed a mortgage on a house and lot owned by them as tenants by the entireties to appellee Plymouth Saving & Loan Association No. 2, to secure a note for \$600. In December, 1909, a divorce was decreed Josie Hodgin, and on the next day

appellant Leonard A. Hodgin married his co-appellant, Alta B. Hodgin. After the divorce the mortgaged property was rented, and the rents applied on the mortgage debt, until a few months before the commencement of this action, when appellant Leonard A. Hodgin and his present wife moved into the property, and have since occupied it, to the exclusion of appellee Josie Hodgin. Appellant Leonard A. Hodgin is insolvent and owns no property except the undivided half of the mortgaged lot and personal property of the value of \$25. On demand he refused to permit Josie Hodgin, his former wife, to occupy the real estate, or to pay her any rent while he occupied it. The rental value of the property is \$12 per month. The roof on the cottage, located on the lot, leaks, and the house is in need of repairs. The property is worth \$800. The amount due on the mortgage is over \$500. Appellee Henry Moews holds a judgment against Leonard A. Hodgin for \$165. In February, 1910, appellee Plymouth Saving & Loan Association commenced an action in the Marion superior court to foreclose its mortgage, and made Leonard A. Hodgin and his present wife, Alta B., and his former wife, Josie, and Henry Moews, defendants. In its complaint plaintiff prayed for the appointment of a receiver to collect the rents of the real estate pending the suit. On a hearing of this application for a receiver, the court declined to grant the prayer of plaintiff, but indicated, at the hearing, as shown by the record, that a receiver would be appointed on the proper application of defendant Josie Hodgin, and thereupon she filed her petition, in which she prayed for the appointment of a receiver. This occurred on February 18, 1910. On February 21, 1910, an action pending in said court, wherein Josie Hodgin was plaintiff and Leonard A. Hodgin and Alta B. Hodgin, and the Loan Association and Henry Moews were defendants, for partition of the same real estate, was, by order of the court, consolidated with this action, and thereafter on the same day Josie Hodgin filed her amended, verified petition for the appointment of a receiver, in which she alleged, among other things, that she had paid \$100 on the principal of the mortgage debt and paid the accruing interest; that Leonard Hodgin was occupying the property, and excluding her therefrom, and had let taxes and assessments against the real estate become delinquent, and refused to account to her for rental for her undivided half of the property, and failed to make necessary repairs to the property. To this petition appellants entered a special appearance and filed a motion to dismiss the amended petition for a receiver. This motion was overruled.

The record then recites that appellants were present in court, "and the court upon its own motion suggests that, if said defend-

ants Leonard A. Hodgkin and Alta B. Hodgkin desire further time to procure evidence to resist said amended petition for a receiver, said court would grant time to said defendants for said purpose. That upon said statement by said court said defendants Leonard A. Hodgkin and Alta B. Hodgkin, by and through their said attorneys, Clarke & Clarke stated in open court that they were as ready now to resist said petition as they would be later, and had as much evidence as they desired in resisting said petition, in court now. Whereupon said petition came on for hearing," etc. The court, after the hearing, granted the petition, and appointed a receiver to collect the rents and profits of the real estate, and care for the same pending the litigation. Appellants filed a motion to modify the interlocutory order, but the court did not pass on the motion. The first assignment of error by appellants challenges the action of the court in overruling the motion to dismiss the petition for a receiver. This ruling does not constitute error warranting a reversal. *Butt v. Iffert*, 171 Ind. 554, 86 N. E. 961, and cases cited.

Appellants next assign as error the action of the court in appointing a receiver. By reason of the facts, heretofore set out in this opinion, the court did not err. Where one tenant in common excluded his cotenant from possession, refuses to pay rent, lets the property go without repair, fails to pay the taxes and assessments when due, and is wholly insolvent, a receiver may be appointed, pending the determination of a suit for partition and an accounting for rents. *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; *Rapp v. Reehling*, 122 Ind. 255, 23 N. E. 68; *Edwards v. Dykeman*, 95 Ind. 509; *Heinze v. Kleinschmidt*, 25 Mont. 89, 63 Pac. 927; *High on Receivers*, §§ 604, 607; 2 Story, Eq. 833; *Varnum v. Leek*, 65 Iowa, 751, 23 N. W. 151; *Freeman, Cotenancy & Partition*, § 327; *Knapp on Partition*, p. 241.

The third error assigned is that the court erred in making the interlocutory order, without any notice having been served on appellants. The record does not disclose the issuance or service of notice; but it affirmatively shows that appellants appeared to the petition. Appellants vigorously assailed the record in this particular, and assert that it does not speak the truth. On appeal the record imports absolute verity. If not correct, appellants' remedy was by motion in the court below to correct it. *Ferris v. State* (1901) 156 Ind. 224, 59 N. E. 475, and cases cited.

The next contention is that the court erred in consolidating this cause with the partition action brought by Josie Hodgkin. The parties were the same in both actions, and in each the litigation involved the same real estate. The actions originally were pending in different rooms of the same court. By the consolidation multiplicity of suits was avoid-

ed. The action of the court was not prejudicial to appellants.

The last and fifth contention is that the petition of Josie Hodgkin for the appointment of a receiver is insufficient. A brief statement of the principal allegations of the petition has been set out in this opinion. The petition is sufficient. While there are some technical irregularities disclosed by the record, they are not such as would warrant a reversal of the interlocutory order.

Judgment affirmed.

(175 Ind. 161)

GRAND TRUNK WESTERN RY. CO. v. REYNOLDS. (No. 21,767.)

(Supreme Court of Indiana. Feb. 2, 1911.)

RAILROADS (§ 352*)—ACCIDENT AT CROSSING—SPECIAL FINDINGS—CONSTRUCTION.

A finding in answer to an interrogatory that, if the decedent in approaching a crossing had at a point in the highway 47 feet north of the track looked east, he could have seen the headlight of the engine for 80 rods, and thence continuously as he approached the crossing he could have seen it for that distance or more, is not a finding that the headlight could have been seen continuously as it approached when within 80 rods' distance, and in view of findings that the view was obstructed, and that the train was within the 80 rods, it is not a finding of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1216; Dec. Dig. § 352.*]

On petition for rehearing. Petition overruled.

For former opinion, see 92 N. E. 733.

MYERS, C. J. Appellant upon its petition for a rehearing takes the position that the finding of the jury upon answer to the interrogatories that, "if the decedent in approaching the crossing on this occasion had at a point in the highway 47 feet north of the track looked east, he could have seen the headlight of the engine for a distance of 80 rods, and thence continuously as he approached the crossing he could have seen it for that distance or more," excludes the supposition that decedent might have thought the headlight to be a switchlight or other light than that of an approaching engine, and is a finding of contributory negligence on the part of the decedent. We point out again that it is alleged in the complaint: "That at the point of crossing, and for a long distance east, the railroad runs through a deep cut, and that a train approaching the highway from the east could not be seen by a traveler coming from the north until he got upon the track. The banks 25 to 30 feet high lay along the cut of said road for a distance of 1½ miles east and cut off any view of the trains." The jury find that the railroad enters the cut 10 rods east of the highway, and from different points at short intervals of space indicated in the original opinion the train could not be seen at all,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and from others for only short distances. In view of these allegations and findings, what is the force and effect of the finding to which appellant's learned counsel address their urgency? It is not, it will be seen, a finding that the approaching train could have been seen continuously from a point 80 rods east as it came west from the time the decedent was at a distance of 47 feet from the track, but that from that point a headlight could be seen 80 rods and more; but what of the space between the crossing and 80 rods east? It is clearly not a finding that it could be seen continuously as it approached when within 80 rods' distance. He might have been able to see it 80 rods and farther away had it been there; but suppose it was within the 80 rods. We cannot infer, in view of the allegations of the complaint as to the obstructions, that he was bound to see it within 80 rods.

Appellant's construction is that he could see the headlight continuously within the 80 rods, but that is not the finding, but the finding is that it was visible at and beyond a point 80 rods from the crossing continuously as he approached, if it had been at or beyond 80 rods away, and not that it could have been seen as it approached when within the 80 rods, and it is equally clear under the finding that the train was considerably within the 80 rods, so that, notwithstanding the obstructions as alleged, we would be bound, in order to overthrow the general verdict, to infer that he could have seen it within the 80 rods, which we cannot do.

Careful reconsideration of the questions confirms us in our original opinion, and the petition for a rehearing is overruled.

(176 Ind. 147)

**BOARD OF TRUSTEES OF LAFAYETTE
SCHOOL CITY v. STATE ex rel.
BATON et al.** (No. 21,799.)

(Supreme Court of Indiana. Feb. 1, 1911.)

**1. MANDAMUS (§ 84*)—SCOPE OF REMEDY—
CONTRACT RIGHTS—ENFORCEMENT.**

While mandamus will not lie to enforce a mere contractual right of a purely private or personal nature, the remedy may be invoked to enforce a contract involving a public trust, or official duty, if there be a clear legal right and no adequate legal remedy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 180-183; Dec. Dig. § 84.*]

2. MANDAMUS (§ 84*)—SCHOOL BOOKS—SELECTION—CONTRACTS—DUTY TO USE—MANDAMUS.

Act March 2, 1889 (Laws 1889, c. 50), created the state board of education and required them to select text-books equal to a given standard, and, after advertising for bids, to contract for books to be furnished through the county superintendents and township trustees in accordance with the selections made; the trustees being required to receive and distribute text-books to the students on payment of the price fixed under the contract, and Supplemental Act 1891 (Laws 1891, c. 90; Burns' Ann. St. 1908, § 6348) § 11, declaring that the

books so selected and adopted shall be uniformly used in all the common schools in the state in teaching the branches of learning treated of in such books, and that it shall be the duty of the proper school officers and authorities to use such books in such schools for teaching the subjects so treated. Held that, where the state board of school book commissioners had selected and contracted for a series of writing books to be furnished by relators for use in the public schools, it was the absolute duty of the trustees of the city schools, enforceable by mandamus, to order and use such books, and it was no answer to the contractors' application for the writ that the writing books contracted for were worthless, and that writing had been taught for years in such schools by a supervisor of penmanship without copy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 180-183; Dec. Dig. § 84.*]

3. MANDAMUS (§ 154*)—COMPLAINT—ALTERNATIVE WRIT—SUFFICIENCY.

Where a state board of school book commissioners had adopted for use in the public schools a series of writing books, and contracted with relators to furnish the same, it was not necessary that a complaint and alternative writ of mandamus against the trustees of city schools to compel them to order and use such books should specifically negative the provisions of Amendatory Act March 8, 1909 (Laws 1909, c. 156) § 2, placing certain conditions and restrictions on the state board of commissioners and contractors for books in the making of a contract and furnishing books thereunder; such restrictions and conditions being applicable solely in the selection of books by the board to be met and settled by it at the time of making the contract.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

4. MANDAMUS (§ 154*)—COMPLAINT—ALTERNATIVE WRIT—CERTAINTY.

Where a complaint and alternative writ of mandamus to compel certain school trustees to order and use certain writing books adopted for use in the schools by the state board of school book commissioners alleged that plaintiffs ever since the execution of the contract had been ready and willing to comply with all the terms and conditions thereof, and that they had complied with all the terms and conditions of the same, and that they had at all times and had then copy books and writing supplies sufficient to furnish all the common schools of the state, and had been and were willing and ready to fill all and any requisitions that might be placed with them, or with the agencies and school depositories and depots for school supplies as provided for and regulated by law, such allegations sufficiently showed a compliance with the contract on the part of relators.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

5. MANDAMUS (§ 154*)—APPLICATION—CERTAINTY.

No greater certainty is required in an application for mandamus than in stating a cause of action in other proceedings.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. § 154.*]

6. MANDAMUS (§ 154*)—STATUTORY DUTY—DEMAND AND REFUSAL.

Where a complaint and alternative writ of mandamus to compel school trustees to order and use certain copy books contracted for by the state board of school book commissioners alleged that defendants have refused and still refuse to use the copy books and writing supplies of relators, and have refused and still refuse to supply the school children of the common schools of the city of Lafayette with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

relators' copy books and writing supplies, or to make requisitions on the plaintiffs or on the proper officers to supply such copy books and writing supplies, etc., it was not objectionable for failure to allege a demand which would be unnecessary after the refusal alleged.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 308; Dec. Dig. § 154.*]

Appeal from Superior Court, Tippecanoe County; Henry H. Vinton, Judge.

Mandamus by the State, on relation of Ira T. Eaton and others, against the Board of Trustees of Lafayette School City. From a decree granting the writ, respondents appeal. Affirmed.

Stuart, Hammond & Simms and Allison E. Stuart, for appellants. W. R. Wood, for appellee.

COX, J. The relators, constituting a partnership, are the contractors for a series of writing books to be furnished and supplied by them for the use of the common schools of the state for a period of five years from the 12th day of June, 1909. The contract was made by the relators with the state board of school book commissioners under the provisions and by authority of Act March 2, 1889 (Laws 1889, c. 50), and subsequent amendatory and supplementary acts (Burns' Ann. St. 1908, § 6320 et seq., and Acts 1909, pp. 377-379). The relators filed a petition in the trial court for a writ of mandate to require appellants to show cause why they should not be compelled and required to use said writing books and to compel them to make requisition for and use them in the common schools of the city of Lafayette during the term of the contract. The alternative writ was issued in accordance with the prayer of the petition, and appellants appeared and demurred for want of facts, and their demurrer was sustained. Relators then filed an amended petition, and appellants unsuccessfully demurred to the amended petition and the alternative writ, the parties considering the alternative writ issued upon the original petition as applicable to the amended petition, and asserted want of facts, and that relators had not legal capacity to sue, as the ground of their demurrer. Appellants then answered and made return to the amended complaint and alternative writ, by general denial, which was subsequently withdrawn, and at length specially. A demurrer was sustained to the special answer, and, appellants refusing to plead further, the court rendered judgment ordering that a peremptory writ issue. On appeal from that judgment the questions presented for the decision of this court by the assignment of errors arise from the action of the trial court in overruling the demurrer of the appellants to the amended petition and alternative writ, and in sustaining the demurrer of the relators to the second paragraph of appellants' answer and return.

Under these assignments of error appellants first contend that the relators are seeking to enforce what is wholly a contractual right, and that mandate is not available to them for that purpose.

That mandamus will not lie to enforce mere contractual rights of a purely private or personal nature is beyond question. But it is well settled that where the contract involves a public trust or official duty, or, in the language of our Code, "an act which the law especially enjoins, or a duty resulting from an office, trust, or station," the remedy may be invoked if there be a clear legal right and no adequate legal remedy. Merrill on Mandamus, § 16; High on Ex. Legal Rem. (4th Ed.) §§ 25-28; Spelling on Inj. & Ex. Leg. Rem. (2d Ed.) § 1379; State ex rel. v. Cadwallader (1909) 172 Ind. 619-637, 87 N. E. 644, 89 N. E. 319. "The use of mandamus is limited to the enforcement of rights and duties imposed by law, and if the right or duty rests wholly upon contract the writ will not issue. * * * But a contract may create a relation upon which the law will impose rights and duties enforceable by mandamus. * * * Rights under a contract made with public officers under statutory authority may be enforced by mandamus in the absence of an adequate legal remedy." 19 Am. & Eng. Ency. of Law (2d Ed.) pp. 742, 743. The decisions in this and other states are almost wholly without exception that, if a contractual right is so inseparably bound with an imperative duty laid upon public officials by law as to require the performance of the duty of the officer to further or secure such right, mandamus may be invoked to coerce such official action. Chapin v. Osborn, 29 Ind. 99; City of Greencastle v. Allen, 43 Ind. 347; Mayor, etc., v. State ex rel., 57 Ind. 152; Wren v. City of Indianapolis, 96 Ind. 206; City of Greenfield v. State ex rel., 118 Ind. 597, 15 N. E. 241; Ingerman v. State ex rel., 128 Ind. 225, 27 N. E. 499; State ex rel. v. Bever, 148 Ind. 488, 41 N. E. 802; Vandalla R. Co. v. State ex rel., 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370; State ex rel. v. Cadwallader, supra; State ex rel. v. Marion Light, etc., Co. (last term) 92 N. E. 731; Smalley v. Yates, 36 Kan. 519, 13 Pac. 845; State ex rel. v. School Directors, 74 Mo. 21; Jones v. Bank of Cumming, 131 Ga. 614, 63 S. E. 36; State ex rel. v. Bell, 49 La. Ann. 676, 21 South. 724; Dennington v. Mayor, etc., 130 Ga. 494, 61 S. E. 20; Effingham v. Hamilton, 68 Miss. 523, 10 South. 39; State ex rel. v. Board, 35 Ohio St. 368. See, also, 26 Cyc. p. 234; 19 Am. & Eng. Encyc. of Law (2d Ed.) pp. 742, 743, 818.

The case of State ex rel. v. Haworth, School Trustee, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240, is good authority on which to rest the decision of this question in this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

case, if, indeed, it is not entirely controlling. In that case the validity of the school book law as originally passed in 1889 was determined, and also that mandamus was the proper remedy to coerce a school trustee "to certify to the county superintendent of schools the number of text-books required by the children of the township for use in the public schools, and to procure and furnish such books as the law requires." In considering the question whether mandamus would lie, Judge Elliott in the opinion of the court said: "The question which here emerges is: Do the provisions of the statute concerning school trustees impose a duty or confer a privilege? Or, to particularize: Do those provisions require all township trustees to adopt the books and thus give practical effect to the statutory scheme as a complete and symmetrical system, or do they put it in the power of each trustee to break the uniformity by refusing to procure the books? If it be true that township trustees may, at their pleasure, procure or refuse to procure the books for which the state board contracts, then the statute is nullified in so far as it assumes to confer a right upon the contractor to supply the people of the state with school books. Grant the right of each of the school trustees to determine for himself whether he will or will not procure the books, and it may result that the contract will operate in very few only of the townships of the state, and this, as we shall presently show, was a result the Legislature intended to prevent." After a consideration of the provisions of the act of 1889, he answered the question and stated the conclusion in the following language: "From this synopsis these important things were made manifest: The books are to be secured for all the schools of the state. Everywhere throughout the statute the terms employed refer to the entire state, never to localities. Every provision indicates an intention to establish a uniform system, and not a provision indicates an intention to put it in the power of any office to break the uniformity. The duty is enjoined upon all of the trustees of the state; none are excepted. The books are all to be furnished under the contract, and furnished without exception for all the schools of the state. The only method for securing the books is through contract. The conclusion that the law is obligatory upon every school trustee within the state is therefore irresistible. From beginning to end there is no hint or suggestion that some of the trustees may, and some may not, obey the law, and procure or decline to procure the books under the contract made by the state board. There is not the remotest suggestion from which it can be inferred that the system constructed shall be treated otherwise than as a unit. Nor is there a word from which it can be inferred that the Legislature intended that inferior school officers might exercise discretionary power, and thus break and de-

form the uniformity and symmetry of the system. All we know of the history of the enactment, all we can discover as to the object of the statute, and all that we have learned of the evil sought to be remedied, combine with the words of the statute (words clear in themselves, but clearer still from the light shed upon them by extrinsic facts which it is our duty to know and which we do know) in support of the conclusion that the statute creates a uniform system, requires that all books be procured under the contract, and that school trustees may not exercise discretionary powers, but shall perform the duty enjoined upon them by procuring and distributing the books selected by the state board of education as the law commands."

The decision of the court in the case just quoted from is strengthened and the compelling force of the writ of mandamus more firmly justified by section 11 of the supplemental act of 1891 (Laws 1891, c. 80; Burns' Ann. St. 1908, § 6348), which reads as follows: "The books which have been, or may hereafter be adopted by the state of Indiana for use in its common schools by virtue of this act, or the act mentioned in section 1 hereof, shall be uniformly used in all the common schools of the state, in teaching the branches of learning treated of in such books, and it shall be the duty of the proper school officers and authorities to use in such schools such books for teaching the subjects treated in them."

The relators here are under a duty imposed by the contract with the state board of school commissioners, into which the above-named statutes enter, to furnish a certain series of writing books to the common schools of the state of which the schools of the city of Lafayette are a part, and the law entering into the contract places upon the appellants imperative duty of procuring through the channels the law provides and using in the schools under their control these books. To say that this duty cannot be compelled by mandamus is to admit that that purpose of the Legislature in enacting the laws in question may be nullified by the various school authorities throughout the state, and the schools by them relegated to the same unsatisfactory condition in the diverse use of books and the frequent change of them from which the lawmaking power intended rescue.

It is next insisted that, if mandate be a permissible remedy to enable a taxpayer and patron of the schools of the school city which appellants represent to compel the appellants to use in its schools books adopted and contracted for by the state board of school commissioners pursuant to law, yet nevertheless this remedy is not open to the relators for the reason that this would permit them to enforce performance of their contract by mandamus: that therefore they have not legal capacity to sue—are not proper relators.

In the case of Union Pacific R. Co. v. Hall,

91 U. S. at page 354 (23 L. Ed. 428), it was said by Mr. Justice Strong: "The question raised by the objection, therefore, is whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. Tapping on Mandamus, p. 228, asserts the rule in that country to be, that, 'in general, all those who are legally capable of bringing an action are also equally capable of applying to the Court of King's Bench for the writ of mandamus.' This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest.

* * * In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty, unless the nonperformance of it works them a special injury."

The relators here are seeking to compel the performance by appellants of what is clearly an imperative public duty, an act which the law specially and positively enjoins upon them, without discretion in the doing of it or the manner of doing it. That its performance will result in benefit to them, in that, in a small measure, it contributes to the fulfillment of their contract with the state, can neither alter the character of the action sought to be compelled nor destroy relators' right to the relief. The doubt has never been of the right of one having a special interest in the subject-matter involved in the official act which the writ is asked to compel, but whether one having only such an interest as was held in common by many others has sufficient interest to qualify as a relator. Merrill on Mandamus, §§ 228, 229, 230; Spelling on Injunctions and Other Ex. Leg. Rem. (2d Ed.) §§ 1625, 1626; High, Ex. Leg. Rem. (4th Ed.) § 431; 26 Cyc. pp. 401-406; 18 Encyc. of Pl. & Pr. pp. 630-638; 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 742; State ex rel. v. Marion Light, etc., Co., supra; State v. Gardner, 98 Am. St. Rep. 865, note C. In practically all of the decisions of this court above cited there was involved the question of the propriety of mandamus to force official action in aid of contract rights on the petition of one having special rights under the contract, and the decision in each instance approved the employment of the remedy.

The appellant further urges that the complaint and alternative writ are insufficient and defective in that both wholly fail to negative specifically and particularly certain provisions in section 2 of the amendatory act of March 8, 1909 (Laws 1909, c. 156), which placed conditions and restrictions upon the state board of school book commissioners and contractors for books in the making of a contract and furnishing books thereunder. It is unnecessary to lengthen this opinion by setting out these provisions, seven

in number. They involved matters to be met, and in the main settled, by the board at the time of making the contract. The provisions of the law entered into and formed a part of the contract. City of Auburn v. State ex rel., 170 Ind. 511-530, 83 N. E. 997, 84 N. E. 990. The petition and the alternative writ averred: That "said plaintiffs ever since the execution of said contract have been ready and willing to comply with all the terms and conditions of the same, and that they have complied with all the terms and conditions of the same. That they have had at all times and now have copy books and writing supplies sufficient to furnish all of the common schools of the state of Indiana. That they have at all times been ready and willing and are now ready and willing to fill all and any requisitions that may be placed with them or with the agencies and school depositories and depots for school supplies, as provided for and regulated by law." This was sufficient. Burns' Ann. St. 1908, § 376; Fireman's Fund Ins. Co. v. Finkelstein, 164 Ind. 376-378, 73 N. E. 814; Voluntary Relief Dep. v. Spencer, 17 Ind. App. 125, 46 N. E. 477; Etna Ins. Co. v. Kittles, 81 Ind. 98. In an application for mandamus no greater certainty is required than in stating the cause of action in other proceedings. 13 Encyc. of Pl. & Pr. p. 674.

It is also contended by appellant that the complaint and alternative writ are insufficient on demurrer because no demand and refusal are shown. The complaint and alternative writ contain the following averments: "That the above-named defendants have refused and still refuse to use the copy books and writing supplies of these plaintiffs, and have refused and still refuse to supply the school children of the common schools in said city of Lafayette, in Tippecanoe county, Ind., with said copy books and writing supplies. And that said defendants have refused and still refuse to make requisition upon these plaintiffs, or upon the proper officers, as hereinbefore stated, appointed by law to supply them said copy books and writing supplies, notwithstanding they are compelled by the laws of the state of Indiana to furnish said writing books and writing supplies to all the pupils within their jurisdiction and under their control." It may be well doubted whether, in a case like this, where the law unconditionally and imperatively demands the doing of the act performance of which is asked, a demand is essential. 26 Cyc. pp. 442, 443; 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 759; Spelling on Inj. & Other Ex. Rem. (2d Ed.) § 1381. In the section from Spelling just cited it is said: "Where no general interests are involved and merely private rights are affected, the relator must, in a proceeding by mandamus, allege and prove demand and refusal by the person or persons whom it is sought to coerce by the writ; but where a duty is strictly of a public nature,

as where it is due by a public officer and is not a special duty affecting peculiarly the relator, there is no one specially empowered to demand its performance, and there is no necessity for a demand and refusal. In such case the law imposing the duty is a continuing demand, and neglect of performance a continuing refusal." But if a demand was necessary, as appellants' counsel earnestly argue, it would be unnecessary after the refusal alleged in the complaint and writ and set out above. *Evansville, etc., R. Co. v. State ex rel.*, 149 Ind. 276, 49 N. E. 2. It is manifest that the trial court did not err in overruling appellants' demurrer to the amended complaint and alternative writ.

In support of the assignment that the trial court erred in sustaining the relator's demurrer to the second paragraph of their answer and return, appellants have stated no point or proposition and cited no authority, and under the rules of this court we would be justified in considering it waived. The answer is long and argumentative. It avers that appellants control eight ward schools and a high school in the city of Lafayette with an aggregate enrollment of 2,690; that it does and has for many years taught writing in its schools without copy or writing books under a supervisor of penmanship; that the writing books contracted for by the state are worthless; that it has not made requisition for or used the writing books because no necessity exists for their use; that to compel them to use the books would add to the expense of the pupils without corresponding benefit. The whole answer is drawn on the theory that the various schools and trustees in the state, having control over the public schools, were left with a discretion under the law to use or not to use the books contracted for by the state board of school commissioners. As we have seen, this is not the case, for reasons elsewhere stated in this opinion. It follows that the answer is bad.

No error being shown, the judgment of the trial court is affirmed.

(175 Ind. 175).

EFFINGER v. FT. WAYNE & W. V. TRACTION CO. (No. 21,817.)

(Supreme Court of Indiana. Feb. 2, 1911.)

1. RAILROADS (§ 360*)—FRIGHTENING HORSES.

Though, in general, those in charge of a railroad train need not watch an abutting highway to discover frightened horses, and though it is not negligence in itself to run such a train or car at a speed of 20 miles per hour, yet there may be circumstances under which the railroad would be bound to take steps to avoid injuring a traveler on such highway, for negligence depends on attendant circumstances, such as the danger of one likely to be injured, and what at one time might be lawful may at others be negligent.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1241-1244; Dec. Dig. § 360.*]

2. RAILROADS (§ 391*)—FRIGHTENING HORSES ON HIGHWAY—LIABILITY.

Where a person is in imminent peril, one, who having knowledge of his condition, acts so as to increase it, is negligent; and hence, where a railroad's servant in charge of an electric car, having seen that a horse on an abutting highway was frightened by it, and liable to do damage, failed to stop his car, although able to do so safely, and increased the horse's fright, thereby causing an accident, the company is liable for his negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1317, 1326-1330; Dec. Dig. § 391.*]

3. RAILROADS (§ 394*)—FRIGHTENING HORSES—COMPLAINT—SUFFICIENCY.

Where a complaint in an action against a railroad for injuries caused by its servant's negligence in failing to stop an electric car which was frightening a horse on an abutting highway and caused an accident proceeded on the theory that the defendant with knowledge of plaintiff's peril acted so as to increase it, an allegation that the car or any act of defendant's employes was calculated to frighten horses was unnecessary.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.*]

4. RAILROADS (§ 394*)—OPERATION—ACTIONS—COMPLAINT—SUFFICIENCY.

Where the complaint in an action against a railroad alleged that plaintiff and another were in a careful manner driving a horse which had always been safe and gentle along a highway abutting the railroad, and that the approach of one of defendant's cars frightened the horse, and, though signaled to stop and able to do so, safely, the motorman negligently failed to stop, thereby causing an injury, it was unnecessary to allege that, if the car had been stopped, the horse could have been controlled.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.*]

5. RAILROADS (§ 394*)—FRIGHTENING HORSE—COMPLAINT—ALLEGATIONS—PROXIMATE CAUSE.

The complaint in an action against an interurban railway company for injuries caused by frightening a horse on an adjacent highway alleged that, though the motorman saw the horse's fright, he negligently failed to stop the car or check its speed, but ran it at high speed toward the horse, "by reason of which, and on account of" the motorman's negligence as aforesaid, "it rendered it impossible" to control the horse; that, "on account of" the motorman's negligence, "the horse was caused to jump" into the ditch beside the road, throwing plaintiff out and injuring him; that, had the motorman shut off the current, the noise of the car would have been greatly lessened, and, had the car been stopped or its speed slackened, the accident would have been avoided. *Held*, that the complaint sufficiently alleged that the failure to check the speed of the car was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.*]

Appeal from Circuit Court, Wells County; C. E. Sturgis, Judge.

Action by Ferdinand Effinger against the Ft. Wayne & Wabash Valley Traction Company. From a judgment of the Appellate Court (93 N. E. 32), affirming a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed, with directions to overrule demurrer.

Mock & Sons, for appellant. Eichhorn & Vaughn, Barrett & Morris, and Samuel Morris, for appellee.

MORRIS, J. This suit is brought by appellant against appellee. The circuit court sustained a demurrer to the complaint for want of facts. Appellant declined to plead further. Judgment was thereupon rendered in favor of appellee, from which judgment this appeal is prosecuted.

The only error assigned is in sustaining the demurrer. The complaint, omitting formal parts, is as follows: "The plaintiff complains of the defendant for complaint in the above-entitled cause, and for cause of action says and avers: That the defendant, the Ft. Wayne & Wabash Valley Traction Company, is a corporation, organized and doing business under the laws of the state of Indiana. That the business of said corporation is that of a common carrier, and in its said capacity of a common carrier it operates a line of railway between the city of Ft. Wayne, Ind., and the city of Bluffton, Ind., over which line of railway cars are propelled by means of electricity, said cars being what are commonly called interurban railway cars, and said line of railway being commonly called an interurban railway. That on and prior to the 27th day of September, 1906, the said defendant owned and was operating said railway as aforesaid. That for a mile north of the city of Bluffton said railway runs parallel with and on the west side of the public highway, and the center of said railway track is within 80 feet of the center of said public highway throughout said distance. That there was on said day a deep ditch on both sides of said public highway, and that for three-quarters of a mile south from the place of the accident hereinafter mentioned and complained of there were no trees of any kind, hills, or obstructions of any sort between said highway and said interurban railway. That on said 27th day of September, 1906, the plaintiff was in a single buggy, the top of which was up, which said buggy was drawn by a six year old horse that had always been gentle, quiet, and safe to drive, and was owned and driven at said time by one Luther Brown. That on said day the plaintiff and said Brown were seated in said buggy, and the horse was being driven by said Brown from the north towards said city of Bluffton on and along said public highway on the east side of said railway. That on said day said defendant was running one of its cars north from said city of Bluffton over said railway track at a rate of speed not less than 20 miles per hour at said time. That at said time said Brown was driving said horse in a careful manner on said public highway. That, when said horse and buggy were over 100 feet from said car as it was approaching said horse and buggy, said horse became frightened at said approaching car and the ap-

pearance thereof, and began to jump and rear. That said Brown threw up his hand, and signaled the motorman in charge of said car to stop. That, while said horse was so frightened, jumping, and rearing at the approach of said car, defendant's agent and motorman saw and was fully aware of the frightened condition of said horse and the cause thereof in ample time to have stopped the speed of said car and the motion thereof, in time to have prevented the injuries to the plaintiff hereinafter complained of, and said motorman and agent of the defendant in charge of said car, with full knowledge of the facts aforesaid, carelessly, negligently, and unlawfully failed, refused, and neglected to stop or check the speed of said car, though signaled and requested to do so by said Brown, and negligently and carelessly ran said car at said high rate of speed of 20 miles per hour towards and in the direction of said horse and buggy in close proximity to them, thus greatly increasing the fright of said horse, by reason of which and on account of the negligence of said motorman and agent of the defendant as aforesaid it rendered it impossible for said Brown or this plaintiff to hold, manage, or control said horse. That, on account of the said negligence and carelessness of said motorman and agent of the defendant, the said horse was caused to jump into said ditch on the east side of said highway, and to upset said buggy in said ditch, thereby throwing the plaintiff violently against the east bank of said ditch on his shoulders and face, causing concussion from the shoulder to the hip joint, and going around the entire body, producing echymosis and great pain and anguish. That, had said motorman shut off the electricity from the motors on said car, the noise caused by said car would have been greatly lessened, and, had said car been stopped or the speed thereof slackened, said accident would have been averted, all of which could have been done without danger or damages to said car or any of the occupants thereof. That at the time of said injury this plaintiff was in the real estate business and earning \$200 per month. That on account of said injury the plaintiff was confined to his bed three weeks and unable to do any work or follow his occupation until the 18th day of December, 1906. That, on account of said injury, he has been compelled to pay for medical attention the sum of \$25 and the further sum of \$12 for medicine. All to the plaintiff's damage in the sum of \$1,000, for which plaintiff demands judgment and for all other proper relief."

Counsel for appellant, in their brief, state that the lower court sustained the demurrer on the theory that defendant owed no duty to one driving along a highway running parallel with its road. While, as a general rule, those in charge of a railway train are not required to watch an abutting highway to discover frightened horses, and while it is

not negligence in itself to run a train or electric car at a speed of 20 miles an hour, it does not follow therefrom that there may not be circumstances under which a duty might arise on the part of the railway company to avoid an injury to a traveler on such highway. As was said by Mr. Justice Brewer in *Culp v. Atchison, etc., R. Co.*, 17 Kan. 475: "That a party has a right to do a given act at certain times and under certain circumstances does not prove that the same act is right under all circumstances and at all times." 2 *Thomp. Neg.* §§ 1900-1911; *Billman v. Indianapolis, etc., R. Co.* (1881) 76 Ind. 167, 40 Am. Rep. 230. "Negligence" is a relative term, and of necessity must depend upon the circumstances of each particular case. All the attendant circumstances, including the degree of danger and the defendant's knowledge, if any, of plaintiff's peril, should be considered in determining the standard of care which may be reasonably required in the particular case. 29 *Cyc.* 417. It is not sought in this complaint to charge the defendant with negligence in the first instance by reason either of the speed of the car, or its appearance, but the theory of the pleading is that plaintiff was in a situation of imminent peril, and defendant with full knowledge of the situation afterwards increased that peril, and thereby caused the injury.

It may be stated as a general rule that when one sees another in imminent peril, from which he cannot extricate himself, it is the duty of such person to so act as not to increase the peril, and, if he does act in a manner to increase the danger, after he has knowledge thereof, it is negligence. *Indianapolis, etc., R. Co. v. Boettcher* (1891) 131 Ind. 82, 28 N. E. 551; *Billman v. Indianapolis, etc., R. Co.*, *supra*; *Louisville, etc., R. Co. v. Stanger* (1893) 7 Ind. App. 179, 82 N. E. 209, 34 N. E. 688; *Lake Erie, etc., R. Co. v. Juday* (1897) 19 Ind. App. 436, 49 N. E. 843; *Kentucky Bridge Co. v. Montgomery*, 87 S. W. 1008, 57 L. R. A. 781; *Ward v. Maine, etc., R. Co.*, 96 Me. 136, 51 Atl. 947; *Hanlon v. Philadelphia, etc., Co.*, 182 Pa. 115, 37 Atl. 943; *Fares v. Rio Grande, etc., R. Co.*, 3 Am. & Eng. Ann. Cas. 1070, note; *Ill. Cen. R. Co. v. Martin* (1908) 110 S. W. 815, 33 Ky. Law Rep. 666; *Louisville, etc., R. Co. v. Smith*, 107 Ky. 178, 53 S. W. 269.

The complaint alleges that plaintiff and another were driving on a public highway, running parallel with defendant's road, and only 80 feet from the center thereof; that there was a ditch on each side of the highway; that the horse became frightened at the approaching car and began to jump and rear; that the buggy top was up; that defendant's motorman saw and was fully aware of plaintiff's situation while the car was 100 feet away, and in time to have

slackened the speed of the car, and prevented plaintiff's injury, and without danger of injury to the passengers or car, but that with full knowledge of the situation he neglected to stop or check the speed of the car, thereby increasing the horse's fright, and rendered it impossible for the driver to control the horse; that by reason of the motorman's said conduct, after knowing plaintiff's peril, the horse was caused to jump into one of the ditches at the side of the highway, thereby causing plaintiff's injury. The complaint charges negligence under the above rule.

Counsel for appellee assert that the complaint is insufficient because there is no allegation that the appearance of the car, or any act complained of, was calculated to frighten horses of ordinary gentleness. The complaint does not proceed on that theory, but on the theory above indicated.

Appellee also contends that the complaint is defective because it fails to aver that plaintiff would have been able, because of the gentleness of the horse, or other reason, to have controlled it, had the car been stopped. In view of the facts alleged, such allegation was unnecessary.

Appellee further says the complaint is insufficient because it fails to allege that defendant's failure to check the speed of the car was the proximate cause of the injury. The complaint alleges sufficient facts in regard to this matter to justify the submission of the question of negligence to a trial. *Baltimore, etc., R. Co. v. Slaughter* (1906) 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503; *Rodgers v. Baltimore, etc., R. Co.* (1898) 150 Ind. 397, 49 N. E. 453.

Appellee suggests other objections to the complaint that might be well taken on a motion to make the complaint more specific, but which are not involved in the ruling on a demurrer for want of facts. The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to the lower court to overrule the demurrer.

(175 Ind. 134.)

MERRILL v. STATE. (No. 21,644.)

(Supreme Court of Indiana. Jan. 31, 1911.)

1. CRIMINAL LAW (§ 1081*)—APPEAL—NOTICE—DISMISSAL.

Where a judgment of conviction was rendered February 18, 1910, and the transcript was filed in the Supreme Court March 31, 1910, and appellant's brief was filed the same day, and appellee's was filed July 15, 1910, when the objection was made to the jurisdiction, and July 29, 1910, appellant notified the prosecuting attorney of the appeal and filed proof of notice in the office of the clerk of the Supreme Court July 30, 1910, it was such a compliance with the statute as to confer jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724; Dec. Dig. § 1081.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. INTOXICATING LIQUORS (§ 147*)—WRONGFUL SALE—PLACE OF SALE—DELIVERY.

Prosecutor, a resident of a city in which the sale of liquor was prohibited, forwarded an order for beer to a licensed liquor dealer in another city, directing the latter to deliver at prosecutor's address a certain number of bottles of beer, the price of which was inclosed with the order. Some days thereafter defendant delivered the beer, which had been shipped to him for that purpose, using a team belonging to the brewing company by which the beer was manufactured, and which defendant testified he was permitted to use for their keep, he being engaged in hauling coal when not engaged in hauling beer, and receiving from prosecutor 15 cents delivery charges. *Held*, that defendant was the agent of the seller, and that such facts constituted a sale in violation of law at the place of prosecutor's residence; the sale not being complete until delivery at prosecutor's residence.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 162; Dec. Dig. § 147.*]

3. INTOXICATING LIQUORS (§ 167*)—PRINCIPAL AND ACCESSORIES—MISDEMEANORS.

An illegal sale of liquor is a misdemeanor, and all persons engaged therein may be indicted as principals under the rule that the law knows no accessories in cases of misdemeanors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 182, 183; Dec. Dig. § 167.*]

Appeal from Circuit Court, Howard County; L. J. Kirkpatrick, Judge.

William Merrill was convicted of unlawfully selling intoxicating liquors, and he appeals. *Affirmed*.

Herron & Byers, for appellant. Jas. A. Bingham, A. G. Manning, E. M. White, A. G. Cavins, and Wm. H. Thompson, for the State.

MYERS, C. J. Appellant was indicted, tried, and convicted upon an indictment in six counts, under section 8337, Burns' Ann. St. 1908. The first charged an unlawful sale to Angelo Martello of 21 pints of beer, defendant not having a license. The second charged the unlawful operation of a place where intoxicating liquors were sold without a license. The third charged the unlawful operation of a place where intoxicating liquors were given away without a license. The fourth, fifth, and sixth that appellant was unlawfully found in possession of 21 pints of beer which he had in his possession for the purpose of selling to Angelo Martello, he not having a license. The court found him guilty generally of "the unlawful sale of liquor as charged in the indictment," and he was fined.

The error assigned is upon overruling his motion for a new trial. The Attorney General challenges the jurisdiction of this court upon the ground that prior to the filing of the transcript in this court no notice of appeal had been given to the prosecuting attorney, and no waiver filed, or appearance entered. The judgment was rendered February 18, 1910, the transcript was filed in this court March 31, 1910. Appellant's brief was

filed March 31, 1910, and appellee's brief was filed July 15, 1910, in which the point was raised as to want of jurisdiction, and on July 29, 1910, appellant notified the prosecuting attorney of the appeal and filed proof of such notice in the office of the clerk of this court July 30, 1910. This is held to be such a compliance with the statute as to confer jurisdiction. *State v. Sutherland*, 165 Ind. 339, 75 N. E. 642; *Beggs v. State*, 122 Ind. 54, 23 N. E. 693. Appellant's claim of error is that the finding is contrary to law, in that the evidence does not show a sale by appellant. It is disclosed by the evidence that prior to a local option election, and whilst saloons were in operation in Howard county, Edward Weiser kept a bottling house in Kokomo and was agent for the bottling, and sale of the Terre Haute Brewing Company's beer, and appellant had for a number of years been employed by Weiser in the delivery of beer with Weiser's horses and wagons or those of the Terre Haute Brewing Company, and, after the operation of saloons was suspended in that county, appellant kept the horses and wagons in the same barn. He claimed that he had the use of the horses and wagons for caring for the horses. When not employed in delivering beer, he was employed by one person in delivering coal in the same wagon in which he delivered beer, and was engaged more or less in delivering beer shipped by Donnelly after the saloons were suspended in Howard county, and collecting and removing the empties.

The prosecuting witness testified: That about a week prior to December 24, 1909, he asked the Weiser boys, of whom he had been accustomed to get beer—there were two of the Weisers—whether there was any way he could get beer, and was told they could not furnish it. Shortly thereafter he received a circular through the mail, and with it a postal card, as he called it, upon which he was informed that if he would sign the card and put \$2 in the inclosed envelope, and mail it back, he would receive a case of beer. He did not know the parties to whom the card was sent, but he signed the card, and inclosed \$2 as directed, and received a case of beer at his house between 7 and 8 o'clock a. m., delivered there by appellant, who was paid 15 cents by the witness' wife in his absence. That the witness did not know the beer was at the station, and did not order its delivery by appellant, though appellant had theretofore spoken to him in regard to deliveries generally of shipments to him. This was supplemented by the testimony of Maurice Donnelly: That he was a licensed saloon keeper of Marion county, Ind., and was a general agent of the Terre Haute Brewing Company. That he had never seen appellant, or engaged him to deliver beer, but had obtained his name from Mr. Edward Weiser,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whom he had known for a number of years. He was shown a blank order in the following form and terms: "Indianapolis, Ind. Maurice Donnelly, Licensed Liquor Dealer, 131 N. Pennsylvania St., Indianapolis, Ind. Please deliver to my address _____ dozen large bottles Terre Haute Brewing Co.'s Beer, _____ dozen small bottles Terre Haute Brewing Co.'s Beer. Name. _____ Address. _____. Orders will be filled only at Licensed Liquor House, 131 N. Pennsylvania St., Indianapolis, Ind., and will not become binding until accepted by the above named dealer." This he said he had sent to persons whose names were sent in from agencies as the form of order blank. The exact filling of blanks in the order used in this case is not shown. That he had made a shipment of beer to Kokomo consigned to appellant December 23, 1909. Appellant's name was on the cases, and the name also of the person to whom the case was to be delivered. The waybill was for a consignment of 43 cases of bottled beer, $\frac{1}{2}$ barrel of beer and $\frac{1}{4}$ barrel of beer, all consigned to appellant in one shipment. The freight on the 43 cases was \$5.81 and on the barrel beer 43 cents and was prepaid. There was no bill of lading. The witness testified: That the freight was added to the price at which the beer was sold if delivered at his place, and he paid the freight on shipment. He could not recall the name Martello to whom the sale was alleged to have been made. That the empty bottles and cases were shipped back to him without any arrangement with appellant to collect and return them, other than request to the parties for the return of the empties or they would be charged with them; could not say whether he had received a list from Weiser or not. Appellant testified that he delivered the beer to Martello December 24th which he had gotten at the railway station, shipped by Donnelly; that he also delivered some 40 other cases of beer to a number of other persons that day; that in light work he used the light wagon of Weiser, and in heavy work he used the Terre Haute Brewing Company's wagon; that he took care of the horses for their use, and the use of the wagons; he worked at delivering coal and delivering beer that was shipped from Indianapolis; that he was supposed to deliver the beer and take the empties out of the way for 15 cents, but had no contract with Martello or Mrs. English, for whom he had a shipment at the same time, but could not give the names of those to whom the other cases were delivered by him except two, those were the ones found by the officers; that they were customers of Weiser's and had been for some time; that he took chances on the parties paying him when he delivered beer; he was not doing a general drayage business. There was evidence by him before the grand jury

that Weiser had told him to take the empties to the railway station. On the morning of December 24th, one of the Weiser boys was with appellant at the freight house, and Weiser had a paper from which he appeared to be checking off the cases as appellant placed them around in different places. It is significant that the Weisers did not testify in the cause, and there is no evidence that there was no arrangement between them and the vendor.

From these facts we are asked to reverse the judgment. It is not shown that Weiser had not directed the delivery of the beer, or the return of the empties, and the trial court might reasonably infer from the evidence that Weiser or appellant or both were agents of the vendor, and that sale was consummated by the delivery in Howard county. The order blank itself directs a delivery at the prosecuting witness' address. The order was one prepared and sent out to prospective customers by the shipper, and on its face is an undertaking to deliver at the witness' address. The fact that appellant charged and received 15 cents for its delivery was wholly voluntary on the part of the prosecuting witness. He was entitled to have it delivered at his address, and the delivery was a necessary part of the sale. The prosecuting witness could not have gone to the station and gotten the beer, for it was consigned to appellant, and without an order from appellant, it could not have been delivered to the prosecuting witness. There was certainly no authority for the carrier delivering to any one than appellant, which distinguishes the cases of delivery to a carrier consigned to named persons. *Gates v. Chicago, etc., Co.*, 42 Neb. 379, 60 N. W. 583 (1894); *Union Pac. Ry. Co. v. Johnson*, 45 Neb. 57, 68 N. W. 144, 50 Am. St. Rep. 540 (1895). As between the consignor and the consignee, the consignment in care of a third person, and in the absence of known limitations, confers upon the third person the right to receive the goods, and ordinarily constitutes him the person to whom to make delivery, and this circumstance may be taken into account in determining whether the third person is in law the agent of the shipper or of the consignee. *Commonwealth v. People's Express Co. (Mass.)* 88 N. E. 420 (1908). Here the consignment is to appellant, practically a consignment to the vendor himself. The only direction or limitation is the indication by the direction on the cases to whom delivery should be made by him. The case of *Commonwealth v. Burgett*, 136 Mass. 450 (1884), is strongly in point to the proposition that the undertaking of the vendor was to deliver the beer, and that, unless or until its delivery, the order was not filled, and the vendor was not entitled to retain the money. See, also, *Berger v. State*, 50 Ark. 20, 6 S. W. 15 (1887); *Commonwealth*

v. Greenfield, 121 Mass. 40; *Suit v. Woodhall*, 113 Mass. 391; *State v. Basserman*, 54 Conn. 88, 6 Atl. 185; *Benjamin on Sales*, 87, 145. The place of sale is the place where the sale is completed by delivery. *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; *Doster v. State*, 93 Ga. 43, 18 S. E. 997. The cases of *Harding v. State*, 65 Neb. 238, 91 N. W. 194, and *State v. Cairns*, 64 Kan. 782, 68 Pac. 621, 58 L. R. A. 55, are not in point, for in each of those cases consignment was made through a common carrier to the purchaser. *United States v. Lackey* (D. C.) 120 Fed. 577, it must be admitted lends support to appellant's contention. There is this distinction, however, that Lackey was not a common carrier, but a market gardener; which it seems to us distinguishes him from the case of delivery to a common carrier who is obligated to carry upon payment of the costs of carriage, and impresses us with the conviction that the case shows a case of agency and sale in Roanoke, to the extent that we cannot follow it. Besides, it is against the weight of authority. Appellant was not a common carrier. He was not a general delivery man. When not delivering beer, he was employed by one person in delivering coal. The court below may reasonably have supposed that the attempt was to do indirectly what could not be done directly, and was to defeat the object and purpose of the law, and that appellant was the agent of the vendor. *Mason v. State*, 170 Ind. 195, 83 N. E. 613; *Government B. & L., etc., v. Denny*, 154 Ind. 261, 55 N. E. 757. Suppose that before delivery to the vendee the vendor had concluded that this act was a violation of the statute, and had directed appellant not to deliver, could it be contended that the prosecuting witness had such title that he could recover the beer. The statute expressly provides contrary to the common-law rule that sale of intoxicating liquors shipped C. O. D. shall be deemed sales at the place where the money is paid or the goods delivered. *Burns' Ann. St. 1908*, § 8347. Under this section, delivery through the carrier and collection by it would constitute an offense. Much more must this be so under a consignment not to the purchaser, but to a third person with at least implied direction to deliver, and, if the delivery constitutes a sale in the one case, it is difficult to see wherein it is not a sale at least by implication in the other, where there are reasonable grounds of inference of agency of appellant. In reviewing the sufficiency of the evidence to sustain a conviction, the Supreme Court will only give consideration to the evidence most favorable to the state. This is for the reason that it was necessarily upon such evidence that the court below whose province it was to make all reasonable inferences relied in a finding of guilty. *Wilson v. State* (1910; No. 21,677, at

this term) 93 N. E. 609; *Schondel v. State*, 93 N. E. 67 (1910). The offense charged is a misdemeanor, and all who aid or abet or assist in perpetration of the offense are equally guilty, and may be indicted as principals. The law knows no accessories in cases of misdemeanors. *Stratton v. State*, 45 Ind. 408; *Lay v. State*, 12 Ind. App. 362, 39 N. E. 768; *Bonds v. State*, 130 Ala. 117, 30 South. 427; *Elwbank's Criminal Law*, 360.

The statute prohibits the sale by direction or indirection. It seems to us that the court might reasonably infer from the evidence that appellant was the agent of the vendor, and that the sale was intended to be made, and was made, in Howard county, and, in order to reverse the judgment, we would be compelled to substitute our inference for that of the court on a matter of fact, or at least of mixed fact and law.

We cannot say that error is shown, and the judgment is affirmed.

(176 Ind. 707)

DONNELLY v. STATE (No. 21,728.)

(Supreme Court of Indiana. Feb. 2, 1911.)

Appeal from Circuit Court, Howard County; Lex. J. Kirkpatrick, Judge.

Maurice Donnelly was convicted of illegally selling liquor, and he appeals. Affirmed.

Blackledge, Wolf & Barnes, for appellant. Jas. Bingham, A. G. Manning, Alex. G. Cavins, Edw. White, and Wm. H. Thompson, for the State.

MYERS, O. J. Appellant was indicted at the same time and under a like indictment as in the case of *Merrill v. State* (at this term) 93 N. E. 857, and the facts disclosed and the questions presented are practically the same.

Appellant's testimony in this case is elaborated somewhat beyond his testimony in the former, especially with respect to not having employed Merrill, or agreed to pay him anything, or having paid him anything, and that he had no relation with Ed. Weiser at any time, and no interest in the bottling works, or the business there, in this case, as in that. He testified that through his bookkeeper he had had inquiry made "as to who would be a responsible drayman to ship beer to," and that Mr. Weiser had recommended Merrill, and that he was interested in seeing that the beer was properly taken care of, and that it got to the proper parties in Kokomo, that he was interested in seeing that the empty cases got back. Merrill was not a witness in this case, neither were the Weisers. No different reasons are urged from those in the *Merrill Case*, and we see no reason to depart from the opinion in that case, and the judgment is affirmed.

(48 Ind. App. 349)

CHICAGO, I. & L. RY. CO. v. NEWKIRK.
(No. 6,748.)¹

(Appellate Court of Indiana. Feb. 8, 1911.)

1. APPEAL AND ERROR (§ 757*)—BRIEFS—DEFECTS—EFFECTS.

Where, on appeal to the Appellate Court, the brief fails to comply with rule 22 of that court (55 N. E. v), in that it does not state how the issues were decided and what the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Rehearing denied.

or decree was, the errors relied on for reversal, or, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely and without argument or elaboration, together with the authorities relied on in support of them, no question is raised for decision, and the appeal should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

2. APPEAL AND ERROR (§ 756*)—BRIEF—REQUISITES.

The brief on appeal must be so prepared that all the questions presented by the assignment of error can be determined by the Appellate Court from an examination of the briefs without looking at the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*]

Appeal from Circuit Court, Lawrence County; S. B. Lowe, Judge.

Action by James Newkirk against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Appeal dismissed.

E. C. Field, H. R. Kurrie, and Brooks & Brooks, for appellant. Rufus H. East, for appellee.

PER CURIAM. This is an appeal from a judgment rendered by the Lawrence circuit court. Appellee asks that the appeal be dismissed, for the reason that the brief filed by the appellant is insufficient, under rule 22 of this court (55 N. E. v), to raise any question for decision.

The brief filed by appellant fails in several particulars to comply with rule 22. It does not state (1) how the issues were decided and what the judgment or decree was; (2) the errors relied upon for reversal; or (3) under a separate heading of each error relied on, separately numbered propositions or points, stated concisely and without argument or elaboration, together with the authorities relied upon in support of them. This court has held that a brief which fails in these respects to comply with the rules raises no question for decision and that the appeal in such case should be dismissed. *Miller v. Collier et al.*, 35 Ind. App. 176, 73 N. E. 925. It has been held by the Supreme Court of this state that the briefs must be so prepared that all the questions presented by the assignment of error can be determined by this court from an examination of the briefs without looking at the record. *American Food Co. v. Halstead*, 165 Ind. 633, 76 N. E. 251; *Chicago, etc., Railway Co. v. Wysser Land Co.*, 163 Ind. 238, 294, 69 N. E. 548; *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; *Albaugh Bros. v. Dover & Co.*, 90 N. E. 908; *Hall v. McDonald*, 171 Ind. 9, 85 N. E. 707; *Chicago Terminal, etc., Co. v. Walton*, 165 Ind. 253, 74 N. E. 1090.

In this case the court would be required to refer to the record to ascertain what

errors are relied upon for reversal. There is no statement in the brief as to the errors relied upon, and the assignment of error is not copied into the brief. The propositions and authorities are not arranged under separate headings of each error relied upon, and there is absolutely no way to determine the errors relied on, without resort to the record, except as they can be inferred from the argument or other parts of the brief. The rules of this court cannot be enforced in one case and ignored in another. They should be either uniformly enforced, or uniformly ignored, so that the profession may not be in uncertainty as to the position of the court.

The appeal in this case is dismissed, at the cost of the appellant.

(47 Ind. App. 113)

HODSON v. GREAT CAMP, KNIGHTS OF THE MODERN MACCABEES.

(No. 6,889.)

(Appellate Court of Indiana, Division No. 1. Feb. 8, 1911.)

1. INSURANCE (§ 819*)—MUTUAL BENEFIT INSURANCE—DEFENSES—SUICIDE—SUFFICIENCY OF EVIDENCE.

Where suicide is alleged as a defense to an action on a mutual benefit certificate, the burden is on the insurance company to establish the same, not by evidence sufficient to establish a prima facie case only, but by such proof as would withstand and overthrow all the evidence to the contrary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2007; Dec. Dig. § 819.*]

2. INSURANCE (§ 825*)—DEFENSES—SUICIDE—CAUSE OF DEATH.

Where, in an action on a benefit certificate, defendant pleaded suicide as a defense, and the cause of death was directly in issue, on which the evidence was conflicting and warranted different inferences, it could not be determined by a presumption of law, but must be determined as an inference of fact by the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action by Anna M. Hodson against the Great Camp, Knights of the Modern Maccabees. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Jos. E. Talbot and Talbot & Talbot, for appellant. J. B. McIlwain, Daniel Pyle, and Anderson, Parker & Crabill, for appellee.

MYERS, C. J. The appellant appeals from a judgment rendered on a verdict by the jury returned at the direction of the court. The overruling of appellant's motion for a new trial is assigned as error. Under this error we are called upon to review the action of the court in giving to the jury a peremptory instruction to find for the appellee.

The complaint in this action was founded upon a benefit certificate issued by the ap-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pellee, certifying that one William K. Hodson had been regularly admitted as a member of the appellee, and entitled to all the rights, benefits, and privileges of such membership; and at his death one assessment on the membership, not exceeding the sum of \$2,000, will be paid as a benefit to Annie Mulligan Hodson, his wife. The complaint shows that on February 14, 1904, said William K. Hodson died, and that proofs of death were furnished to the appellee. Appellant is the beneficiary named in said certificate.

Appellee answered in three paragraphs. The first was a general denial. The second and third, in so far as the facts are material to the questions here presented, in substance, aver that the laws of appellee, together with the certificate of membership, formed the basis of the contract for beneficial membership, and that said laws, in force at the time of issuing said certificate, provided, in substance, that no benefit shall be paid under said certificate in case the said member shall come to his death from suicide within five years after his admission to life benefit membership. And in all cases where death results from suicide within five years after the admission to life benefit membership, whether the member is sane or insane at the time of death, the beneficiary of the member shall only be paid the amount of money which the member has paid in the life benefit fund. That said William K. Hodson came to his death from suicide within one year after becoming a member. Appellant replied to said affirmative paragraphs of answer, first, by a general denial, and by two additional paragraphs, each alleging facts tending to show that the deceased's death was accidental.

The certificate was the foundation of the action, and the laws of appellee were made a part of the certificate by reference only. From a careful examination of the evidence in the record before us, it is clear that the only issuable fact about which there was any dispute at the trial was whether the deceased committed suicide. This issue was tendered by the second and third paragraphs of answer. The burden was upon the appellee to establish this issue to the satisfaction of the jury by a preponderance of the evidence, and this appellee was required to do, not by a prima facie case alone, but by such proof as would withstand and overthrow all of the evidence to the contrary. *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Modern Woodmen of America v. Craiger* (Sup.) 92 N. E. 113; *Hale v. Life Indemnity, etc., Co.*, 61 Minn. 516, 63 N. W. 1108, 52 Am. St. Rep. 616. "The statements in the proof of death, either of facts or of opinion, are not conclusive." *Travelers' Ins. Co. v. Nitterhouse*, supra.

While the evidence in this case tends

strongly to support the theory that the deceased committed suicide, yet there is evidence from which a contrary inference of this fact might be drawn. Therefore, as said in the case of *Modern Woodmen of America v. Craiger*, supra: "In determining the charge of suicide, the jury may properly consider the facts and circumstances bearing upon that question given in evidence in the light of their common knowledge and experience that mankind instinctively love life and generally shun death, although occasionally men, both sane and insane, take their own lives. The cause of death was directly in issue in this case to be decided not by a presumption of law, but as an inference of fact by the jury, in the same manner as other facts are determined in civil actions." *Equitable Life Ins. Co. v. Hebert*, 37 Ind. App. 373, 76 N. E. 1023, 117 Am. St. Rep. 324; *Hale v. Life Indemnity, etc., Co.*, supra.

In the case of *Sovereign Camp, etc., v. Haller*, 30 Ind. App. 450, 66 N. E. 186, this court was strongly persuaded by the evidence to conclude that the insured committed suicide, but the question being one of fact, held there was no error in submitting the question to the jury, and cited a number of cases in which that question was in issue and seemed to be reasonably well established; yet in each case the question was left to the jury. In addition to the cases there cited, see *Sargent v. Home Benefit Association* (C. C.) 85 Fed. 711; *Treat v. Merchants' Life Association*, 198 Ill. 431, 64 N. E. 992; *Aetna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203, 24 Ky. Law Rep. 2454; *Washburn v. National Accident Society*, 10 N. Y. Supp. 366.¹

The court in the case of *Northwestern, etc., Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192, in speaking of the effect of a clause in a policy protecting the company against loss in case of the assured's self destruction, whether sane or insane, said: "Such a clause has, however, no application to a case in which death resulted by accident or without intention or expectation, even though it was caused by the hand of the assured. Death resulting from accident, or from an act which at the time it was entered upon or engaged in was not expected or intended to produce that result, cannot be said to be within the meaning of the policy."

The question whether the assured committed suicide was one depending upon the inferences to be drawn from the evidence and facts proved. The court, by the instruction given, determined as a matter of law that the appellee had established the fact as to which it has the burden. This the court was without authority to do, if there was any conflicting evidence, however slight, upon the point in issue (*Jacobs v. Jolley*, 29 Ind. App.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 57 Hun, 538.

25, 62 N. E. 1023); and it will not do to say that the instruction was harmless because a right result was reached (*Haughton v. Aetna Life Ins. Co.*, 165 Ind. 32, 73 N. E. 592, 74 N. E. 613). For as said in the last case cited: "We must assume that the jury, in the faithful discharge of its duty, would have found the facts according to the weight of testimony; but such a sufficiency of evidence as ought to satisfy the jury, or the circumstances that it was in part contradicted will not, in our opinion, authorize a court to direct the jury that it proves the fact in controversy. When the judgment of the judge upon the sufficiency of the evidence to sustain the verdict is invoked by a motion for a new trial, then it becomes his duty, under the law, to weigh the evidence for himself, and either to confirm or overthrow the conclusion of the jury as in his opinion the preponderance of the evidence may require. But until such time as the matter may thus be brought before him, the duty of weighing the evidence must be left with the jury, where the law has placed it."

The record before us does not present a case which authorized the court to give a peremptory instruction in favor of appellee. The giving of the instruction invaded the province of the jury, and was therefore erroneous. *Indianapolis Street R. Co. v. Coyner*, 39 Ind. App. 510, 80 N. E. 168; *Stephens v. American Car, etc., Co.*, 38 Ind. App. 414, 78 N. E. 335; *Haughton v. Aetna Life Ins. Co.*, *supra*, and cases cited.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(47 Ind. A. 79)

**FIRST NAT. BANK OF LOGOOTEETEE v. VAN BUREN SCHOOL TRUSTEE, DA-
VISS COUNTY. (No. 7,138.)**

(Appellate Court of Indiana, Division No. 2.
Feb. 2, 1911.)

1. RECORDS (§ 14*)—TOWN OFFICERS—TRUSTEES—ADVISORY BOARD—"PUBLIC RECORD."

Burns' Ann. St. 1908, § 9590, provides that the advisory board of a township shall keep a record of its proceedings in a separate book to be furnished by the township trustee, and kept as a part of the records of the township, and remain in the custody of the chairman of the board; that the board shall elect one of its members secretary, who shall record the proceedings thereof at any meeting in full, under the direction of the board, which shall be signed before the board adjourns. *Held*, that the record of such board is a public record in which the proceedings of the board are required to be fully recorded, and is open to inspection to all persons doing business with the township.

[Ed. Note.—For other cases, see *Records*, Cent. Dig. §§ 13-18; Dec. Dig. § 14.*

For other definitions, see *Words and Phrases*, vol. 6, p. 5818; vol. 8, p. 7773.]

2. TOWNS (§ 46*)—BORROWING MONEY—EMERGENCY—AUTHORITY OF ADVISORY BOARD.

Burns' Ann. St. 1908, § 9593, provides that on a special call of the township trustee or the

chairman of the advisory board, or a majority of its members, the board may, if a quorum is present, by consent of all the members present, determine whether an emergency exists for the expenditure of any sums not included in the existing estimates and levy, and, in case an emergency is found to exist, the board by special order entered and signed on the record may authorize the trustee to borrow a sum of money to be named sufficient to meet the emergency. *Held*, that the borrowing of money to meet an emergency not contained in the existing estimate and levy must be authorized by the advisory board and entered on the board's record.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 83; Dec. Dig. § 46.*]

3. TOWNS (§ 46*)—FISCAL MANAGEMENT—BORROWING MONEY—EMERGENCY—FINDINGS OF ADVISORY BOARD—RECORD.

Under Burns' Ann. St. 1908, § 9590, requiring the advisory board of a township to elect a secretary who shall record the proceedings of the board at any meeting in full, the board's record, in order to justify a loan under section 9595, must contain not only a special order authorizing the loan, but also a finding that an emergency existed which was not included in the existing estimate and levy.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 83; Dec. Dig. § 46.*]

4. TOWNS (§ 50*)—BORROWING MONEY—PROCEEDINGS.

Burns' Ann. St. 1908, § 9595, provides that, in case of an emergency, the advisory board of a township at a meeting at which a quorum is present by consent of all the members may determine that an emergency exists, and, in case that an emergency is found to exist, by special order entered and signed on the record may authorize the trustee to borrow a sum of money named sufficient to meet the emergency. *Held*, that where an order declaring an emergency and authorizing a township trustee to borrow money was not made until four days after the date of the warrant for the money borrowed, and the record was not signed by the advisory board until three days after the money was secured, so that, if the lender at the time of accepting the warrant and paying the money had examined the record of the board, it would have shown no signed order of any kind authorizing the loan, the warrant was invalid and unenforceable.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 87, 88; Dec. Dig. § 50.*]

5. TOWNS (§ 46*)—BORROWING MONEY—"EMERGENCY."

The term "emergency," as used in Burns' Ann. St. 1908, § 9593, authorizing the borrowing of money to meet an emergency on the authorization of the advisory board of a town, is an event or occasional combination of circumstances which calls for immediate action or remedy; the word being synonymous with "pressing necessity" or "exigency."

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. § 83; Dec. Dig. § 46.*

For other definitions, see *Words and Phrases*, vol. 3, p. 2361.]

6. TOWNS (§ 46*)—BORROWING MONEY—EMERGENCY—VALIDITY OF LOAN.

Under Burns' Ann. St. 1908, § 9590, providing that no existing indebtedness of a township need be paid until due, where on January 4, 1907, there was in the tuition fund of defendant township \$919.03, and on January 27th following the township received from the county treasurer for the credit of the same fund \$1,227.27, and no payments were made to teachers between the 4th and 27th of January, no

emergency existed on January 4th, authorizing the borrowing of money under section 9595 to pay teachers' salaries, though an emergency might arise at or before the termination of the school term.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 83; Dec. Dig. § 46.*]

7. SUBROGATION (§ 23*)—LOAN TO TOWNSHIP—INVALIDITY.

Where proceedings taken by the advisory board of a township to borrow money to meet an alleged emergency to pay teachers' salaries were fatally defective and the court in an action on the township warrant found no facts from which a conclusion would follow, or an inference arise, that the tuition fund for which the money was borrowed on the day the loan was made was insufficient to meet all demands then due and payable out of it, it could not be said that the money borrowed was paid on a valid indebtedness then owing by the township, and hence the lender was not entitled to subrogation to the right of the teachers alleged to have been paid out of the fund as against the township.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 64-66; Dec. Dig. § 23.*]

8. TOWNS (§ 46*)—FISCAL MANAGEMENT—BORROWING MONEY—QUANTUM MERUIT.

Where the proceedings of the advisory board of a township were insufficient to authorize the borrowing of money loaned by plaintiff to meet an alleged emergency, plaintiff was not entitled to recover the money so loaned on a quantum meruit, under the rule that a trustee who seeks to bind his township must proceed as provided by statute and within the powers conferred thereby, otherwise his contracts are void, and no subsequent act can estop the township from setting up their invalidity.

[Ed. Note.—For other cases, see Towns, Cent. Dig. § 84; Dec. Dig. § 46.*]

9. TOWNS (§ 46*)—TOWNSHIP TRUSTEES—AUTHORITY—NOTICE.

A bank lending money to a township trustee for the benefit of the town was charged with notice of the extent of the trustee's authority which would not be enlarged by intendment or by any strained construction of the statute.

[Ed. Note.—For other cases, see Towns, Cent. Dig. §§ 83, 84; Dec. Dig. § 46.*]

Appeal from Circuit Court, Daviess County; H. Q. Houghton, Judge.

Action by the First National Bank of Loogootee, Ind., against the Van Buren School Trustee, Daviess County. Judgment for defendant, and plaintiff appeals. Affirmed.

A. J. Padgett and Alvin Padgett, for appellant. E. T. Laughlin, Hastings, Allen & Hastings, and Mattingly & Myers, for appellee.

ADAMS, J. Action by appellant against appellee on a township warrant in the words and figures following: "State of Indiana, Daviess County. Trustee's Office Van Buren Township. This is to certify that there is due from this township to the First National Bank of Loogootee, Indiana, or order four hundred dollars for money received for Van Buren township to be paid out of the tuition funds with 6 per cent. per annum from January 1st, 1907, payable at the First National Bank at Loogootee, Indiana, on or before the

1st day of January, 1908 No. Hiram Simms, Township Trustee. Given by authority of the advisory board this 1st day of January, 1907. James Trueblood, Secretary. James Evans, President. Albert Singleton." The complaint was in one paragraph, to which a demurrer was overruled, and the cause put at issue by answer in general denial. Upon request the court made a special finding of facts, and stated its conclusion of law thereon.

Said finding discloses that on the 1st day of January, 1907, the members of the advisory board of Van Buren school township, elected in November, 1906, went to the home of the trustee for the purpose of organizing said board, and for the purpose of examining the annual report of the trustee; that no meeting was had on said date, but by agreement they were to return on the 4th day of January, 1907, to the home of said trustee and organize; that no record of such agreement was made; that on said 4th day of January all the members of said advisory board did meet at the home of the trustee for the purpose of organizing, and for the purpose of examining the financial report of said trustee for the year 1906; that said board did on said date meet and organize by the election of James Evans president and James Trueblood secretary; that no notice of said meeting was ever given; that at said meeting the trustee orally reported to the said board that he did not have sufficient funds to pay the teachers of the township for their services as the same would come due during the balance of the school year, and that such teachers would have to wait for their pay for their said services until he would make the June, 1907, draw for funds from the county treasurer, unless the said board would authorize him as such trustee to borrow \$300 for the tuition fund, and with which he would pay said teachers as their wages became due; that the advisory board relied upon the statement of the trustee, and, having no information to the contrary, believed that an emergency existed requiring said trustee to borrow \$800 in order to carry on the township schools for the balance of the school year, and did verbally authorize said trustee to borrow \$800 for said purpose; that the only entry made in the record of the advisory board relating to said loan was as follows: "The trustee then asked the privilege of borrowing eight hundred dollars (\$800.00). \$400.00 to be paid January 1st, 1908, and \$400.00 to be paid January 1st, 1909, at six per cent. interest which was granted. * * *

It is also found that the record of the meeting of January 4, 1907, was not signed by all of the members of the advisory board on that date, but was signed by all of the members of said board on the 11th day of January, 1907; that the warrant sued on

bearing date of January 1, 1907, was not signed by the trustee and members of the advisory board until the 4th day of January, 1907, and was not delivered to the appellant and the money received thereon until the 8th day of January, 1907.

It is further found that on the 4th day of January, 1907, the trustee of appellee township had in his hands belonging to the tuition fund of said township the sum of \$919.08, and that he received from the treasurer of said county on the 27th day of January, 1907, tuition funds for said township in the sum of \$1,227.27; that he had paid the teachers of said township from the beginning of the school term to January 4, 1907, \$155; that the sum of \$3,211.74 of tuition money was required to pay the teachers of said township for the school year ending March, 1907, and that the school term on the 4th day of January, 1907, was half over; that out of the \$800 so borrowed said trustee paid the sum of \$496.75 to the school teachers of said township, but that no payment was made to said teachers between the 1st and the 27th of January, 1907, and that thereafter said trustee used the remainder of said money for other purposes than tuition without the knowledge or consent of appellant; that appellant did not examine the records of the advisory board, and did not examine the records kept by the trustee, nor the records in the auditor's office in Daviess county pertaining to the tuition fund in said county, but relied wholly upon the statement made by said trustee, and the signed statement of said advisory board on said warrants, and at the time believed the representations so made to be true.

Upon the finding of facts, the court stated as its conclusion of law "that the plaintiff is not entitled to recover on the warrant sued on, and that the defendant is entitled to a judgment for its costs." To this conclusion of law the appellant at the time objected and excepted, and has assigned said conclusion of law as error in this court. The act creating the township advisory board defines its powers and duties. It is provided: "Such board shall keep a record of their proceedings in a separate book to be furnished by such trustee, and kept as a part of the records of the township, to be known as the record of the advisory board of such township, and to remain in the custody of the chairman of such board. Said board shall elect one of its members secretary for said board, who shall record the proceedings thereof at any meeting, in full, under the direction of the board, which shall be signed before the board adjourns." Burns' Ann. St. 1906, § 9590. It will be observed that the record of the advisory board is a public record, and that the proceedings of the board are required to be set out therein in full. This record is open to inspection to all persons doing business with the township. The borrowing of the

money to meet an emergency not included in the existing estimates and levy must be authorized by the advisory board, and entered upon the record. The statute (Burns' Ann. St. 1906, § 9595) provides: "Upon a special call of the township trustee or the chairman of the advisory board or a majority of the members of said board, given in writing to each member thereof, stating the time, place and purpose of the meeting, said board may, if a quorum be present, by consent of all the members present, determine whether an emergency exists for the expenditure of any sums not included in the existing estimates and levy. In the event that such an emergency is found to exist said board may authorize by special order entered and signed upon the record, the trustee to borrow a sum of money to be named sufficient to meet such emergency. * * *"

It is evident that the right to borrow money as provided in this section is dependent upon the finding of the board that an emergency exists. But it is urged by counsel for appellant that a finding of such emergency is not required to be set out in the record of the advisory board, for the reason that the statute (section 9595, Burns' Ann. St. 1906, supra) only directs that the special order authorizing the loan be entered and signed upon the record. Considering this section alone, appellant's contention would seem to be well founded, but when considered in connection with section 9590, supra, which declares that the secretary "shall record the proceedings thereof at any meeting in full," the position of counsel is not tenable. The finding that an emergency exists is the important thing, and upon such finding the right to borrow money rests. Much liberality ought to be shown in construing the records of a township advisory board as to matters of form and phraseology, but the entire omission from the record of a finding upon which the order is based is not a matter for construction. The findings of the court show that the order was not made until four days after the date of the warrant sued on, and that the record was not signed by the advisory board until three days after the money was secured. If at the time of accepting the warrant and paying the money appellant had examined the record of the advisory board, it would have shown no signed order of any kind authorizing the loan.

Appellant insists that the finding of facts show an emergency indebtedness, in that it is found that the tuition fund was insufficient to pay the teachers of the township for the school term ending March, 1907, and that the deficiency would be in a sum in excess of the amount of the loan authorized. This requires an examination of the word "emergency" as used in this act. Webster defines "emergency" as any event or occasional combination of circumstances which calls for "immediate action or remedy." The word is considered synonymous with "pressing necessity";

exigency." The facts found show that on January 4, 1907, there was in the tuition fund for appellee township the sum of \$919.03; that on January 27th following the township received from the county treasurer for the tuition fund the further sum of \$1,227.27; that no payments were made to teachers between the 4th and the 27th of January. Conceding that an emergency would arise at or before the school term ended, the facts did not show an emergency on January 4th. There was no call for immediate action, and there was no "pressing necessity" at that time. Indeed, the statute (Burns' Ann. St. 1908, § 9590) expressly provides "that no existing indebtedness need to be paid until due." If the meeting of the advisory board at which the loan was authorized had been the only meeting that could be lawfully held before the time for the final settlement with the teachers of the township, a more liberal interpretation of the word would be justified. But the Legislature has provided (Burns' Ann. St. 1908, § 9595) that a special meeting of the advisory board may be called by the trustee, the chairman of the advisory board, or a majority of the members of the board at any time, and at such meetings only matters arising out of an emergency can be considered. *Lincoln School Tp. v. Union Trust Co.*, 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272.

Counsel for appellant argue that, in this case, no new debt was created, but a change was made only in the creditor, that the township received the money and paid out the same in the discharge of valid obligations, and that, therefore, the appellant ought to be subrogated to the rights of the teachers to whom the township was indebted and who were paid with appellant's money. This would ordinarily be true in a case otherwise made out. But in this case the court found no facts from which a conclusion would follow or an inference arise that the tuition fund was on the 4th day of January insufficient to meet all demands then due and payable out of said fund. It cannot be said that the money borrowed from the appellant was paid on a valid indebtedness then owing. Therefore the equitable doctrine of subrogation would not apply. *Union School Tp. v. First National Bank*, 102 Ind. 464, 2 N. E. 194; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42, 47 N. E. 349; *Indiana Trust Co. v. Jefferson Tp.*, 37 Ind. App. 424, 77 N. E. 63. The trustee who seeks to bind his township must proceed in the manner provided by statute and within the powers given by statute. Otherwise his contracts are void, and no subsequent act can estop the township from setting up their invalidity. Nor can an action now be maintained against a township on a quantum meruit. *Peck-Williamson Co. v. Steen School Tp.*, 30 Ind. App. 637, 66 N. E. 909; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42, 47 N.

E. 349; *Lee v. York School Tp.*, 163 Ind. 339, 71 N. E. 956.

The powers of a township advisory board are the powers enumerated in the act creating the board, and their powers must be exercised in the manner prescribed, or the contracts made in violation of the act will by the terms of the act be null and void. *Burns' Ann. St. 1908, § 9601*; *Moss v. Sugar Ridge Tp.*, 161 Ind. 417-420, 68 N. E. 896; *Oppenheimer v. Greencastle School Tp.*, 164 Ind. 99, 103, 72 N. E. 1100; *Platter v. Board, etc.*, 103 Ind. 360, 2 N. E. 544.

It is well settled in this state that those who deal with a township trustee are charged with notice of the extent of his authority, and this authority will not be enlarged by intendment or by any strained construction of the statute. A void contract cannot be enforced no matter what hardship it may work, or how strong the equities may appear. There was no error in the conclusion of law stated by the court on the facts found.

Judgment affirmed.

(47 Ind. A. 58)

EVANSVILLE ELECTRIC RY. CO. v. FOLZ. (No. 7,065.)

(Appellate Court of Indiana, Division No. 2. Jan. 31, 1911.)

1. STREET RAILROADS (§ 87*)—OPERATION—FRIGHTENING ANIMALS.

Where a team of mules being driven along a street take fright at an approaching street car, and, because the car does not stop, become unmanageable and run away, the railway company is not liable unless the motorman's management of the car shows a wanton or malicious disregard for the safety of the occupants of the vehicle.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 181, 182; Dec. Dig. § 87.*]

2. STREET RAILROADS (§ 87*)—OPERATION—FRIGHTENING ANIMALS.

In order to show a duty on the part of a street railway motorman to slow down or stop his car when he sees that a team is being frightened by it, it must appear that a person of reasonable prudence would have been led to believe that the persons driving were in danger, that the further approach of the car would probably increase the danger, and that by ordinary care the motorman could have taken precautions which would have avoided causing the injury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 182; Dec. Dig. § 87.*]

3. PLEADING (§ 17*)—FACTS—DIRECT AVERMENTS—PARTICIPIAL CLAUSES.

Participial clauses or phrases do not contain the asserting elements of a verb, and cannot be properly used in making a direct averment.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 38; Dec. Dig. § 17.*]

4. STREET RAILROADS (§ 110*)—INJURIES TO TRAVELERS—FRIGHTENING ANIMALS.

Plaintiff's complaint alleged that her mules became frightened at the approach and noise of a street car, and became more and more frightened and unmanageable as the car approached; that plaintiff and her son signaled and called to the motorman, but that he made no effort

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

to stop the car or reduce its speed; and that plaintiff was thrown against the car, dragged and injured. There was no averment as to the width of the road or other condition which would prevent plaintiff's son, a man 24 years of age, who was driving the team, from controlling them or cause injury in case the mules were not immediately controlled, nor was it averred that the team and wagon were so close to the track that in their frightened condition there was danger of the mules going on the track. *Held*, that the complaint did not allege facts imposing a duty on the motorman to slacken speed or stop the car, and was therefore demurrable.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 110.*]

5. PLEADING (§ 17*)—AVERMENT BY WAY OF RECITAL.

In an action for injuries to plaintiff by her team becoming frightened at the approach of defendant's street car, an averment that plaintiff and her son, realizing the danger, signaled and called to the motorman calling his attention to their perilous condition, was not a direct averment that plaintiff and her son were in peril.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 17.*]

Appeal from Circuit Court, Posey County; O. M. Welborn, Judge.

Action by Catherine Folz against the Evansville Electric Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

W. D. Robinson, Wm. E. Stilwell, and G. V. Menzies, for appellant. Wm. Reister and U. S. Jackson, for appellee.

LAIRY, J. This appeal is prosecuted from a judgment awarding damages to appellee for personal injuries. The complaint upon which the judgment is based, omitting the formal parts, is as follows: "The plaintiff complains of the defendant, and alleges: That the defendant was at the time hereinafter mentioned, a corporation duly organized under the laws of the state of Indiana, and owned and operated a system of lines of street railway over and upon certain streets in the city of Evansville, Ind., and extending and operating said lines to suburban points near the city; that on the 30th day of August, 1902, this defendant was the owner of and operated a street railway upon a street or road known as the Mt. Vernon Road; that on said day this plaintiff in company with her son, a man 24 years of age, driving a team of mules hitched to and drawing an ordinary spring wagon, was traveling upon said Mt. Vernon Road, a public highway and thoroughfare, going in a northwesterly direction at and near the point on said road where Law avenue crosses and intersects the same; that while so driving at said time and place the defendants were running a street car propelled by electricity in charge of a motorman, in a southwesterly direction, approaching said place on said Mt. Vernon Road; that while so running said car the plaintiff's mules became frightened

at the approach and noise of defendant's car, as above alleged; that said mules became more and more frightened and unmanageable as said car approached, and the plaintiff and her son realizing the danger signaled and called to the motorman in charge of said approaching car, calling said motorman's attention to their perilous condition when said approaching car was still a distance of about 200 feet from the point on said road where this plaintiff and her son were, as above alleged, but said motorman, without decreasing the speed at which said car was still running, or without stopping said car, and seeing the perilous condition of and the circumstances surrounding said plaintiff when said car was still a distance of 200 feet from said point, as above alleged, and disregarding plaintiff's signaling, warning, and calling, and disregarding the perilous condition of and the circumstances surrounding said plaintiff, as above alleged, all of which the motorman did see, and could have seen by the exercise of ordinary care, the said motorman carelessly and negligently approached, causing said mules to turn from side to side, and causing the team to lunge back, all of which frightening and unmanageableness of said team of mules increased as said car approached them, then in the hands and in charge of said motorman as above alleged; that until with a sudden jerk, turning and lunging to the side, all of which was caused by the approach of said car, in the manner and under the circumstances as above alleged, and in the hands of said motorman of said car, caused said plaintiff to fall out of said wagon upon the ground near said track of said street railway just as said car was passing said wagon and team, said plaintiff falling against said passing car, and her clothing becoming then and there fastened in the trucks of said car, dragging said plaintiff on the ground several feet along the side of said track, said frightening of the mules as alleged, and said lunging and jerking and said falling of the plaintiff as above alleged, all being caused by the said motorman, continuing in the approach of said car in the careless and negligent manner as above alleged, after seeing the perilous situation of this plaintiff, and hearing the signal of said plaintiff and her son, as above alleged; that if said motorman under circumstances and conditions as above alleged, after seeing the perilous situation of said plaintiff, had stopped the car, the mules would have been controlled, and plaintiff would not have fallen out of said wagon, and would not have been dragged by the moving car as above alleged, and would not have received the injury complained of herein, and that by reason of the failure on the part of said motorman then and there to stop the said car the plaintiff was injured as above alleged. Plaintiff avers that said

falling and dragging as above alleged injuring said plaintiff on her right side, and both her lower extremities, so that it became necessary to call medical aid; and by reason of such injury she was confined to her bed and room for more than two months, and is still unable to use her right leg, it being injured at and above the knee joint so that said joint is stiff and interferes with plaintiff's walking, and still causes her pain when she undertakes to use the same; that she has been lamed by reason of defendant's negligence, as above alleged, in the decrease of her earning capacity, and is now unable to follow her usual vocation in life; that she has suffered great bodily pain and is now suffering; has paid medical bills by reason of defendant's negligence, as above alleged, and without any fault or negligence on her part and without fault or negligence on the part of her son, above mentioned. Wherefore plaintiff demands judgment in the sum of \$5,000, and all other proper relief."

A demurrer to this complaint for want of facts sufficient to constitute a cause of action was overruled by the court. This ruling is assigned as error, and thereby the sufficiency of the complaint is presented to this court for determination.

The question is, Does this complaint state facts sufficient to constitute a cause of action? The law defining the relative rights and duties of companies operating electric street cars in the streets and highways, and of persons riding or driving horses along such highways or streets, is fairly well settled in this state. This court, in the case of *Terre Haute Electric Ry. Co. v. Yant*, 21 Ind. App. 487, 51 N. E. 732, 69 Am. St. Rep. 376, quotes with approval section 298 from Booth on Street Railway Law. This section is as follows: "And * * * for obvious reasons, companies which have been duly licensed, and, therefore, have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot ordinarily be held responsible for horses taking fright at the appearance, movement, or noise of the cars. If a horse takes fright at an approaching car, and, because the car is not stopped, * * * becomes unmanageable and runs away, injuring the driver and others, the company is not liable, unless the conduct complained of, in the management of the car, is attributable to a wanton or malicious disregard for the safety of the driver or other travelers upon the street. * * * To the extent that travelers, whether on cars, on foot, or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable; for if drivers, motormen, or gripmen were required to stop their cars, slacken their speed, or omit or discontinue necessary sig-

nals, upon which the safety of others depends, because timid horses may become frightened, or already manifest symptoms of fear, not indicating imminent peril, street railway service would be materially embarrassed by numerous delays as to defeat the purpose of which such franchises are granted, and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced."

In all such cases it is necessary to aver facts which show a duty on the part of those in charge of the car either to stop the car, or slacken its speed, or to use some other precaution. In order to show such duty, facts must be averred which show, first, that the person injured was so situated in reference to the conditions surrounding him as would lead a person of reasonable prudence to believe that he was in a position of danger or peril, and that the further approach of the car would be likely to increase such danger; and, second, that the person in charge of the car saw the conditions of danger surrounding the person injured, or that by the exercise of ordinary care, he could have seen such conditions in time to have taken precautions to avoid the injury. If this duty is shown by facts properly averred, and if it be further averred that the person in charge of the car failed to exercise the precautions which this duty imposed upon him, and that by reason of such failure the injury complained of resulted to the damage of the plaintiff, the complaint states a cause of action.

The complaint in this case is unusually wanting in direct averments, many of the facts being recited by means of participial phrases. Participles do not contain the asserting element of a verb, and cannot be properly used in making a direct averment, but waiving this defect and treating the facts so recited as direct averments, can it be said that this complaint states facts sufficient to show that it was the duty of the person in charge of the car therein described to take any unusual precaution for the safety of the plaintiff? Upon this subject, the complaint avers that plaintiff's mules became frightened at the approach and noise of the car, and that they became more and more frightened and unmanageable as the car approached, and that plaintiff and her son signaled and called to the motorman. This averment, standing alone is not sufficient to give rise to any duty on the part of the motorman either to stop the car or reduce the speed. The complaint avers that the son 24 years of age, was driving the team. There is no averment as to the width of the road at that place, showing it to be unusually narrow, or that there was an embankment, ditch, or other dangerous condition in close proximity to the plaintiff which would prevent her son from controlling the team, or result in injury in case it was not immediately controlled; neither is it aver-

red that the team and wagon were so close to the tracks of the street car company that, in their frightened condition, there was danger of their going upon the tracks.

It is also stated in the complaint, by way of recital, that the plaintiff and her son, realizing the danger, signaled and called to the motorman, calling his attention to their perilous condition. This is not an averment that the plaintiff and her son were in a perilous condition, but, treating it as a direct averment, it states a conclusion and not an issuable fact. The facts surrounding the plaintiff, showing her situation to be dangerous or perilous, should have been averred. From what has been said we conclude that the complaint was insufficient to withstand a demurrer.

The other questions presented on this appeal may arise upon another trial of the case and are therefore not considered.

Judgment reversed, with directions to sustain the demurrer to the complaint.

SUPREME TRIBE OF BEN HUR v. LENNERT. (No. 7,125.)¹

(Appellate Court of Indiana, Division No. 2.
Feb. 2, 1911.)

1. INSURANCE (§ 694*)—BENEFIT CERTIFICATES—ELIGIBILITY OF MEMBERS—PERSONS ENGAGED IN SALE OF LIQUORS.

Where insured when he joined defendant benefit association was teamster of a brewing company and required to solicit orders for beer, deliver the same, and collect money therefor, he was disqualified from membership under a by-law providing that no person engaged as principal, agent, or servant in the sale of liquors as a beverage shall be admitted, and, if any member after admission shall engage in such prohibited occupation, he shall stand suspended, etc.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 694.*]

2. INSURANCE (§ 730*)—BREACH OF WARRANTY—RESCISSION OF CONTRACT—FRAUD—RETURN OF PREMIUM.

In order that an insurer may rescind the contract for fraud or breach of warranty, it must elect to rescind within a reasonable time, and return, or offer to return, whatever of value has been received under the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1877; Dec. Dig. § 730.*]

3. INSURANCE (§ 724*)—MUTUAL BENEFIT CERTIFICATE—RESCISSION—RETURN OF PREMIUM.

Insured applied for membership in defendant association on January 30, 1899, stating that he was a teamster by occupation, and was not engaged in the sale of liquors as a beverage. This was false, however, as he was employed to sell and deliver beer for a brewery and collect the price. He followed this occupation until July, 1904, when he engaged in the saloon business on his own account, and on July 15th defendant's officers attempted to terminate his policy, refused to accept further payment of dues, but made no tender or offer to return the premiums and dues paid. Held, that since the certificate was voidable from the beginning, and the attempt to avoid it in 1904 without returning the premiums either then or within

a reasonable time thereafter was abortive, the policy continued in force after insured's death.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 724.*]

4. APPEAL AND ERROR (§ 1033*)—INSTRUCTIONS—PREJUDICE.

Where, in an action on a benefit certificate, defendant claimed a forfeiture for fraud and breach of warranty, an instruction placing the burden of proof that defendant failed to tender and repay the premiums and assessments on plaintiff was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

5. APPEAL AND ERROR (§ 757*)—BRIEFS—INSTRUCTIONS—REVIEW.

Where neither an instruction objected to nor the substance thereof is set out in appellant's brief, it will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

Appeal from Circuit Court, Warrick County; Roscoe Kiper, Judge.

Action by Kate Lennert against the Supreme Tribe of Ben Hur. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles L. Wedding, for appellant. F. E. Monfort and George K. Denton, for appellee.

IBACH, J. This is an action upon a certificate of membership, issued by appellant to Adam E. Lennert, in which appellee is named as the beneficiary. The cause was tried by a jury in the Warrick circuit court, verdict and judgment for \$1,600.

The errors assigned are, first, the overruling of appellant's motion for a new trial; second, the overruling of the demurrer to the reply; and, third, the overruling of the demurrer to the complaint. Appellant has not discussed the third assignment of error, and therefore it is waived. To the complaint filed by the appellee, the appellant filed three paragraphs of answer, the first of which was a general denial, and was afterwards withdrawn. In the second paragraph it is alleged in substance that the contract sued upon is founded upon the by-laws of the appellant order, the written application of Adam E. Lennert, and the certificate of membership regularly issued to him; that at the time insured became a member of the order, and at all times thereafter, there was in force among the laws of the order a certain by-law, which reads as follows: "No person shall be admitted to this order who is engaged as principal, agent or servant, in the sale of spirituous or malt liquors as a beverage, and should any member of the order engage in the above prohibited occupation, after admission, he shall ipso facto stand suspended from all rights and benefits of the order, without any action whatever, and his beneficial certificate shall immediately become null and void." It is further averred that on the 15th day of July, 1904, the insured entered into the business of a saloon keep-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Rehearing denied, 94 N. E. 889. Both superseded by opinion in Supreme Court, 98 N. E. 115. Second petition for rehearing denied.

er, and did then and there become and continued to be engaged as a principal in the sale of spirituous and malt liquors as a beverage, and thereby forfeited all his rights and benefits in the order, and became suspended from all rights and benefits, and so continued up to the time of his death, and his certificate thereby became null and void. The third paragraph of answer is based upon statements made by the insured at the time the certificate sued upon was issued. Said paragraph of answer admits that on the 31st day of January, 1899, the insured became a member of the defendant order, but it is averred that, in order to secure said membership, the insured signed and presented his application for membership, dated January 30, 1899, containing among other questions and answers relative to his occupation the following: "What is your occupation? Answer: Teamster. Are you now engaged in the sale of intoxicating liquors as a beverage, either as principal, agent, or servant? Answer: No." It is further averred that as a part of said application he further agreed that the answers to the questions, among other things, should form the basis of his contract of insurance; that any untrue or fraudulent answers or any suppression of facts in regard to his occupation should vitiate his beneficial certificate, and forfeit all payments made thereon, and should he thereafter engage in any occupation or trade prohibited by the laws of the order, that from and after the date of his so engaging in such prohibited occupation his right, as well as that of his beneficiary to participate in the benefit funds of the order, should cease, and become null and void, and he should stand suspended without any notice from the order; that the contract should be null and void. It is further averred that on the — day of July, 1904, said insured entered into the business as principal in keeping and conducting a saloon, and engaged generally in the sale of spirituous and malt liquors as a beverage, and did thereby forfeit all his rights as such member. Said paragraph also sets out a provision of the by-laws of the appellant order, as set out in the second paragraph of answer.

In reply to these answers, appellee avers that, when Lennert made his application for membership, he informed the agent that he was engaged in the sale of spirituous and malt liquors as a beverage for the F. W. Cook Brewing Company, and the agent at all times knew he was a driver of a beer wagon for such company, solicited orders for it, delivered beer, and collected money for the same; that on the 15th day of July, 1904, the head officer of the order learned that Lennert was engaged in running and operating a saloon, and engaged in the sale of spirituous and malt liquors as a beverage, and that he had been so engaged at the time he made his application, and at all times thereafter

until he entered into the saloon business; that upon hearing the facts as aforesaid the order refused to accept further payments of dues, and declared the certificate of membership forfeited and void. Appellant claims that the court erred in overruling the demurrer to the reply to the second and third paragraphs of answer. The reply contains facts showing a waiver on the part of the appellant of the right to avoid the contract sued on, and therefore was sufficient to withstand demurrer.

Appellant insists that the policy of insurance became forfeited on the 15th day of July, 1904, when the insured became engaged in the saloon business, as principal, that his membership was accepted and his certificate kept in force up to that time, and, by reason of the terms of the policy, nothing was due the insured. On the other hand, the appellee insists that on the — day of July, 1904, appellant having knowledge that the insured had been engaged in a prohibited occupation from the time he became a member of the order, and they not having returned the premiums, nor offered to return them, which had been paid by the assured, within a reasonable time, they thereby treated the contract as a valid and binding one. It appears from the evidence that at the time Lennert became a member of the order he was driving a beer wagon for the F. W. Cook Brewing Company; that he was required to solicit orders for beer, deliver the same, and collect the money for it; that was his occupation until July, 1904. The evidence also reveals the fact that on that day he engaged in the saloon business on his own account as principal, and that his policy was then and there declared forfeited by appellant order. That the brewing company employing Lennert was engaged in the sale of intoxicating liquors as a beverage there is no dispute, and, if Lennert had been employed solely as a teamster by the brewing company, he certainly could not have been considered as engaged in the sale of spirituous and malt liquors as a beverage, but since it appears from the uncontradicted evidence that his employment not only required him to act as a teamster, but to solicit orders for beer, deliver the same, and collect the money for it, this being his regular employment, we conclude that he was at the time he applied for membership in the appellant order, engaged in an occupation prohibited by the by-laws of the order. As a part of the evidence, the appellee introduced a letter from the appellant to the assured, relating to his insurance, in which it was stated: "A person who drives a beer wagon is not in a prohibited occupation, but the person who drives a beer wagon and sells beer and makes collections is so engaged. The fact of Mr. Lennert's selling intoxicating liquors was concealed from the deputy and the officers of the court, and as soon as it was ascertained that he was so engaged, his payments were refused." This, we think,

evidences a construction placed upon the by-law in question by the appellant order consistent with the conclusion reached. His answers to the questions with regard to his employment therefore were not true, and the appellant was authorized to cancel and avoid the policy for that reason, if for no other. This appellant attempted to do in July, 1904, but failed to return or offer to return the premiums and assessments which had been paid by Lennert up to that time. It has been frequently held by the courts of this state that, before a party can have a rescission of a contract for fraud or for breach of warranty, he must not only return or offer to return whatever of value he had received by way of the contract, but he must elect to rescind and place the other party in statu quo within a reasonable time, or with "reasonable promptitude" after knowledge of the facts relied on for a rescission, and that a failure to pursue this course affirms the contract. *American Central Life Ins. Co. v. Rosenstein*, 92 N. E. 380, and cases cited; *Horner v. Lowe*, 159 Ind. 406, 64 N. E. 218; *Modern Woodmen v. Vincent*, 40 Ind. App. 711, 80 N. E. 427, 82 N. E. 475. If appellant had elected to treat the certificate of insurance as void by reason of the violation of a by-law of the order, which prevented Lennert from selling spirituous and malt liquors as a beverage, as principal, agent, or servant, it would have been void from its inception; and there was no liability on the part of the order to pay any insurance, and no risk would have attached. The appellant could have returned the premiums paid by Lennert at any time after the issue of the certificate of membership up to July, 1904, or within a reasonable time thereafter, and, not having elected so to do, the policy remained valid and in force. Whether there was fraud on the part of the assured in obtaining his membership in the order does not alter the rule announced. Such a contract remains voidable at the election of the defrauded party, and a rescission thereof can be made by such party only by returning or offering to return the value received. *Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 536, 79 N. E. 524.

Appellant, however, insists that by a certain stipulation in the application for membership insured agreed that any false answers would render the certificate void, and that he would forfeit all rights to the premiums paid. It is a well-settled law of this state that, where the policy contains a stipulation that any misrepresentations in it shall render the policy void, such a policy would not be void, but voidable at the option of the insurer. *American Central Life Ins. Co. v. Rosenstein*, supra; *Masonic, etc., Co. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295. We have examined many of the authorities cited by counsel for appellant in his brief. They are to the effect that where the risk has attached, and the insurer has earned the pre-

miums, it need not be returned before rescinding the contract. If in the case at bar the risk of insurance had attached, and was carried by the order from January, 1899 to July, 1904, it would have the legal right to keep the premiums paid during that time, but, on the other hand, if the risk never attached, and premiums had not been earned, the order had no right to keep possession of the money collected by it in the form of dues and assessments. "There seems to be a well-defined distinction between cases where the risk has attached and where it has not attached. In the latter case all the premiums must be returned, and an action will lie for their recovery. This rule is grounded in sound reason. In such case the insurance company has not incurred any risk, and hence is not entitled to any compensation, but where the risk has attached, and the company has assumed liability in case of loss, the rule must be different." *Metropolitan Life Ins. Co. v. McCormick*, 19 Ind. App. 53, 49 N. E. 45, 65 Am. St. Rep. 392. Since we have concluded that the policy issued by the appellant to Adam E. Lennert, deceased, was voidable from the beginning, under the facts shown by the evidence, and that the appellant attempted to avoid said policy or certificate of insurance in July, 1904, without returning or offering to return the premiums which the said Lennert had paid thereon, or within a reasonable time thereafter, that the policy or certificate remained in force, and at the time of the death of Lennert, on the — day of February, 1908, the appellee herein was entitled to recover the amount of the benefits as provided in such policy or certificate, she being the beneficiary described therein, to hold otherwise would be to defeat the very purpose which the questions and answers in the application were intended to accomplish.

The error assigned in overruling the motion for a new trial calls in question the correctness of certain instructions given. It is insisted that instruction No. 2, given by the court on its own motion, erroneously states the defense asserted in the two paragraphs of answer. The first part of the instruction it is claimed is misleading, and justified the jury in considering assured's admission into the order, as to which no question was presented in the defense. Reference to said answers does not warrant this construction. Said second instruction is simply a condensed statement of the answers of the appellant, including the provisions of the by-laws, therein set out, and there was no error on the part of the court in calling the attention of the jury to what appellant's contention was.

It is also claimed that instruction No. 4, given by the court on its own motion, is erroneous, confusing, and misleading, because it is based upon a refusal to accept the payments, and the forfeiture was founded upon his admissions originally made to the order, whereas the reply was that it was upon the

head officer learning in July, that the assured was engaged in the saloon business, and the instruction was erroneous, in that there was no evidence or any claim of forfeiture by reason of misrepresentations of his occupation originally. The first objection to the instruction is not warranted, and there is no merit in the second objection, for the reason that the instruction was clearly within the issues.

By the fifth instruction, given by the court on its own motion, the jury were told that unless the appellee showed by a fair preponderance of the evidence that the defendant failed and refused to tender back or repay the amount of dues paid by Lennert at the time the company elected to forfeit the certificate in question, and still refuses to pay or tender the same, its finding should be for the defendant. Said instruction placed the burden upon the plaintiff to prove that the defendant failed to tender back or repay the premiums paid by the insured. This was surely as favorable to the appellant as could be asked.

Instruction No. 1, asked by appellant, is objected to. Said instruction nor the substance thereof is set out in appellant's brief, and it cannot be considered.

The second instruction, given at the request of the appellee, told the jury in effect that if after the appellant learned that the insured had been in a prohibited business from the time of his application for membership in the order up to July, 1904, when it first learned this fact, and it refused to pay back the money received as premiums, it estopped itself from setting up the defense set up in the answer. This instruction we think clearly and correctly stated the law, and was not misleading.

The third instruction, given at the request of appellee, is substantially the same as instruction No. 2, and the court did not err in so instructing the jury.

We find no error in the record. Judgment affirmed.

(48 Ind. App. 104)

LEONARD v. CITY OF TERRE HAUTE.
(No. 7,242.)¹

(Appellate Court of Indiana, Division No. 2.
Feb. 3, 1911.)

1. MUNICIPAL CORPORATIONS (§ 196*)—FIRE DEPARTMENT—CHIEF—REMOVAL—CAUSE.

Under the express provisions of Burns' Ann. St. 1908, § 8781, the chief of the fire department is an appointee of the board of public safety whom the board cannot remove for political reasons, nor in any other manner than as therein provided.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 538; Dec. Dig. § 196.*]

2. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A demurrer admits the allegations of the complaint that plaintiff was appointed to the

position of fire chief by the board of public safety, and that the board attempted to depose him for political reasons and without notice, and that plaintiff had been for more than 20 years a member of the fire department, that no charge had ever been made against him, and that no order had been made discharging him from the force.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 525; Dec. Dig. § 214.*]

3. MUNICIPAL CORPORATIONS (§ 199*)—FIRE CHIEF—ACTION FOR SALARY—COMPLAINT.

A complaint to recover salary after wrongful discharge by the board of safety held to state a cause of action in each of its two paragraphs—one for salary as chief of the fire department, and the other as merely a member of the force.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 199.*]

4. OFFICERS (§ 101*)—ACTION FOR SALARY—COMPLAINT.

Where an appointive officer was improperly dismissed without notice, and it did not appear by the complaint in his suit for his salary thereafter accruing that any other person had been appointed in his place, the complaint was not demurrable on the ground that plaintiff must first establish his title to the office by quo warranto before bringing action for his salary.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 101.*]

5. OFFICERS (§ 80*)—COMPENSATION—RECOVERY.

When a de facto officer is in the possession of an office and discharging his duties under color of right, a person claiming to be de jure entitled to the same office cannot sue for the salary or fees of the office, without first establishing his right to the office by quo warranto, as otherwise it would permit him to try the title to an office in a collateral proceeding to which the holder of the office under color of right was not a party.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 80.*]

6. MANDAMUS (§ 8*)—OBTAINING OFFICE—REMEDY BY QUO WARRANTO.

Quo warranto being aptly designed to try title to, and, in cases of dispute, obtaining possession of, an office, mandamus does not lie to gain possession or to settle such title.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 23; Dec. Dig. § 8.*]

7. PLEADING (§ 17*)—ARGUMENTATIVE DENIALS.

Averments in answer to complaint of a fireman for his salary as fire chief and expert fireman that he surrendered his office as fire chief and at the same time abandoned his position as member of the force are good as argumentative denials.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 38; Dec. Dig. § 17.*]

8. OFFICERS (§ 94*)—COMPENSATION—NATURE OF RIGHT.

The salary of an official position belongs to the officer occupying such position as an incident to the office, and does not depend upon his performance of the duties of the office.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 136-138; Dec. Dig. § 94.*]

9. MUNICIPAL CORPORATIONS (§ 199*)—FIREMEN—COMPENSATION AND REMOVAL.

Where a statute makes provision for the chief of fire force and firemen, their appointment, mode of compensation, and proceedings for removal, their duties are of a public nature, and so far official that one holding a position ei-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

¹ Rehearing denied.

ther as chief or fireman is entitled to his salary as an incident to the position, whether he performs the duties of such position or not.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 546; Dec. Dig. § 199.*]

10. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULINGS ON DEMURRER.

Error in overruling a demurrer to paragraphs of an answer is harmless where all the facts therein alleged were provable under the general denial, also pleaded.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4102; Dec. Dig. § 1040.*]

11. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—RULING ON DEMURRER.

Where no evidence was given in support of the allegations of an answer, error in overruling a demurrer thereto was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1040.*]

12. OFFICERS (§ 63*)—ABANDONMENT OF OFFICE—ACTS UNDER COERCION.

Acts done under coercion cannot be held to be an abandonment of office.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 94; Dec. Dig. § 63.*]

13. APPEAL AND ERROR (§ 1010*)—QUESTIONS OF FACT—FINDINGS.

Where the complaint stated two causes of action, and the evidence to support the second was uncontradicted, a finding and judgment for defendant on both counts must be reversed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3982; Dec. Dig. § 1010.*]

Appeal from Circuit Court, Parke County; Gould G. Rhenby, Judge.

Action by Elias F. Leonard against the City of Terre Haute. From a judgment for defendant, plaintiff appeals. Reversed, with directions to grant a new trial.

R. B. Stimson and White & White, for appellant. Frank S. Rawley, Howard Maxwell, J. S. McFaddin, and Fred W. Snyder, for appellee.

LAIRY, J. The appellant brought an action in the Vigo circuit court against the city of Terre Haute. The case was taken on a change of venue to the Parke circuit court, where a trial was had, and a judgment rendered in favor of appellee.

The complaint is in two paragraphs, and, omitting the formal parts, is as follows:

"(1) Elias F. Leonard complains of the city of Terre Haute, and for cause of action alleges that the defendant is a city of the third class, and for more than 20 years has maintained and still maintains a paid fire department; that said city has created and maintains a fireman's pension fund, which fund is made up largely of money deducted from the salaries of the members of said fire department; that on the 5th day of December, 1904, the plaintiff was appointed by the board of public safety to the office of chief of said fire department, and served in that office until the 4th day of September, 1906; that the salary of said chief of said fire department at the time of plaintiff's appointment to said

office as aforesaid was, and ever since has been, \$100 per month; that out of plaintiff's salary as such chief the usual sums were deducted and paid into said pension fund; that on the 4th day of September, 1906, the board of public safety of said city unlawfully attempted to depose said plaintiff from said office of chief of said fire department by an order deposing him from said office, which order was made without a hearing, without any notice to plaintiff, and for political reasons only; that on account of said unlawful order of said board, and for no other reason, the defendant struck plaintiff's name from the pay roll of said fire department, and refused and still refuses to pay plaintiff his salary as chief of said fire department; that the salary of said office becomes due and is payable monthly at the end of each calendar month; that the salary accruing to plaintiff as chief of said fire department from the 31st day of August, 1906, to the 1st of December, 1906, is due and unpaid, in the principal sum of \$300, with interest on the installments thereof as they become due.

"(2) Elias F. Leonard complains of the city of Terre Haute, and for reason of action alleges that the defendant is a city of the third class and for more than 20 years has maintained and still maintains a paid fire department; that said city has created and maintains a fireman's pension fund, which fund is made up largely of money deducted from the salaries of members of said fire department; that the plaintiff is an expert fireman, and for more than 20 years has been, and still is, a member of said fire department; that the salary of an expert fireman in said department since June, 1906, has been and still is \$67.50 a month, which salary becomes due and is payable at the end of each calendar month; that from the 5th day of December, 1904, to the 4th day of September, 1906, plaintiff acted as chief of said fire department at a salary of \$100 a month; that on the 4th day of September, 1906, the board of public safety of said city made an order deposing plaintiff from acting as chief of said department, which order was made for political reasons only; that no charge has been made against plaintiff as member or as chief of said department, and no order has been made dismissing plaintiff from said fire department; that the defendant by reason of said order of the board of public safety of said city deposing plaintiff from acting as chief of said fire department, and for no other reason, has unlawfully stricken plaintiff's name from the pay roll of said department, and has refused, and still refuses, to pay to plaintiff the salary that has accrued to him as an expert fireman of said department from the 3d day of December, 1906, which amounts to \$197.75; that the sum now due and unpaid on account of said salary is \$197, principal, and interest on the several installments of said salary as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

they become due. Wherefore, plaintiff demands judgment against the defendant for \$350, and for all proper relief."

To this complaint appellee filed three paragraphs of answer. The first was a general denial, and the two other paragraphs were as follows:

"(2) Comes now the defendant, and for further and second answer to plaintiff's complaint says that for a long time prior to the 5th day of September, 1904, plaintiff was a member of the fire department of the city of Terre Haute; that on the 5th day of September, 1904, he became and was an applicant for the place of chief of the fire department of said city of Terre Haute, and was by the board of public safety of said city duly appointed to the office of chief of the fire department, and that upon said day said plaintiff duly qualified, and took possession of the office of chief of said fire department; and that he continued as chief of said fire department until the 3d day of September, 1906, when the said plaintiff surrendered and abandoned said office to John Kennedy, now chief of said fire department, and has not since said time acted as chief of said fire department, nor attempted to fill the office of chief of said fire department.

"(3) Comes now the defendant, and for further answer to the second paragraph of plaintiff's complaint says that for a long time prior to the 5th day of September, 1904, plaintiff was a member of the fire department of the city of Terre Haute, defendant herein; that on the 5th day of September, 1904, plaintiff became an applicant for, and was duly appointed, chief of the fire department of said city, and he continued upon his duties as chief of said fire department until the 3d day of September, 1906; that upon the 3d day of September, 1906, plaintiff surrendered and abandoned the office of chief of said fire department, and as a member of said fire department, and has not been a member of said fire department since said time, nor acted in the capacity of a member of said fire department since said time. Wherefore, defendant asks judgment for costs."

After the case was venued to Parke county the appellant filed two paragraphs of supplemental complaint, in the first of which he alleged that since the filing of the first paragraph of the original complaint, and up to the time of the filing of the supplemental complaint, he had continued to be chief of the fire force of the city of Terre Haute, and that as such chief his salary had continued to accrue since the filing of the complaint, and that the city refused to pay his salary so accrued, and he prayed judgment for such accrued salary. The second paragraph of supplemental complaint was, in substance, the same as the first, with the exception that the salary accrued since filing the second paragraph of complaint was the salary due him as a member of the fire force of said city.

The appellee filed three paragraphs of answer to the supplemental complaint and each paragraph thereof. The first was a general denial. The second stated, in substance, that on the 3d day of September, 1906, the appellant wholly abandoned and surrendered the office of chief of the fire department of said city, and also at said time wholly abandoned and surrendered the office of member of the fire department of said city, and has not since said date acted as chief of said department or as a member thereof. The third stated, in substance, that the appellant was at all times since the 1st day of September, 1906, an able-bodied man, that he had made no effort since said date to obtain employment, and that, had he done so, he could have obtained employment and could have earned \$100 for each month since that date. The appellant replied to the second and third paragraphs of answer to the supplemental complaint. The first and second paragraphs of reply were general denials, and the third paragraph of reply admitted that appellant had performed no services as chief or as a member of said Terre Haute fire department since the order was made by the board of public safety of said city deposing him as chief of said department, but that he had held himself in readiness to perform said services ever since said order was made, and had been prevented from rendering said services by the defendant, its officers, and employes. A separate demurrer to each paragraph of the complaint was overruled, which ruling is assigned in this court as cross-error by appellee. This question will be first considered, for the reason that, if neither paragraph of the complaint states a cause of action, the judgment below would necessarily be affirmed.

The appointment and discharge of the officers and members of the fire force of cities of the class to which appellee belongs is regulated in this state by statute. Section 8779, Burns' Ann. St. 1908, provides for appointment of a board of public safety. The next section (8780) provides that such board of public safety shall make certain appointments, and among such appointments are a chief of the fire force and all other officers, members, and employes of such force. The next section, No. 8781, contains the following provision: "Every member of the fire and police forces and all other appointees of the commissioners of public safety shall hold office until they are removed by the board." The remainder of the section provides the causes for which and the proceedings by which such appointees may be removed. It is suggested that the first paragraph of the complaint is insufficient for the reason that the statute under consideration does not apply to the chief of the fire department, so as to prevent his removal from the position as chief of the force, and that a fire chief may be removed from such position for political reasons, and without conforming to the provi-

sions of the section of the statute as to charges, notice, and hearing. As we construe the statute we cannot agree with this contention. The chief of the fire force is an office created by the statute, and the board of public safety is empowered to fill this office by appointment. This officer is one of the appointees of said board, and under the provisions of section 8781, above referred to, such board would have no power to remove such appointee from the position to which he had been appointed for political reasons, or in any other manner than as provided in said section. The second paragraph of the complaint proceeds upon the theory that appellant was a member of the fire department of the city of Terre Haute, and that he was a member of the force before his appointment as chief of said force, and that, by reason of said appointment, he did not cease to be a member of said fire force; that, even though the board would have a right to remove him as fire chief, such removal would not operate to remove him from the force. Both paragraphs proceed upon the theory that the action of the board of public safety of said city in discharging the plaintiff without notice or hearing was absolutely void, and that, notwithstanding the action of said board, he still continued to be a member of the fire force, and also chief of the fire force, by virtue of his former appointment to that office.

It is contended by appellee that both paragraphs are insufficient, for the reason that it appears that the appellant before the commencement of this action had been removed from the position as chief of the fire force, and also from the fire department of the city of Terre Haute; that, not being in possession of said office, he could not bring an action for his salary until he had first established his title to said office by an action of quo warranto. This question does not arise upon the demurrer to the complaint. It does not appear from the face of the complaint that the board of public safety had appointed any other person to the office of the fire force, or that any other person was in possession and discharging the duties of such office under color of right. The demurrer admits the allegations of the complaint. It admits, therefore, that appellant was appointed, as charged in the first paragraph of complaint, to the position of chief of the fire force by the board of public safety on the 5th day of September, 1904, and that on the 4th day of September, 1906, the board of public safety of said city attempted to depose him from said office by an order to that effect made solely for political reasons, and without any notice or hearing. As to the second paragraph of complaint, the demurrer admits the averments that the appellant was at the date of filing his complaint, and has been for more than 20 years, a member of the fire department of the city of Terre Haute, and that no charge had ever been made against him

as a member or as chief of said fire department, and that no order had been made dismissing him from said department. Under our statutes bearing upon the subject, we hold that the order made by the board of public safety of the city of Terre Haute by which it was attempted to remove appellant from the position of fire chief without notice or hearing was absolutely void and ineffectual for that purpose. *Roth v. State ex rel.*, 158 Ind. 242, 63 N. E. 460. We also hold that each of the paragraphs of the complaint state facts sufficient to constitute a cause of action. The appellant could not, of course, recover upon both paragraphs of the complaint, but might recover upon one or the other as the facts might warrant.

We recognize the principle of law announced in the line of cases which hold that, when a de facto officer is in possession of an office and discharging its duties under color of right, a person claiming to be a de jure officer, and as such entitled to the possession of the same office, cannot maintain an action for the salary or fees incident to the office. He must in such case first establish the right to the office by a quo warranto proceeding. To permit him to sue for the salary of the office under such circumstances would be to permit him to try the title to an office in a collateral proceeding to which the person in charge of the office under color of right was not a party. *Hagan v. Brooklyn*, 126 N. Y. 643, 27 N. E. 265; *Van Sant v. Atlantic City*, 68 N. J. Law, 449, 53 Atl. 701. The case of *State ex rel. Worrell v. Carr*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163, is not in conflict with the cases last cited. In that case, *Worrell*, in addition to being a de jure officer, was occupying apartments set apart to him in the state house, and was actually discharging the duties of the officer during the time the salary sued for accrued. He was therefore during said time both a de jure and a de facto officer, and was permitted to maintain a mandamus proceeding to compel the auditor of the state to issue a warrant for his salary, notwithstanding the office and its salary had been claimed by another during said time. The case at bar is similar to the case of *McGee v. State ex rel. Axtell*, 103 Ind. 444, 8 N. E. 139, and the same principle applies here. *McGee* resigned as county superintendent of schools and the township trustee appointed a relator to fill the vacancy. After relator had qualified, he demanded of his predecessor the possession of the books, papers, and furniture belonging to the office, and, being refused such possession, brought suit for a writ of mandate to compel his predecessor to turn them over to him. The court says: "Proceedings in quo warranto may be resorted to, and are aptly designed for the purpose of trying title to, and in cases of dispute obtaining possession of, an office, and because an ample remedy is thus afforded mandamus does not lie for the purpose of gaining possession or settling such

title." High, Ex. Leg. Rem. § 49, et passim. "The application in this case does not proceed upon the theory that there is an existing dispute about the title to or possession of the office. It avers that appellant resigned, and that appellee was duly appointed and qualified in his stead to fill his unexpired term, and that he entered upon the duties of the office. This presents no question of conflicting claims. The question presented related to the refusal of the appellant to turn over the proper records to his successor, and the demurrer in effect admitted that the appellee is his successor, and that the appellant's right is at an end. Admitting that he had resigned, and that the appellee was duly appointed his successor, there was but one thing more required of that appellant, and that was to turn over to him the records and furniture pertaining to the office. Failing to do this, mandamus was the proper remedy." *Johnson v. Smith*, 64 Ind. 275.

In the case at bar the complaint does not proceed upon the theory that there is an existing dispute about the title or the possession of an office. It is not disclosed by the complaint that any person other than appellant had ever been appointed to said office, or that any other person was in possession thereof, or discharging the duties appertaining thereto under color of right. As it does not appear from the pleadings that the title to an office was in dispute between adverse claimants, and as the complaint proceeds upon the theory that the appellant was undisputed claimant to the office, there can be no grounds for holding that under such circumstances he cannot maintain an action for the salary incident thereto.

Demurrers were filed and overruled to the second and third paragraphs of answer to the complaint, and also to the second and third paragraphs of answer to the supplemental complaint. The first and second paragraphs of answer to the complaint and the second paragraph of answer to the supplemental complaint contain substantially the same averments, and will be considered together. They each aver, in substance, that appellant on the 3d day of September, 1906, surrendered and abandoned his office of chief of the fire force, and that at the same time he abandoned his position as a member of the force, and that since that time he has not acted as chief or performed any duties as fireman. These answers are good as argumentative denials, and for that reason no prejudicial error was committed in overruling the demurrers thereto. *Kluney v. Dodge*, 101 Ind. 573; *Flanagan v. Reitemier*, 26 Ind. App. 243, 59 N. E. 389. The salary of an official position belongs to the officer occupying such position as an incident to the office, and does not depend upon his performance of the duties of the office. The statute makes provision for the chief of the fire force. It also provides for their appointment, the manner of fixing their compensa-

tion, and the proceedings by which they can be removed. Their duties are of a public nature. We therefore conclude that the duties of the chief of the fire force or a member of the department are so far official in their character that one holding either position is entitled to draw his salary as an incident to such position, whether he performs the duties of such position or not. *Andrews v. City of Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835. If an officer or a member of the force fails to perform the duties of the position, he can be removed for cause, and his right to compensation will then cease. The facts averred in these paragraphs of answer are therefore insufficient to confess and avoid either paragraph of the complaint, but, as every fact therein averred could have been proved under the general denial, the error in overruling the demurrer to these paragraphs was harmless. *State ex rel. Trustee v. Osborn et al.*, 143 Ind. 671, 42 N. E. 921; *Hiatt v. Town of Darlington*, 152 Ind. 570, 53 N. E. 825; *Flanagan v. Reitemier*, supra. As there was no evidence offered by appellee in support of the third paragraph of answer to the supplemental complaint and as the evidence of appellant on that subject did not tend to prove any of its allegations, the error of the court, if any, in overruling a demurrer thereto was harmless.

The only issues of fact that were presented to the court for trial were the issues made upon the first and second paragraphs of the complaint, and the first and second paragraphs of the supplemental complaint by the answers in general denial thereto, and the only evidence that could be considered by the court in reaching its decision was such evidence as could be properly admitted under the general denial.

The next question to be considered is, Does the evidence under the issues presented by the pleadings sustain the decision of the trial court? The evidence introduced by appellant tends to prove every material allegation of the complaint, and this is undisputed, except in so far as this evidence, tending to show that appellant abandoned his office as fire chief and his position on the fire force, may be considered. The evidence on this subject shows without dispute that on the 3d day of September, 1906, appellant was called to the city hall where he met Mr. Kennedy, and learned that Kennedy had been appointed chief of the fire force, and that, after learning this fact, appellant went with Mr. Kennedy and introduced him to the men on the fire force as the new chief; and that afterwards, when they arrived at the office, appellant delivered the keys to Kennedy, saluted him as chief, and asked to be assigned to duty. Whether these facts would show an abandonment of the office of chief of the fire force would depend upon whether they were done voluntarily or under coercion. The cir-

cumstances surrounding these acts and the acts themselves are of such a nature that a man fair minded, intelligent, and honest might reach the conclusion that they were done voluntarily, while another man equally fair minded, intelligent, and honest might reach a different conclusion. If the judgment below rested only upon the first paragraph of the complaint, we could not disturb it upon the evidence. There was, however, a judgment against the appellant upon both paragraphs of complaint, and we find no evidence which proves or even tends to prove that he ever abandoned his position as a member of the fire force. There is no evidence that appellant at any time either by word or conduct indicated an intention to abandon his position on the force. All of his acts and conduct disclosed by the evidence indicate the opposite intention. At the time he turned over the keys he reported for duty, and, according to appellant's testimony, he reported for duty several times afterwards, the last time being on November 17, 1906, at which time he was told by Kennedy that he would be notified when Kennedy was ready to assign him to duty. In so far as Mr. Kennedy testified on the subject, he corroborated the appellant, and his testimony is not disputed by any other witness. There is no evidence which can be considered under the issues as formed which tends to dispute or contradict the evidence which clearly sustains every material allegation of the second paragraph of complaint.

The judgment of the trial court is reversed, with directions to grant a new trial.

(48 Ind. App. 448)

STRAUSS et al. v. YEAGER. (No. 7,144.)¹
(Appellate Court of Indiana. Feb. 2, 1911.)

1. COURTS (§ 18*)—JURISDICTION—SUBJECT-MATTER.

Where a paragraph of a complaint, asking specific performance of a contract for the purchase of real estate located in Illinois, is abandoned, and plaintiff relies on his right to recover the price of the land, a circuit court in Indiana has jurisdiction of the action.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 18.*]

2. VENDOR AND PURCHASER (§ 303*)—ACTION FOR PURCHASE MONEY—CONDITION PRECEDENT—TENDER OF PERFORMANCE.

Where a contract for the sale of realty must be dealt with as an entirety, and its provisions are concurrent and dependent, a tender of a merchantable title is a condition precedent to the enforcement of the seller's demand for payment of any part of the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 831; Dec. Dig. § 303.*]

3. CONTRACTS (§ 171*)—CONSTRUCTION—ENTIRE AND INDIVISIBLE CONTRACTS.

A contract is not entire and indivisible because embraced in one instrument and signed by the same parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 754; Dec. Dig. § 171.*]

4. VENDOR AND PURCHASER (§ 303*)—ACTION FOR PURCHASE MONEY—CONDITIONS PRECEDENT—TENDER OF CONVEYANCE.

Where a covenant to convey is the consideration for the obligation of a purchaser to pay, a tender of conveyance is not essential to the collection of the debt.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 852; Dec. Dig. § 303.*]

5. CONTRACTS (§ 171*)—CONSTRUCTION—"ENTIRE CONTRACTS."

A contract is entire, when by its terms, nature, and purposes, it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754-757; Dec. Dig. § 171.*]

For other definitions, see Words and Phrases, vol. 3, p. 2411; vol. 8, p. 7561.]

6. CONTRACTS (§ 171*)—CONSTRUCTION—"DIVISIBLE CONTRACT."

A divisible contract is one in its nature and purposes susceptible of division and apportionment having two or more parts in respect to matters and things embraced by it, and not necessarily dependent on each other, nor is it intended by the parties that they shall be.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 754; Dec. Dig. § 171.*]

For other definitions, see Words and Phrases, vol. 8, p. 2147.]

7. VENDOR AND PURCHASER (§ 303*)—ACTION FOR PURCHASE MONEY—CONDITIONS PRECEDENT—TENDER OF CONVEYANCE.

Where, under a contract for the sale of realty, an installment of the purchase money was to be paid at a certain date, and it was provided that if the title was not merchantable at that time, the vendor should have sufficient time to correct all defects, but that the date for the closing of the deal should not be delayed beyond a certain date subsequent to that named for the payment of the first installment, the contract was divisible, and the vendor was entitled to recover the first installment of the price prior to the date named for the conveyance without tendering a conveyance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 832; Dec. Dig. § 303.*]

8. VENDOR AND PURCHASER (§ 75*)—PERFORMANCE OF CONTRACT—TITLE OF VENDOR.

A purchaser of land may contract to accept a defective title or to make payments before obtaining title, and, if he does so, he cannot be heard to complain that another rule would have been applicable in the absence of such agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 117; Dec. Dig. § 75.*]

9. PLEADING (§ 204*)—DEMURRER—GROUNDS—PLEADING GOOD IN PART.

If a complaint is good in part and entitles complainant to any relief, it will withstand a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 486; Dec. Dig. § 204.*]

10. PLEADING (§ 252*)—AMENDMENT—EFFECT.

Under the rule that an amended complaint, in the absence of some agreement or waiver, affords the relief as of the date of the beginning of the suit without reference to the date of the amended pleading, where an action for an installment of the purchase price of land was commenced between the time for the payment of such installment and the date at which the vendor was required to tender a conveyance,

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
²Rehearing denied. Transfer to Supreme Court denied.

an amended complaint filed after the latter date is not insufficient, though it does not allege a tender of conveyance by the vendor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 736; Dec. Dig. § 252.*]

11. STATUTES (§ 195*)—CONSTRUCTION—EXPRESS MENTION AS IMPLIED EXCLUSION.

In the construction of statutes, what is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 273; Dec. Dig. § 195.*]

12. VENDOR AND PURCHASER (§ 302*)—REMEDIES OF VENDOR—ACTION FOR PRICE—EFFECT OF PROVISION IN CONTRACT.

A provision in a contract for the sale of land that if either of the parties shall fail to perform the stipulations thereof, the other parties may by suit enforce the specific performance by the defaulting party, the execution of a deed, and the performance of any other act required, or may recover from the defaulting party, with interest and attorney's fees, without relief from valuation and appraisal laws, whatever damages may have been suffered by reason of the default, does not preclude the vendor's right of action for an installment of the price when it becomes due.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 302.*]

13. SPECIFIC PERFORMANCE (§ 102*)—NATURE OF RELIEF.

A suit for specific performance of a contract is an equitable action, and ordinarily seeks performance of a contract according to the precise terms agreed upon, or substantially in accordance therewith.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 318; Dec. Dig. § 102.*]

14. CONTRACTS (§ 9*)—REMEDY—EFFECT OF PROVISION OF CONTRACT.

A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties so to do.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 9.*]

15. CONTRACTS (§ 147*)—CONSTRUCTION—INTENT OF PARTIES—LANGUAGE OF CONTRACT.

The leading purpose in the construction of any contract is to ascertain the intention of the parties from the language employed as understood in its plain, ordinary, and popular sense, unless there is something in the contract to indicate a different meaning.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. § 147.*]

16. CONTRACTS (§ 162*)—CONSTRUCTION—CONSTRUING CONTRACT AS A WHOLE.

In construing a contract, effect must be given to all its provisions and parts where possible, and no part will be rejected unless absolutely repugnant to the general intent, and the instrument should be made consistent by giving to all the parts their due weight.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 744; Dec. Dig. § 162.*]

17. CONTRACTS (§ 143*)—CONSTRUCTION—LAW AS PART OF CONTRACT.

The law applicable to a contract is to be considered in construing it.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 143.*]

18. VENDOR AND PURCHASER (§ 302*)—ACTION FOR PURCHASE MONEY—RIGHT OF ACTION.

Where plaintiffs contracted to sell to defendant certain land, and by the same contract

defendant agreed to sell personalty to plaintiffs, on the refusal of defendant to perform his contract as to the sale of the personalty, the plaintiffs are entitled to recover in money a matured installment of the price of the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 302.*]

Appeal from Circuit Court, Benton County; J. T. Saunderson, Judge.

Action by Simon J. Strauss and others against Edwin S. Yeager. From a judgment for defendant, plaintiffs appeal. Reversed, with instructions.

Chas. M. Snyder, Odell Oldfather, and Arthur F. Biggs, for appellants. Fraser & Isham, for appellee.

FELT, J. This is an appeal from the Benton circuit court from a judgment of that court sustaining a demurrer to the complaint, which was in three paragraphs. The errors assigned and argued by counsel for appellants are the sustaining of appellee's demurrer to appellants' amended first and "third and further" paragraphs of complaint.

In the amended first paragraph of complaint it is alleged, in substance, that plaintiffs were partners doing business under the firm name and style of Strauss Bros. & Co., and that on the 31st day of October, 1906, the plaintiffs entered into a certain contract in writing with the defendant, which contract was filed as an exhibit and made a part of the complaint; that by the terms of said contract the defendant, now appellee, agreed to pay the plaintiffs on November 13, 1906, the sum of \$9,000, which was due and unpaid; that by the mutual mistake of the parties to said contract and the scrivener who wrote the same, it bears date, "November 31, 1906," when, in truth and in fact, it was executed on the 31st day of October, 1906; that on the 18th day of November, 1906, and thereafter, the plaintiffs were ready and willing to perform all the conditions of said contract to be by them performed, and offered to perform all the conditions thereof accrued to that date, and on that date demanded of appellee the performance of each of the conditions on his part to be performed, which had accrued to that date; that appellee refused to perform the conditions upon his part to be performed, and prevented the plaintiffs from performing the conditions to be by them performed. On this paragraph the plaintiffs pray judgment for \$10,000, and all proper relief.

The appellants' "third and further paragraph of complaint" alleges the facts stated in said amended first paragraph of complaint and, in addition thereto, states that by the terms of said contract the appellee sold, and appellant bought, a stock of goods owned by the appellee and located at Earl Park, Ind., which stock was to be invoiced at actual cost of the goods, except damaged or unsalable,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

or out of style goods, which were to be taken at their actual value; that the possession of said stock was to be delivered to appellants on November 13, 1906, and inventory was to have been made of the stock on that date or the day following; that according to the intention of the parties executing said contract, the amount of the value of said stock of goods, when ascertained, was to be applied upon the debt of \$9,000, to be paid by appellee to the appellants on November 13, 1906; that on the 18th day of November, 1906, appellants demanded of appellee possession of said stock of goods at the place in Earl Park, Ind., where the same was situated, and then and there offered to proceed with the inventory thereof, and demanded of appellee the performance of his contract, and offered to perform all the conditions of said contract by appellants to be performed, which had accrued to that date; that appellee refused to perform any of the conditions of said contract on his part to be performed, and then and there repudiated said contract and denied the execution thereof, and refused to deliver the stock of goods to the appellants, and refused to proceed with the inventory or to permit plaintiffs so to do, and refused to pay said sum of \$9,000, or any part thereof, and ordered appellants from the premises; that the appellants were ready, willing, and able to do and perform all of the conditions of said contract accrued to the date of the commencement of this action, which they were to perform, and have actually performed all such conditions, except those the appellee prevented them from performing, and stand ready to do and perform each and singular the conditions of the contract on their part thereafter to be performed in accordance with the provision thereof. This paragraph of complaint also avers the mutual mistake as to the date of the contract, and prays that the same be reformed and made to bear the date of October 31, 1906, and demands judgment in the sum of \$10,000. The original action was filed on the 14th day of November, 1906, and the paragraphs of complaint now under consideration were filed on October 1, 1907. The demurrer challenges the sufficiency of the facts alleged, and also the jurisdiction of the court.

The contract filed as Exhibit A states in substance that the first parties (appellants) sold to the second party (appellee) for the sum of \$29,850 certain real estate in Iroquois county, state of Illinois, describing the same, which real estate the first parties agreed to convey or cause to be conveyed to the second party by deed of general warranty, free from all incumbrances, except such as were specified in the contract. The first parties agreed to furnish an abstract showing a merchantable title to the real estate and fixed the time for the examination of the same. The purchase price was to be paid \$50 in cash, \$9,000 to be paid in cash to first parties

on November 13, 1906, and \$1,000 to be paid in cash March 1, 1907, and the balance was to be secured by mortgage upon the real estate, and evidenced by notes bearing date of March 1, 1907.

The contract contains the following: "Said deed, abstract, deferred payments, notes, mortgages and insurance policy shall be delivered, and this contract shall be closed on or before the first of March, 1907, at the office of Strauss Bros. & Company, at Ligonier, in the State of Indiana." It also provided that if the title was not merchantable at that time, the first parties should have sufficient time thereafter to correct all such defects, either by suit to quiet title, or otherwise, but that the date for closing of the deal should not be delayed beyond March 1, 1907, on account of defects in the title, and provided that in case defects were found, a bond should be executed to indemnify the second party against any loss or damage on account thereof. The contract contains the following provision: "If either of the parties shall fail or refuse to perform the stipulations hereof on their part, then the other parties may by suit enforce the specific performance by the defaulting party of this contract, the execution of a deed as herein provided, and the performance of any other act hereby required of the defaulting parties, or may at their option recover from such defaulting party, with interest and attorney's fees without relief whatever from valuation and appraisement laws, whatever damages they may have suffered by reason of such default." Following this portion of the contract, we find a provision stating that: "It is further agreed that in consideration of the foregoing the second party hereby sells and the first party hereby buys the stock of goods now owned by the second party, which is located at Earl Park, Indiana, which stock is to be invoiced at actual cost (no chrg. for freight or cartage) except such goods as are damaged or unsalable on account of style which shall be taken at value." The contract further provides: "Said stock to be turned over to Strauss Bros. & Co. on November 13, 1906, and inventory to be made, starting on the 13th of November or the 14th"—and states that each party shall select an appraiser.

The contention of appellee that the court did not have jurisdiction cannot be approved. This may have been a sound argument as applied to the amended second paragraph of complaint, which was for specific performance of the contract, which showed the purchase of real estate in Illinois, but this paragraph has been abandoned by appellants, and we have to consider only the amended first and "the third and further" paragraphs. These paragraphs seek a recovery of a part of the purchase money of the Illinois real estate upon the executory contract. Neither paragraph shows that appellants have, or tendered title. Appellee contends that a tender of a merchantable title is a condition

precedent to the enforcement of the demand for payment of any part of the purchase money. If the contract is one that must be dealt with as an entirety, and its provisions are concurrent and dependent, then we think the weight of authority in this state supports such contention. *Irwin v. Lee*, 34 Ind. 319; *Goodwine v. Morey*, 111 Ind. 68, 12 N. E. 82; *Melton et al. v. Coffelt*, 59 Ind. 310; *Migatz v. Stieglitz*, 166 Ind. 364, 77 N. E. 400; *McCleary v. Chipman*, 32 Ind. App. 505-507, 68 N. E. 320. Where, however, the contract is divisible, and the obligations independent, if the parties to the agreement have provided that an installment of the purchase money shall be due before the time arrives for executing the deed, then suit may be maintained for the installment due, without tendering a deed or showing title. *Wile v. Rochester Imp. Co.*, 24 Ind. App. 422, 56 N. E. 928; *Claypool v. German Fire Ins. Co.*, 32 Ind. App. 540-545, 70 N. E. 281; *Keller et al. v. Reynolds*, 12 Ind. App. 383-387, 40 N. E. 76, 280; *Loud v. Pomona Land Co.*, 153 U. S. 564, 14 Sup. Ct. 923, 38 L. Ed. 822; *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, 736; *Leonard v. Bates*, 1 Blackf. 172, 173; *Cunningham v. Gwinn*, 4 Blackf. 341; *Beach on Mod. Law, Contracts*, vol. 1, § 731; 7 Am. & Eng. Enc. Law, p. 95; *Irwin v. Lee*, 34 Ind. 319; *Carver v. Fennimore*, 8 Ind. 135-137; *Basler v. Nichols*, 8 Ind. 260; *Harshman v. Paxson*, 16 Ind. 514; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248. A contract is not entire and indivisible because embraced in one instrument and signed by the same parties. *Pierson v. Crook*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. Where the covenant to convey is the consideration for the obligation to pay, a tender of conveyance is not essential to the collection of the debt. *Trimble v. Green*, 38 Ky. 353.

We are called upon to determine whether the covenants in the contract executed by appellants and appellee are dependent or independent; that is, on November 14, 1906, when this suit was filed, did the right of the appellants to maintain this suit, depend upon their prior performance of the covenant to convey, or upon a tender of a deed for the land? Did the appellants have the right to divide the contract and sue for the \$9,000, which by the terms thereof became due on November 13, 1906? We have purposely set out all the material provisions of the contract to enable us to properly determine this question. In *Loud v. Pomona Land Co.*, supra, on page 576 of 153 U. S., on page 932 of 14 Sup. Ct. (38 L. Ed. 822), the court, by Justice Jackson, said: "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous, it must be taken according to its

plain meaning, as expressive of the intention of the parties, and, under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, Which intent is disclosed by the language employed in the contract? * * *

In the learned note of Serj. Williams to the early case of *Pordage v. Cole*, 1 Saund. 320, it is said that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act."

In *Goldsborough v. Orr*, 21 U. S. (8 Wheat.) 217, 5 L. Ed. 600, it is said that: "Where the acts are stipulated to be done at different times the covenants are to be construed as independent of each other."

In *Goodwin v. Lynn*, 4 Wash. C. C. 714, Fed. Cas. No. 5,553, the rule is laid down, "that to ascertain whether covenants are dependent or independent, the intention of the parties is to be sought for rather in the order of time in which the acts are to be done, than from the structure of the instruments."

Volume 7, Am. & Eng. Enc. Law, on page 95, defines the two classes of contracts as follows: "A contract is entire when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provision and the consideration, are common each to the other and interdependent." "A divisible contract is one in its nature and purposes, susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, and not necessarily dependent upon each other, nor is it intended by the parties that they shall be."

In *Wile v. Rochester Imp. Co.*, 24 Ind. App. 425, 56 N. E. 928, this court uses language applicable to this case: "It is an action to recover installments of purchase money due; the time for payment of the last installment and for the execution of the conveyance by the plaintiff not having arrived at the commencement of the action. The promise to pay the installments, to recover the amount of which the action is brought, was not to be performed concurrently with the execu-

tion of a conveyance, but was an independent promise. Therefore it was not needed in the complaint to show performance, or tender of performance, or readiness and ability to perform on the part of the plaintiff." To the same effect is *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081.

It is our conclusion that this contract meets every requirement of a divisible contract, and that the obligation to pay the \$9,000 was an independent covenant not depending upon a tender of title. A party may contract to accept a defective title or to make payments before obtaining title, and, if he does so, he cannot be heard to complain that another rule would have been applicable in the absence of such agreement. *Ditchey v. Lee*, 167 Ind. 267-273, 78 N. E. 972; *McCleary v. Chipman*, 32 Ind. App. 505-507, 68 N. E. 320; *Pitman v. Conner*, 27 Ind. 387. Our Code provides (see section 376, *Burns' Ann. St.* 1908): "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegations be denied, the facts showing a performance must be proved on the trial." *Collins v. Amiss, Trustee*, 159 Ind. 593-595, 65 N. E. 906; *Watson v. Deeds*, 3 Ind. App. 75-77, 29 N. E. 151. If a complaint is good in part and entitled the complainant to any relief, it will withstand a demurrer. *Mitgatz v. Stieglitz*, 186 Ind. 361, 12 N. E. 82; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480, 8 N. E. 269; *Keller v. Reynolds*, 12 Ind. App. 383-387, 40 N. E. 76, 280.

The appellee contends that if tender of a deed was unnecessary when the suit was filed on November 14, 1906, it was necessary when the paragraphs of complaint, now under consideration, were filed on October 1, 1907, because the deed was due on March 1, 1907. *Irwin v. Lee*, *Leonard v. Bates*, *Ditchey v. Lee*, *supra*, and some other cases, are cited in support of this proposition. If no suit had been brought until after March 1, 1907, this proposition might avail appellee, but suit was begun on November 14, 1906, and the amended first and "third and further" paragraphs must be tested as of that date. The cases are clearly distinguishable from cases like the one at bar. An amended complaint, in the absence of some agreement or waiver, affords the relief obtainable on the facts alleged as of the date of the beginning of the suit, without reference to the date of the filing of the amended pleading. *Jordan v. Indianapolis Water Co.*, 159 Ind. 348, 64 N. E. 680; *Pitzele v. Reuping*, 32 Ind. App. 237, 68 N. E. 603.

We have yet to consider the effect of that portion of the contract which we have above set out on the subject of remedies. This action is a suit upon the contract to recover an installment of the purchase money. Can it be maintained, notwithstanding the provisions of the contract relative to remedies?

We might refuse to consider the effect of that provision of the contract as the same is not mentioned under points and authorities, and only referred to by the appellee in his statement of facts and in argument. However, the decision of the questions raised by the assignment of error involves the construction of the contract, and we deem it best to express our views upon the same in so far as involved in the ruling upon the demurrer to the complaint. Does the maxim, "*Expressio unius est exclusio alterius*," apply to the provisions of this contract relating to the remedies to be pursued in case of default by either party? In other words, are the appellants by this provision limited to a suit for damages for the breach of the contract, or to an equitable action for the specific performance of the contract as an entirety? This maxim has been applied to the construction of written instruments, such as deeds, wills, and leases, but nowhere have we found it applied to contracts, on the subject of remedies. *Broom's Legal Maxims* (8th Ed.) p. 650; *Wharton's Legal Maxims*, (2d Ed.) p. 171; 2 *Coke upon Littleton*, p. 210. Our courts have applied this principle to the construction of statutes. *Couchman, Adm'r, v. Prather et al.*, 162 Ind. 250-253, 70 N. E. 240; *Hart et al. v. Smith et al.*, 159 Ind. 182-189, 64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280; *Woodford et al. v. Hamilton et al.*, 139 Ind. 481-485, 39 N. E. 47. The reason for this rule is stated in 2 *Lewis' Sutherland Statutory Construction* (2d Ed.) § 491, as follows: "*Expressio unius est exclusio alterius*. This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the law-maker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusions; but otherwise, the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act. The maxim is applicable to a statutory provision which grants originally a power or right." If in the construction of statutes, "what is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act," or when the statute "grants originally a power or right," we may be aided by testing the provisions of the contract under investigation by applying the reasons assigned in the construction of statutes.

The contract specified the remedy of suit for damage for breach of its provisions, and also provided that "if either of the parties shall fail or refuse to perform the stipulations hereof on their part, then the other parties may by suit enforce the specific performance by the defaulting party of this contract, the execution of a deed as herein provided, and the performance of any other act here-

by required of the defaulting parties." The remedies specified in the contract are available under the law independent of the contract. No new remedy is suggested by it, and no authority has been cited showing the application of the doctrine of this maxim to contracts specifying remedies. Doubtless a contract could, by specific provisions, limit the remedies to be pursued in case of default, but that is not the question presented by the one before us. This is a question of implied exclusion. We have sought diligently for authority upon the application of the principle that "the express mention of one person or thing is the exclusion of another," to remedies named in a contract, and have found none. The reason of the rule excluding things not mentioned falls when applied to a contract specifying remedies available under the law independent of the contract.

We do not feel justified in extending the application of this maxim to a subject where it has not been applied so far as we are able to ascertain, and especially so as the reason of the rule does not seem to justify such application. We are strengthened in this conclusion by the holdings of our Supreme and Appellate Courts in construing the employer's liability act of 1893. While these decisions may not be directly in point here, they do, however, clearly distinguish the sections of the act, which enlarge the liability of railroads from those sections which only enact a liability already existing under the common law. In the latter case the liability given by the statute is held not to change or exclude the action given by the common law. *Thacker v. C. I. L. R. R. Co.*, 159 Ind. 82-86, 64 N. E. 605, 59 L. R. A. 792; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513, 55 N. E. 440; *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 251-256, 64 N. E. 476. That portion of the statute specifying a remedy where one existed under the common law before the enactment of the statute, is not exclusive, for the reason that a remedy already existed, and the act to that extent was not creative or in derogation of existing law. A suit for the specific performance of a contract is an equitable action, and ordinarily means the performance of a contract according to the precise terms agreed upon, or substantially in accordance therewith. *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Dow v. Northern R. R.*, 67 N. H. 1, 36 Atl. 510. But the language of the contract before us goes further than the mere statement of remedies by suit for damages, or specific performance. Following the provision for specific performance, we find the language "and the performance of any other act hereby required of the defaulting parties." The contract is divisible and the obligation to pay an independent covenant. When the time for payment arrived, and default was made, we do not feel warranted in saying that the provisions of the contract, independ-

ent of any implied exclusion, denied to appellants the remedy pursued. A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties so to do. The leading purpose in the construction of any contract is to ascertain the meaning and intention of the parties from the language employed. The words used are to be understood in their plain, ordinary, and popular sense, unless there is something in the contract to indicate a different meaning. *Beard v. Loftin*, 102 Ind. 408, 2 N. E. 129; *R. R. Co. v. Meeds*, 11 Ind. 273. In construing a contract, effect must be given to all its provisions and parts where possible, and no part will be rejected unless absolutely repugnant to the general intent. 1 *Beach on Contracts*, § 711; 17 *Am. & Eng. Enc. Law* (2d Ed.) p. 7, and cases cited; *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; *Ind. Nat. Gas & Oil Co. v. Grainger*, 33 Ind. App. 559, 70 N. E. 895. The instrument should be made consistent by giving to all its parts their due weight. *Cravens v. Eagle, C. N. Co.*, 120 Ind. 6, 21 N. E. 981, 16 *Am. St. Rep.* 298; *Boardman v. Reed*, 6 Peters, 328-345, 8 L. Ed. 415. The law applicable to a contract is to be considered in construing the same. *Pa. Co. v. Clark*, 2 Ind. App. 146, 27 N. E. 588, 28 N. E. 208. Giving effect to the provision for the enforcement of any act upon which default had occurred, as well as the other parts of the agreement, and considering the law applicable to a divisible contract, we do not think the provisions of the contract are sufficiently definite to authorize us to exclude any remedy given by law to the parties to the agreement.

The appellee obligated himself to pay appellants a sum of money upon a given date. This date was earlier than the date fixed for the delivery of the deed. When payment was refused and this suit filed, the "act" "required" of the appellee was payment of the money, according to the terms of the contract. To compel the performance of this act, this suit was begun, and while, according to the technical meaning of the term, the suit is not for specific performance of the contract as a whole, it does, however, follow the contract and seek the enforcement of that provision upon which default had occurred when the suit was begun. Considering all the provisions of the contract, and especially those fixing the time for the payment of the \$9,000, and the delivery of the deed, and the clause relating to the remedies to be pursued in case of default by either party, we think it reasonable to hold that the suit as brought was not denied the appellants by the provisions of the contract. The appellee cannot be relieved from his obligation to pay in money by his own refusal to pay in property by delivering to the appellants the stock of goods mentioned in the

contract. This leaves the two paragraphs of complaint under consideration standing upon the same footing. We therefore conclude that each paragraph was sufficient to withstand the demurrer.

The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the amended first and the third paragraphs of complaint, and for further proceedings in accordance with this opinion.

MYERS, C. J., and HOTTEL, LAIRY, ADAMS, and IBACH, JJ., concur.

(47 Ind. App. 64)

CITY OF LOGANSFORT v. SMITH.

(No. 6,859.)

(Appellate Court of Indiana, Division No. 1.
Feb. 1, 1911.)

1. ELECTRICITY (§ 16*)—INJURIES INCIDENT TO PRODUCTION—LIABILITY.

A city maintaining electric light wires suspended over its streets owes to employes of a railway company using a telephone system in its yards the duty to use a reasonable degree of care to avoid injury, and its duty does not depend on any franchise right of the company, and where the city negligently permitted the telephone wires to become heavily charged with electricity, causing the death of an employé of the company while attempting to use the telephone, it is liable.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 18.*]

2. NEGLIGENCE (§ 19*) — DANGEROUS SUBSTANCES—LIABILITY.

One who artificially collects on his own premises a substance which from its nature is liable to escape and cause injury to others must use reasonable care to restrain it, and is answerable for any injuries to another through its escape from its want of such care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 26; Dec. Dig. § 19.*]

3. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—ACTIONS—COMPLAINT.

A complaint in an action against a city, maintaining electric light wires over its streets, for the death of an employé of a railway company operating a line of railroad through the city, and, in connection therewith, railroad yards and a telephone system for use by the employes in carrying on the business of the company, which alleges that decedent was in a place where he had a right to be, and that he was killed while attempting to use a telephone because the telephone wires were heavily charged with electricity, which had escaped from the wires of the city, sufficiently shows that decedent received the fatal charge of electricity while he was engaged in the discharge of his duties as an employé of the company, and stated a cause of action.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

4. ELECTRICITY (§ 14*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED.

One maintaining electric wires over the streets of a city is liable for negligence in so constructing or maintaining the wires as to permit electricity to escape to the injury of others, and the care must at all times be proportionate to the danger.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.*]

5. ELECTRICITY (§ 17*)—INJURIES INCIDENT TO PRODUCTION—PROXIMATE CAUSE—CONCURRENT ACTS.

A city maintaining electric light wires over its streets, and permitting the escape of electricity to telephone wires strung by a railway company operating a road through the city, and thereby causing the death of an employé of the railway company while attempting to telephone, is liable for the accident, though the company's failure to properly guard its telephone wires from contact with electric light wires concurred in producing the death; the city having knowledge of the existing conditions.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 17.*]

6. NEGLIGENCE (§ 15*)—JOINT TORT-FEASORS—PARTIES.

A suit may be brought against one tort-feasor only, though concurrent negligence of others is shown to have contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 18; Dec. Dig. § 15.*]

7. TRIAL (§ 359*) — GENERAL VERDICT — SPECIAL VERDICT—EFFECT.

A general verdict finding every issuable fact essential to a recovery, cannot be disturbed by the answers to the interrogatories in the special verdict, unless they are in irreconcilable conflict with the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

8. ELECTRICITY (§ 19*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for the death of an employé of a railway company, killed by an electric shock while attempting to use the company's telephone in the railroad yards, owing to contact of the telephone wires with the electric light wires of defendant city, evidence held not to show that decedent had knowledge of the danger so as to render him guilty of contributory negligence in using the telephone.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

9. RAILROADS (§ 18*)—FRANCHISES—POWERS.

The operation of telegraph and telephone lines and necessary instruments is an incident to the operation of railroads, and is permissible by virtue of an implied power under an express grant giving authority to operate a railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 39-44; Dec. Dig. § 18.*]

10. ELECTRICITY (§ 15*)—INJURIES INCIDENT TO PRODUCTION—LIABILITY.

A city granted to a railway company, the right to construct and maintain railroad tracks and yards in the city. The company maintained telephone wires in the streets of the city in connection with its business. The city subsequently erected electric light wires in its streets, and employes of the electric light department knew of the existence and location of the telephone wires for many years. The electric light wires came in contact with the telephone wires and heavily charged them with electricity, causing the death of an employé of the company while attempting to telephone. Held, that the company was not a trespasser on the streets of the city because of the erection and maintenance of its wires in connection with its business, and the city owed to the employes of the company the duty to use care in the control and management of the electricity which it used.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

11. TRIAL (§ 295*)—ERRORS IN INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where the instructions, when considered as a whole, state the law correctly and fairly to both parties, errors in the instructions, if any, are harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

12. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

13. TRIAL (§ 59*)—ORDER OF PROOF.

The order of admission of testimony is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-145; Dec. Dig. § 59.*]

Appeal from Circuit Court, Cass County; Frank D. Butler, Special Judge.

Action by Lyman O. Smith, administrator of David J. Smith, deceased, against the City of Logansport. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. W. Funk, Antrim & McClintic, and E. P. Kling, for appellant. Robert J. Loveland and Kistler & Kistler, for appellee.

FELT, J. This is an appeal from the Cass circuit court from a judgment in favor of appellee, in the sum of \$1,500. The errors assigned are the overruling of the demurrer to the first, second, and third paragraphs of complaint, overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict, overruling the motion for a new trial and the motion in arrest of judgment. The first paragraph of the complaint is for alleged negligence of the appellant in constructing an electric light plant in the city of Logansport, resulting in an injury causing instant death to the appellee's decedent, David Judson Smith, an employé of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, in the capacity of switchman or yard brakeman.

It is alleged in substance that the appellant owned and operated an electric light plant in said city, and in so doing maintained throughout said city electric light wires highly charged with electricity, which were supported on poles about 15 or 20 feet above the surface of the street; that in placing the same along and upon Berkley street appellant "knowingly erected and maintained the same under, near, and adjacent to numerous telephone wires similarly supported on poles on and along Canal street," which street crossed said Berkley street; that telephones were connected with said wires and used by the employés of said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company in conducting its business; that said electric light wires on the 20th day of August, 1905, and during all the time the ap-

pellant operated its electric light plant, were highly charged with a dangerous and deadly current of electricity, and appellant carelessly and negligently, with full knowledge of the danger occasioned thereby, placed and maintained said wires in such position and proximity to said telephone wires that the dangerous and deadly current carried over appellant's electric wires was liable to be, and was by one of the city's wires, diverted and communicated to and over one of the telephone wires of the said railway company, to and into the telephone apparatus located in the yards of said company where the decedent was employed; that on said day decedent, while engaged in the discharge of his duties as such employé, without any knowledge or means of knowing the danger created by the position of the city's electric light wires and the said telephone wires, carefully and prudently took hold of one of said telephones for the purpose of using the same, and while so doing, by reason of the carelessness and negligence of appellant in so constructing and maintaining its electric light wires, as aforesaid, received a charge of electricity, which then and there and thereby passed into and through his body, causing instant death.

The second and third paragraphs of complaint are substantially the same as the first paragraph, except that the charge is negligence in the maintenance of the electric light wires for a long time previous to the accident, and at the time of the accident, in the negligent and dangerous manner described in the first paragraph of complaint. The ruling upon the demurrer to the several paragraphs of complaint may be considered together, as it is quite evident if one is good all are good.

The principal objections raised are (1) there is no averment showing that appellant granted to the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company the right to construct and maintain a private telephone system upon its streets; (2) the appellant owed no duty to the decedent, except to avoid a willful injury. We do not think the complaint bad for failure to specifically aver a grant from appellant to the railway company of the right to maintain its private telephone system upon its streets.

It appears from the complaint that the railway company was engaged in operating a line of railway within and through the city of Logansport, and that in connection therewith it operated railway yards at a point near the intersection of said Berkley and Canal streets; that the telephones were used by the employés of said company in conducting its business; and that the decedent at the time of his injury was in the employment of said company, and engaged in the discharge of his duties as such employé. This shows that he was in a place where he

had a right to be, and was not a trespasser. In such situation the appellant owed to him the duty not to injure him, if such injury could be avoided by a reasonable degree of care, and this duty did not depend upon any franchise right of his employer, the railway company. The city, by the averments of the complaint, is shown to have been engaged in the electric light business, using a dangerous and deadly agency—electricity—and to have negligently permitted the same to escape from its wires to the fatal injury of decedent.

Central Union Tel. Co. v. Sokola, Adm., 34 Ind. App. 429, on page 434, 73 N. E. 143, on page 144, was a suit for the negligent killing of a person caused by contact with a telephone wire which lay across a charged and uninsulated electric light wire. Liability was denied because the wire was on private property. The court, by Judge Robinson, said: "It is true it was upon private property, but it was a place where people had a right to go, and where they were liable to go. There is reason in such cases for making the distinction between liability for injuries to persons on private property and liability for injuries to persons using a public street. But if the person injured is not a trespasser, and has a right to be where he is when injured, the duty must extend to him to maintain the wires in a safe condition, although the wires are maintained by the company across private property. *Keasbey, Electric Wires* (2d Ed.) 247."

1 Thompson on Neg. § 696, states: "One who artificially collects upon his own premises a substance which, from its nature, is liable to escape and cause mischief to others, must use reasonable care to restrain it, and is answerable for any damages occasioned to others through its escape from a want of such care." To the same effect the following authorities: 1 Thompson on Neg. § 801; *City Elec. St. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N. E. 238, 32 L. R. A. 736; *Guinn v. Delaware & A. Tel. Co.*, 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668; *Fitzgerald v. Edison Elec. Illumin. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Van Winkle v. Am. Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472.

In *City Electric St. Ry. Co. v. Conery*, supra, the court said: "The main difference between the case last cited and this is the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires are suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the

streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it, to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended."

These authorities fully answer appellant's objection that appellee's decedent was an employé of the railway company, and that the city did not owe him the duty of furnishing him a safe place in which to work. This is true as a general proposition, but it does not change appellant's duty to the public to use care in controlling the dangerous current of electricity it was carrying over its wires. This duty extended to the decedent, and his relations to the railway company did not deprive him of that protection, or relieve appellant from liability if that duty was neglected. The cases where no public duty relative to some dangerous substance or agency is shown, and cases applying the doctrine that one who lets or sells property for use is not responsible to third persons for injuries sustained by reason of defects therein, when carefully considered, are found not to conflict with our holding, and in most of them the exception in regard to dangerous substances or agencies is expressly mentioned. This is true of *Griffin v. Jackson Light & Power Co.*, 128 Mich. 653, 87 N. W. 888, 55 L. R. A. 318, 92 Am. St. Rep. 496, relied upon by appellant upon this proposition. 1 Thompson on Neg. § 831, recognizes this distinction and says: "The boundary line excluding this class of cases was said to be this: That where there is no privity of contract between the plaintiff and defendant, and no public duty has been broken by the latter, the plaintiff cannot recover."

The further objection is urged to the second paragraph of the complaint that it does not aver that when appellee's decedent received the fatal charge of electricity he was engaged in the discharge of his duties as an employé of the railway company. The form of the averment of this fact is not to be commended, but we think a fair construction of the whole paragraph shows that he was so engaged at the time. It clearly appears that he was in a place where he had a right to be, and, under the authorities already cited, we think the paragraph states a cause of action.

In *Van Winkle, Adm. v. Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472, supra, in discussing the duty owed to third persons not at the time in the exercise of any legal right, the court said: "That in all cases in which

any person undertakes the performance of any act which, even done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case the guy wire was stretched over an open field across which people were accustomed to travel without objections by the landowner. The adjoining field was used as a ball ground. It was probable that, if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or bare licensee, as against the landowner, cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant." The doctrine of this case goes further than our holding, for the deceased was not a mere licensee, nor was he a trespasser. He was engaged in a lawful undertaking in a place where he had a right to be. Considering the danger attending the use of wires highly charged with electricity, and the resultant duty to the public, we find no conflict in the decisions cited by appellant's learned counsel, and the cases showing liability for negligence in so constructing or maintaining electric wires as to permit the current to escape to the injury of others. The care must at all times be proportionate to the danger. *City Elec. St. Ry. Co. v. Conery*, supra; *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Fitzgerald v. Edison E. Illumin. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, supra; *Keasbey Elec. Wires*, §§ 238-252; 1 Thompson on Neg. § 797.

The relative position of the telephone and electric light wires is not controlling. The fact that the appellant strung its wires at the time in the manner shown in the evidence in this case, or the fact that the railway company may have failed to properly guard its telephone wires from contact with the electric light wires, considered in connection with the knowledge of the existing conditions on the part of appellant, cannot shield the city from liability on account of its alleged negligence in the maintenance of its said wires in a position likely to result in injury to persons entitled to protection from the dangerous agency employed. *City Elec. St. Ry. Co. v. Conery*, supra; *Hebert v. Lake Chas. I., L. & W. W. Co.*, 111 La. 622, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; *McKay v. Southern Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; *Illingsworth v. Boston Elec. Light Co.*, 161 Mass. 583, 37 N. E. 778 25 L. R. A. 552-554. The fact that the railway company, the employer of

appellee's decedent, may have been guilty of concurrent negligence in so placing and maintaining its telephone wires upon the street, as alleged, may show the city and railway company to be joint tort-feasors, but cannot deprive appellee of the right to recover for actionable negligence on the part of appellant. *L. N. A. & C. R. Co. v. Lucas*, 119 Ind. 583-591, 21 N. E. 968, 6 L. R. A. 193; *Logansport & Wabash Val. Nat. Gas Co. v. Coate*, 29 Ind. App. 299-305, 64 N. E. 638; *Richmond Gas Co. v. Baker*, 146 Ind. 600-606, 45 N. E. 1049, 36 L. R. A. 683; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *New York, etc., R. Co. v. Robbins, Adm.*, 38 Ind. App. 172-183, 76 N. E. 804; *City of Elwood v. Laughlin*, 29 Ind. App. 667-673, 65 N. E. 18; 1 Thompson on Neg. (2d Ed.) § 499 et seq.; *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 21 N. E. 972, 16 Am. St. Rep. 323. The fact that the suit is brought against one tort-feasor only where concurrent negligence is shown contributing to the injury, is not ground for defense to such action. *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908; *Knouff v. City of Logansport*, 26 Ind. App. 202, 59 N. E. 347, 84 Am. St. Rep. 292.

It is contended by appellant that the court erred in overruling its motion for a judgment in its favor on the answer to the interrogatories, notwithstanding the general verdict. In support of this contention it is asserted that the appellee's decedent had knowledge before he used the telephone, resulting in his injury, that it was heavily charged with electricity and that in so using the same he was guilty of contributory negligence.

The general verdict finds every issuable fact essential to appellee's recovery, and cannot be disturbed by the answers to the interrogatories unless the same are in irreconcilable conflict therewith. We have examined the evidence upon this subject, and it discloses that on the day of the fatal accident, and but shortly before it occurred, a fellow workman informed the decedent that he had touched his finger to the "clapper" of a telephone and had received a shock, but no injury was shown to have resulted therefrom. The telephone so touched was in another part of the railway company's yards, and some two squares away from the telephone which the decedent attempted to use when he was killed. The decedent undertook to use the telephone in the usual and ordinary way, and while so doing he received such a powerful current of electricity that his death resulted instantly. The current was shown to have been from 1,100 to 1,150 voltage. There is no evidence showing that he had any knowledge of the connection between the telephone touched by his fellow workman and reported to him, and the one which he attempted to use. Neither is it shown that he had any special knowledge of electricity or of the location of the telephone

wires with reference to the electric light wires of the appellant. The evidence comes far short of showing such knowledge upon his part as to make his attempted use of the telephone contributory negligence. Neither can it be said as a matter of law against the general verdict, on the facts of this case, that deceased, in the use of the telephone assumed the risk. *Wright v. C. I. & L. Ry. Co.*, 160 Ind. 583-590, 66 N. E. 454.

It is further contended by appellant that the answers to interrogatories show that the private telephone wires of the railway company, the employer of the decedent, on the date of the injury, were by said railway company permitted to sag and come in contact with the wires of appellant, and thus became charged with the electricity which caused the death of decedent; and, further, that this negligence of the railway company was an intervening, responsible agent which cut off the line of causation, and relieved the appellant from any liability on account thereof. The facts which appellant relies upon to show an intervening, responsible agent cutting off the line of causation from the alleged negligence of the city do not show such intervening agent, but tend to show concurrent negligence on the part of the city and the railway company, making them joint tort-feasors. The appellee in such situation had the right to sue either or both parties, and the appellant cannot be relieved by showing that the railway company is also liable. The cases cited upon the proposition of an independent, intervening, responsible agent cutting off the line of causation, in our view of this case, are not in point, and need not be further considered. But if it be conceded (which we cannot do) that the negligence of the railway company in allowing its telephone wires to sag and come in contact with the electric light wires of the city brings the case within the rule of an intervening agent cutting off the line of causation, a well-recognized exception to the rule, when applied to the facts of this case, will prevent its affording appellant any relief. In *Indianapolis St. R. Co. v. Schmidt*, 35 Ind. App., on page 210, 71 N. E. 666, this court said: "If the circumstances are such that the intervention of the independent agent ought to have been foreseen, then such intervention does not operate to release the original wrongdoer from the consequences of his negligence." The length of time the telephone wires had been suspended upon the poles, with knowledge on the part of the city of their close proximity to its electric light wires, the tendency of wires to sag, the effect of heat and other elements upon suspended wires, and the danger of contact with the other wires when carrying high voltage currents of electricity, certainly indicate that the thing which did occur in this case was such as should have been foreseen, and would have been if that care and diligence required by the law had been exercised by

appellant. 1 *Thompson on Negligence*, §§ 54, 58; *L. R. Co. v. Lucas*, 119 Ind. 583-590, 21 N. E. 968, 6 L. R. A. 193; *Reid v. Evansville & T. H. R. Co.*, 10 Ind. App. 385-396, 35 N. E. 708, 53 Am. St. Rep. 391.

In the case of *Logansport & Wabash Nat. Gas Co. v. Coate*, 29 Ind. App., on page 305, 64 N. E., on page 640, this court said: "It is well settled that where the plaintiff was injured, without his fault, by the concurrent negligence of the defendant and a third person, not subject to the plaintiff's control or direction, the defendant cannot avail himself of the negligence of such third person as a defense." *Town of Knightstown v. Musgrove*, supra; *L. N. A. & C. Ry. Co. v. Davis*, 7 Ind. App. 222, 33 N. E. 451; *Grimes v. L. N. A. & C. Ry. Co.*, 3 Ind. App. 573, 30 N. E. 200.

The alleged error in overruling the motion for a new trial is largely disposed of by the holdings already announced, but there, as well as upon the motion for judgment on the interrogatories, the proposition is urged that, in the absence of any express grant from appellant to the railway company of the right to use its streets for telephone purposes, it was a trespasser, or at most had only a permissive right to the use of the streets for that purpose. In *Prather v. W. U. Tel. Co.*, 89 Ind. 501, on page 524, our Supreme Court said: "It is a well-known and reasonable rule, in construing a grant, that all means to attain it, and all the fruits and effects of it are granted also." It has been held that the erection of telegraph poles and wires is not an additional servitude, although not expressly mentioned in the grant to a railway company. The operation of telegraph and telephone lines and instruments is an incident to the operation of railroads, and is permissible by virtue of the implied power under an express grant giving authority to operate a railroad. 1 *Elliott on R. R.* § 41; *Prather v. Western U. Tel. Co.*, supra; *Pittsburgh & Con. R. Co. v. Shaw* (Pa.) 14 Atl. 323; *Marletta & Cin. R. Co. v. W. U. Tel. Co. et al.*, 10 Am. & Eng. R. R. Cas. p. 387; *Cleveland, etc., R. R. Co. v. Huddelston*, 21 Ind. App. 621-627, 52 N. E. 1008, 69 Am. St. Rep. 385.

The evidence shows that the city of Logansport in 1859 granted to the predecessor of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and that the latter company succeeded thereto, the right to construct and maintain railway tracks and yards in said city, and over and along the particular streets mentioned in appellee's complaint. The evidence further shows that the city of Logansport placed electric arc wires along Berkley street in the year 1895, and over the tracks of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and that said company had maintained wires supported by poles along Canal street and across Berkley street for about 30 years;

that in 1905, at the time of the accident, there were 30 wires at the crossing of Canal and Berkley streets; that a part of these were telephone and part telegraph wires, and that the telephone wires were located on the lower arm on the south side of the pole; that the telephone wires in question in this suit were placed on the lower cross-arm in December, 1899, and that there had been no change in the location of the wires from that date to the 20th day of August, 1905, when the deceased was killed. The evidence also shows that employes of the electric light department of appellant knew of the existence and location of these wires for many years before the accident. It was agreed by the parties that the appellant had been engaged since 1895 in the manufacture and distribution of electricity, for lighting the streets of the city, public buildings, and for private consumption. Under the authorities already cited, we think we are warranted in holding that for the purposes of this case the railway company was not a trespasser upon the streets of the city of Logansport on account of the erection and maintenance of its telephone wires in connection with its business as a railway company. Furthermore, as already shown, the relation of the deceased to the railway company as an employe was not such as to impute to him any negligence of the company in so maintaining its telephone wires, and the duty which the city owed to the public to use care in the control and management of the electricity which it was using extended also to the decedent.

The decision of the questions already announced disposes of all the questions raised by the motion for a new trial and the motion in arrest of judgment, except the objections to certain instructions and to the admission of certain evidence over the objection of appellant.

The objections to instructions given and to the refusal to give certain instructions tendered are numerous. We have carefully considered them, and find that the principal objections are based upon the view of the law applicable to this case, as announced by appellant's learned counsel, which we have already decided adversely to their contention. There is ground for criticism of the phraseology of some of the instructions given, but on the whole they state the law correctly and fairly to both parties. The errors pointed out, if conceded to be errors, could not possibly have misled the jury, and were therefore harmless. The court did not err in refusing instructions tendered by appellant for the reason that the jury was fully instructed by other instructions given covering all the issues of the case.

The admission of testimony in rebuttal from a city councilman tending to show notice to the city of the railway's occupancy

of its streets by its telephone wires was not erroneous. The order of admission of testimony is within the sound discretion of the trial court, and there is no showing that appellant was in any way harmed thereby.

Considering the other testimony in the case, it is quite clear that, even if erroneous, the admission of this testimony was harmless.

We find no available error in the record.
Judgment affirmed.

(47 Ind. App. 646)

INDIANA UNION TRACTION CO. v. MYERS. (No. 6,874).¹

(Appellate Court of Indiana, Division No. 1.
Feb. 2, 1911.)

1. APPEAL AND ERROR (§ 996*)—REVIEW—WEIGHT OF EVIDENCE.

Appellate tribunals will not weigh oral evidence, but will look to the evidence when its sufficiency to sustain a verdict is challenged, and consider it in its most favorable light, and, with all reasonable inferences to be drawn therefrom, determine whether it supports the general finding of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 996.*]

2. APPEAL AND ERROR (§ 996*)—VERDICT—REVIEW.

A verdict will not be set aside on appeal where the evidence is such that fair-minded men might draw different inferences or conclusions therefrom, either of which would be in accord with that of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3908-3911; Dec. Dig. § 996.*]

3. RAILROADS (§ 324*)—STREET CROSSING—PLACE OF DANGER.

A railroad crossing is a place of danger as a matter of law, and to a person intending to cross who is acquainted with its existence and surroundings it is a warning of danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1020-1026; Dec. Dig. § 324.*]

4. RAILROADS (§ 327*)—CROSSING ACCIDENT—DUTY TO LOOK AND LISTEN.

Where decedent was acquainted with the existence of a railroad crossing, he was bound to know the dangers attendant on his attempting to cross the same, and was required to look and listen for approaching cars, and his failure to do so without a proper excuse is negligence, which, if proximately contributing to his injury, precludes recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

5. RAILROADS (§ 346*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action for death of plaintiff's decedent at a railroad crossing, the burden was on the railroad company to prove that decedent was guilty of contributory negligence, which is not made out by mere proof that decedent knew the crossing was a dangerous place.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1121, 1122; Dec. Dig. § 346.*]

6. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—PROOF—PRESUMPTIONS.

Contributory negligence is a fact to be established by evidence, and not by presumption.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-234; Dec. Dig. § 122.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹ Rehearing denied.

7. RAILROADS (§ 313*)—DEFECTIVE CARS—WHISTLE FOR CROSSING—STATUTES—NEGLIGENCE.

Under Burns' Ann. St. 1908, § 2879, making it a criminal offense for any person having charge of an interurban electric car equipped with a whistle to fail or neglect when such car is approaching a road crossing to sound the whistle at a distance of not more than 100 or less than 80 rods from the crossing, a failure to sound the whistle as required prior to a car reaching the crossing at which decedent was struck and killed constituted negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1002; Dec. Dig. § 313.*]

8. RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

In an action for death at an interurban electric railroad crossing, whether decedent was guilty of contributory negligence *held* for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1192; Dec. Dig. § 350.*]

9. TRIAL (§ 295*)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.

The correctness of an instruction given must be determined by a consideration of the instruction as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 708-717; Dec. Dig. § 295.*]

10. RAILROADS (§ 351*)—CROSSING ACCIDENT—COMPLAINT—LAST CLEAR CHANCE.

Where the complaint in an action for the death of a traveler in a railroad crossing accident alleged that, when decedent was on the crossing, defendant negligently ran one of its cars toward and onto the crossing at a high and dangerous rate of speed, and negligently ran the car against the horses and wagon of plaintiff's decedent on the crossing, and negligently knocked plaintiff's decedent out of the wagon and crushed and destroyed the same, and did thereby inflict mortal injuries on decedent's body from which he died, etc., it was sufficient, after plaintiff had proved the gist of her charge, to authorize the submission of the theory that defendant's motorman by the exercise of ordinary care after discovering decedent's peril could have stopped the car and avoided the injury in accordance with the last clear chance doctrine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1195; Dec. Dig. § 351.*]

11. RAILROADS (§ 351*)—CROSSING ACCIDENT—LAST CLEAR CHANCE DOCTRINE—INSTRUCTIONS.

Plaintiff was struck and killed while attempting to cross the grade crossing of an interurban electric railway. The car was 300 feet from the crossing when the motorman discovered that decedent was attempting to drive across the track, and other witnesses testified that, when the car was that distance away, the horses were on the track, and that decedent was looking toward the car which was moving at 30 miles an hour, while the horses were walking. *Held*, that such evidence was sufficient to justify an instruction that plaintiff could recover, notwithstanding decedent's negligence exposed him to the risk of injury, if such injury was more immediately caused by defendant's omission, after becoming aware of the danger, to use ordinary care to avoid injuring him, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1214; Dec. Dig. § 351.*]

Appeal from Circuit Court, Henry County; Ed. Jackson, Judge.

Action by Anna Myers, as administratrix of the estate of Franklin C. Myers, deceased,

against the Indiana Union Traction Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

J. A. Van Osdol, Wm. A. Kittinger, and Forkner & Forkner, for appellant. E. H. Bundy and W. J. Beckett, for appellee.

MYERS, C. J. Appellee brought this action against the appellant to recover damages for the death of her decedent, Franklin C. Myers, resulting from the alleged negligence of the appellant in running one of its cars against the deceased at a highway crossing. A complaint in one paragraph, answered by a general denial, formed the issues submitted to a jury, resulting in a verdict and judgment in favor of appellee. Appellant's motion for a new trial was overruled, and this ruling is assigned as error. Under this assignment, the questions discussed and the errors relied on for a reversal of the judgment are presented.

Appellant first insists that the evidence shows without any contradiction that the decedent was himself guilty of contributory negligence. The burden of showing contributory negligence on the part of the decedent was on the appellant. The general verdict of the jury amounted to a finding that the appellant had not established that fact. It must be kept in mind that appellate tribunals in this jurisdiction will not weigh oral evidence, but will look to the evidence when its sufficiency to sustain the verdict is challenged, and consider it most favorably and with all reasonable inferences to be drawn therefrom, in support of the general finding of the jury. *Cleveland, etc., Ry. Co. v. Wynant*, 134 Ind. 681, 686, 34 N. E. 569; *Robbins v. Spencer*, 140 Ind. 483, 487, 38 N. E. 522, 40 N. E. 263. In matters of this character, it is not our province to interfere when the evidence, measured by the rule stated, is such that fair-minded and reasonable men might draw different conclusions, either of which is in accord with that of the jury.

The question now under consideration requires us to examine the evidence. Some facts are not in dispute, while as to others there is sharp conflict in the evidence. The accident occurred about 3 or 4 o'clock in the afternoon on September 27, 1906. It had been raining, and the afternoon was dark and gloomy. The collision happened on a public highway known as Thirty-Eighth street, Indianapolis, where it crossed at right angles appellant's line of double-track interurban railroad, then constructed along a platented highway known as College avenue. Neither of the highways at that point were then within the corporate limits of Indianapolis. The country in the immediate vicinity of said crossing was practically level, and but sparsely settled. On the west side of College avenue, beginning about 6 to 15

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

feet north of Thirty-Eighth street, and 16½ feet west of the track, was a line of shade trees, extending north 1,200 to 1,600 feet. The witnesses refer to the first of these trees at Thirty-Eighth street as a tall maple, its body about 6 inches in diameter, and limbs branching out in all directions about 7 feet above the ground. The next one north is described as having the appearance of a broken down tree, with sprouts growing up from its roots, possibly 8 or 10 feet high, forming a bushy top in diameter 10 or 12 feet. The balance of the row consisted of catalpa trees, about 15 feet tall, with limbs branching out about 5 or 6 feet above the ground. A witness testified that the limbs were so close to the ground that he had to stoop down when walking under them. Immediately north of Thirty-Eighth street, and fronting on College avenue, were two vacant lots. On the next lot north was a dwelling house facing the east, and located about 40 feet west of the railroad track. A short distance west of the house was a barn. South of the dwelling and barn a few feet was a board fence, 5 or 6 feet high, extending from College avenue west. These buildings and said trees, and high weeds in the commons north of the house and barn, says a witness, obstructed the view along College avenue north of said crossing of persons traveling east along Thirty-Eighth street towards the crossing. At a point on Thirty-Eighth street about 200 feet west of the crossing, it is said that one looking north between the barn and the house could possibly have seen a car approaching for a couple of squares. After that, the house and trees obstructed the view of approaching cars until within 6 or 8 feet of the track. The decedent at the time of the accident was 34 years old, and in possession of all his senses, except a defect of hearing in his right ear. He was familiar with the situation of the crossing, and knew that cars ran over this crossing at frequent intervals. He resided within 1½ miles of the crossing, and had traveled over it once a day for 10 months. At the time of the accident the deceased was driving two horses to a covered milk wagon, and had approached the crossing from the west. Appellant's car which collided with the wagon came from the north, at a speed estimated at 30 miles an hour. It was an interurban electric car, equipped with a whistle, and when within about 300 feet of the crossing—the horses on the track, the decedent sitting on a seat about the center of the wagon with the door to his left open, and looking toward the car—whistling danger signals were given. The evidence sustains a finding that the whistle was not sounded within the hearing of a person at the crossing prior to the danger signal. The point where these signals should have been given was between Fortieth and Forty-First street, Fortieth street being 1,200 feet north of Thirty-Eighth street.

When horses reached railroad track, they were walking. A short distance back from the crossing they were in a slow trot. There is some evidence from which it might be inferred that the deceased looked and listened, but none that he stopped before going onto the track. The motorman on the car was standing in the front vestibule looking ahead. He testified that the horses had just cleared the track when the car collided with the wagon, and that he stopped the car about 125 to 150 feet south of where the collision occurred; that, as soon as he saw the traveler was not going to get off the track in time to avoid a collision, he attempted to stop the car, and had decreased the speed at least half when he reached Thirty-Eighth street. Other eye-witnesses to the transaction testify they could not notice any lessening of the speed of the car. We find no evidence as to the distance required to stop the car when running at the rate of 30 miles an hour. If appellant's servants in charge of said car gave any signals of the approaching car other than the danger signals immediately before the collision, there is no evidence that the deceased heard them. For 1,200 feet north of Thirty-Eighth street the track is down-grade toward Thirty-Eighth. The jury found that the decedent was not guilty of contributory negligence. We are asked to disturb this finding on the theory that the evidence affirmatively and conclusively shows that the deceased was actively and contemporaneously at fault at the time the alleged wrongful injury was inflicted.

As a proposition of law, a grade railroad crossing is a place of danger, and to a person intending to cross who is acquainted with its existence and surroundings it is a warning of danger. *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Southern R. Co. v. Davis*, 34 Ind. App. 377, 72 N. E. 1053. In the case at bar the deceased was acquainted with the crossing, and was bound to know of the attendant dangers in attempting to cross. He was required to be vigilant in the use of his senses to avoid injury. Therefore it was his duty to look and listen for approaching cars, and his failure so to do without an excuse therefor will be regarded as an act of negligence, which, if it proximately contributed to his injury, will preclude a recovery. *Chicago, etc., R. Co. v. Hedges*, 105 Ind. 398, 406, 7 N. E. 801; *Chicago, etc., Ry. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Malott v. Hawkins*, supra; *Southern R. Co. v. Davis*, supra. Appellant had the burden of proving the decedent guilty of contributory negligence, and that fact was not made out by merely showing that the decedent knew the crossing was a dangerous place. Contributory negligence is established by evidence, and not by presumptions. *Cleveland, etc., R. Co. v. Lynn*, 171 Ind. 539, 85 N. E. 999, 86 N. E. 1017. It is a fact to be determined as other

facts, upon all the evidence and circumstances of the particular case. Pittsburgh, etc., R. Co. v. Seivers, 162 Ind. 234, 67 N. E. 680, 70 N. E. 133; Evansville, etc., R. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612.

In the case last cited it is said: "A casualty resulting in the personal injury or death of a traveler from contact with cars at such place is necessarily occasioned by the concurrent acts of two parties, and in actions therefor by their pleadings each in terms or legal effect charges the other with negligence contributing to the result. In such actions neither party has a *prima facie* cause of action or defense, unless it be shown that the proximate cause of the injury was the violation of a statute or municipal ordinance, and otherwise the court cannot indulge a presumption of law that the implicated act or omission of either party was prudent and cautious or negligent and wrongful, but the inference of negligence or its absence is an ultimate fact to be determined by the trial court or jury."

By statute (section 2679, Burns' Ann. St. 1908) it is made a criminal offense for any person having charge of an interurban electric car equipped with a whistle to fail or neglect when such car is approaching a road crossing to sound the whistle at a distance of not more than 100 or less than 80 rods from the crossing. This case comes to us as one where the company failed to give any warning whatever to persons intending to use the crossing at Thirty-Eighth street, except the signal immediately before the collision. The company's failure to give the warning required constitutes negligence. Pittsburgh, etc., Ry. Co. v. Burton, 139 Ind. 357, 375, 37 N. E. 150, 38 N. E. 594; Indianapolis, etc., R. Co. v. McLin, 82 Ind. 435; Chicago, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761. It appears from the evidence that as deceased approached the crossing he was sitting near the center of the wagon, with the door to his left open, and was looking in the direction of the approaching car; that for some considerable distance before reaching the crossing the car was not observable until a point 8 or 10 feet west of the track; that, when the deceased reached that point, his horses were actually upon the track, and the car within 300 feet of the crossing, running at the rate of 30 miles an hour. From this state of facts it follows that the deceased had less than seven seconds to get out of the danger line. Had he stopped to look and listen, a collision would have been inevitable. He sought safety by trying to cross. In this he failed. Whether he acted as an ordinarily prudent person under all the circumstances was certainly a question of fact for the jury, as was also the question whether he approached within an unsafe proximity to the railroad tracks without stopping to listen. *Malott v. Hawkins*, supra; Pittsburgh, etc., R. Co. v. Martin, 82

Ind. 476, 483; Indianapolis etc., R. Co. v. McLin, supra. He had a right to rely upon the appellant giving the crossing signal, which, if given, appellant's servants testified could have been heard a mile. While the appellant's failure in this regard did not excuse the decedent from the exercise of ordinary care for his safety (Cleveland, etc., R. Co. v. Houghland, 44 Ind. App. 73, 85 N. E. 369, 88 N. E. 623), yet in determining whether he used such care his conduct should be considered along with that of the appellant, and the conditions and surroundings there existing affecting his probability or improbability of seeing the car approaching had he looked, or hearing it had he listened, and the possibility of his being misled into a situation of danger, and from which he was unable to extricate himself in time to avoid injury.

In the case of *Malott v. Hawkins*, supra, it is said: "A further proposition, based on the reciprocal rights of the railway company and a traveler at a public crossing, is that after a traveler has vigilantly used his senses to avoid danger, as stated above, and is unable to see or hear any approaching train, he may, while still exercising due care, assume that the company will not omit to give the usual, and especially the statutory, signals, if a train is really approaching. * * * The omission to give signals may therefore be an element in determining the question of contributory negligence." See, also, *Chicago & Erie R. Co. v. Ginther*, 90 N. E. 911. This is not a case where the undisputed evidence shows that the deceased by looking could have seen, or by listening could have heard, the approaching car in time to have avoided the collision. For that reason that line of cases where the conclusion rests upon the assumption that a traveler approaching the crossing actually saw what he could have seen had he looked, and heard what he could have heard had he listened, are not in point. *Grand Trunk Western Ry. Co. v. Reynolds* (Sup.) 92 N. E. 733-737. After a careful consideration of the evidence in this case, we are not persuaded that reasonably fair-minded men would not honestly differ in their conclusions regarding the quantum of care which the deceased should have exercised. The question submitted on the evidence is not one of law. *Indianapolis Street R. Co. v. Marschke*, 168 Ind. 490, 77 N. E. 945; *Evansville, etc., R. Co. v. Berndt*, supra.

Instruction 6, given to the jury at the request of appellee, is questioned on the ground that it was misleading, and because it invaded the province of the jury. Neither of these objections can be sustained. Appellant has set out a part of the instruction, and then made an attack upon that part. The instruction must be considered as a whole, and, when so considered, there is no basis from which to argue that it attempts to determine the probative force of the evidence, or to assume any fact as proved. These were ques-

tions for the jury, and were left to the jury by the instruction.

Instruction 7 was as follows: "The court instructs you that a plaintiff may recover damages for an injury caused by the defendant's negligence notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. And in this case if you shall find from the evidence that the defendant's motorman in charge of defendant's car saw the plaintiff in peril and great danger on defendant's track ahead of said car at the crossing of Thirty-Eighth street and College avenue, and, after seeing the plaintiff's peril, failed to exercise ordinary care under the circumstances to avoid injuring plaintiff, and plaintiff thereby received injuries from which he died as a proximate result of said want of care on the part of defendant, then your verdict should be for the plaintiff notwithstanding the plaintiff's want of ordinary care brought him into such position of peril." This instruction is criticised on the ground that it brings into the case the doctrine of "last clear chance" without a complaint or facts adduced at the trial to warrant it. To support the instruction, we are referred to that part of the complaint, which, after alleging the negligence of the appellant in several particulars, especially in failing to give the statutory crossing signal, reads as follows: "That, when her said decedent was upon said crossing as aforesaid, the defendant negligently ran one of its cars toward and onto said crossing at a high and dangerous rate of speed, and did negligently so run said car against the said horses and wagon of plaintiff's decedent on said crossing, and did thereby negligently knock plaintiff's decedent out of said wagon and crush and destroy said wagon, and did thereby inflict mortal injuries upon the body of plaintiff's said decedent as aforesaid, from which he died as aforesaid, on the 5th day of December, 1906." It will be noticed that this complaint contains no direct allegation showing that the appellant was aware of decedent's danger in time to have stopped the car and avoided the injury. It is alleged that "the defendant negligently ran one of its cars toward and onto said crossing at a high and dangerous rate of speed, and did negligently so run said car against the said horses and wagon of plaintiff's decedent on said crossing," etc.

In the case of Indianapolis Street R. Co. v. Marschke, *supra*, the court had before it the same question we are now considering, and presented in the same way. In disposing of the question it was said: "Appellee had a right, having offered evidence in support of the gist of her charge, to have the question of negligence submitted to the jury,

either as she had characterized it or in accordance with the gravamen of the allegation." In the case of Indianapolis Traction, etc., Co. v. Kidd, 167 Ind. 402, 79 N. E. 847, 7 L. R. A. (N. S.) 143, the same question arose on the answers of the jury to interrogatories. In that case it was said: "It is no departure from just principles, but a wholesome and humane doctrine, to hold that if after the defendant knew, or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover." The doctrine announced in the two cases last cited, when applied to the complaint and evidence before the jury in the case at bar, leads us to conclude that appellant's contention cannot be sustained. We have referred to the allegation in the complaint which has been held to authorize the admission of evidence justifying the instruction. The evidence shows that the car was 800 feet away from the crossing when the motorman discovered that appellee's decedent would attempt to drive across the track. The motorman testified that the horses were near the track and going toward the track, and the decedent was not looking toward the car. Other witnesses testified that, when the car was 300 feet from the crossing, the horses were on the track, the deceased was looking toward the car, and driving east across the track. The car was moving at the rate of 30 miles an hour, and the horses were walking. From this state of the evidence a collision was evident, unless the speed of the car was materially and noticeably reduced. There was evidence before the jury that the speed of the car was not reduced until after or about the time of the collision. If the jury believed that there was no attempt to stop the car until after the accident, and the car was actually stopped within 125 to 150 feet after the collision, they might readily conclude that, by the exercise of ordinary care, the accident could have been avoided. In any event, the evidence justified the instruction, and the court committed no error in giving it. See, also, Southern Ind. Ry. Co. v. Fine, 163 Ind. 617, 72 N. E. 589; Southern Ind. Ry. Co. v. Drennen, 44 Ind. App. 14, 88 N. E. 724. Judgment affirmed.

(33 Ohio St. 100)

SEEDS, GRAIN & HAY CO. v. CONGER.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. ACCORD AND SATISFACTION (§ 11*)—COM-PROMISE AND SETTLEMENT (§ 5*)—WHAT CONSTITUTES—UNLIQUIDATED DEMAND.

Where there is a bona fide dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative. He must accept the amount tendered upon the terms of the condition, unless the

condition be waived, or he must reject it entirely, or, if he has received the amount by check in a letter, he must return it.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-83; Dec. Dig. § 11; * Compromise and Settlement, Cent. Dig. §§ 10-16; Dec. Dig. § 5.*]

2. ACCORD AND SATISFACTION (§ 11*)—COMPROMISE AND SETTLEMENT (§ 5*)—EVIDENCE—ACCEPTANCE OF CHECK.

Where, in such case, the creditor retains a check which was sent upon the condition that it shall be in full satisfaction of the debt claimed to be due, and receives the money thereon and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-83; Dec. Dig. § 11; * Compromise and Settlement, Cent. Dig. §§ 10-16; Dec. Dig. § 5.*]

Error to Circuit Court, Champaign County.

Action by the Seeds, Grain & Hay Company against one Conger. Judgment for defendant was affirmed in the circuit court, and plaintiff brings error. Affirmed.

The plaintiff in error commenced this action in the court of common pleas of Champaign county to recover \$700 and interest upon a contract for sale and delivery of oats by the defendant. The defendant in error contracted with the plaintiff in error to sell and deliver to it 10,000 bushels of oats during the month of August, 1907, at 37 cents per bushel. On the 17th day of August defendant called plaintiff over the telephone, and notified it that he could not comply with the contract, and desired to settle. There is conflict in the testimony as to the substance of this conversation; the defendant insisting that there was a settlement on the basis of 40 cents a bushel and the plaintiff denying this. Upon the same day, August 17th, the defendant sent the plaintiff a check for \$300, indorsing thereon the following words: "Settlement in full August account." And accompanied it with a letter in which he stated that it was according to their telephone talk of that day and was, "settlement in full for the 10,000 bushels oats sold you May 29, 1907, for August shipment." Defendant on the same evening answered as follows: "Note telephone conversation with you this morning with reference to your sale of 10,000 bushels No. 3 white oats to us subject to Eastern weights and inspection, and your wish to settle that trade at 40 cents track your place, our bid of last night. This we can't consent to do now, for the reason we find ourselves short a few cars of oats, and have nothing with which we can replace this at the present time, but would be glad to buy the oats for you just as quickly as we get enough to replace the amount you sold us. We will not charge you anything for making the purchase, only the price we are obliged

to pay for the oats. It seems to us, however, that you can get the matter closed up more advantageously if you hustle around and buy the oats at Mechanicsburg and ship them on the contract. If you want us to buy them in, while we are short ourselves, we will give you the first ten cars of oats we can buy subject to the same conditions on which your sale was made." Plaintiff received the check, drew the money on it, and kept it, but at the same time wrote a letter to the defendant, of the date of August 18th, acknowledging the receipt of the check for \$300 and stating, "which amount we place to your credit. In our conversation of Saturday we did not mean to close up that transaction as we wrote you on Saturday evening. We have bought about 6,000 or 7,000 bushels of oats to-day at forty-one to forty-two cents and are bidding forty-two cents to-night, and just as soon as we get a sufficient amount to cover your 10,000 bushels, will advise you about the cost of them, and I think you will want to adjust the matter as we wrote you on Saturday evening." It does not appear on the record that there was any open account existing between the plaintiff and defendant, other than the \$300 item. The defendant made no answer to the plaintiff's letter of August 19th.

At the conclusion of the plaintiff's testimony, a motion was made by defendant's counsel to withdraw the case from the jury and direct a verdict for the defendant, which the court then declined to do, but, at the conclusion of all the evidence, the motion was renewed and the court sustained it, upon the ground that under the facts above stated the plaintiff was not entitled to recover and that the transaction shown by the check and letters became an accord and satisfaction upon the plaintiff accepting the money. Upon petition in error the circuit court affirmed the judgment of the court of common pleas and this proceeding in error is prosecuted to reverse the judgment of both the lower courts.

Lemuel D. Lilly, for plaintiff in error.
Thomas B. Ware and Louis D. Johnson, for defendant in error.

DAVIS, J. (after stating the facts as above). In the application of the law of accord and satisfaction, a distinction between liquidated and unliquidated demands is universally recognized. Where there is a bona fide dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon an express condition that, if accepted, it shall be in full of the disputed claim, the creditor must accept it upon the condition unless the condition be waived, otherwise he must refuse it; or, if he has received the amount tendered, he must return it. 1 Enc. L. & P. 626-628. He cannot accept the tender in such case and re-

cover the balance which he claims, because he is presumed to have accepted it upon the express condition on which it was offered.

Generally, however, the law is applied differently in cases of liquidated and undisputed claims, the reason being, as sometimes stated, that the payor pays no more than he is clearly bound in law to pay, and there is therefore no consideration for a release of the remainder of the obligation. But even in such a case it has been held that, when the parties have agreed in settlement of a bona fide dispute between them that the lesser sum shall be received in satisfaction of the greater, it will be regarded as an accord and satisfaction (*City of San Juan v. St. John's Gas Co.*, 195 U. S. 510, 25 Sup. Ct. 108, 49 L. Ed. 299), especially if the agreement has been fully executed (*Dreyfus & Co. v. Roberts*, 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67).

Keeping in mind the foregoing principles, it is easy to distinguish from the case in hand all of the cases cited by counsel for plaintiff in error. Indeed, some of them are distinctly against him, notably *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785, and *Hames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986. In the latter case it was said that: "Ordinarily the retention of a check inclosed in a letter which refers to the amount as the balance due on accounts between the parties will not be held to be an accord and satisfaction so as to bar an action for the balance due. It is only where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered, by an acceptance and retention of the check," citing in support of the last sentence *Fuller v. Kemp*, supra, and *Nassoly v. Tomlinson*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695.

Another case relied upon for the plaintiff in error is *Gassett v. Andover*, 21 Vt. 342. There the debtor tendered a sum of money in full for all legal claims which the creditor had against him upon account. The creditor received the money, protesting that it was not sufficient, but said that he would take it and pass it to the debtor's credit on the account. The debtor expressed no dissent. It was held that the acceptance of the tender did not bar the creditor's right to recover such sum as might be found due him on the account. It is entirely clear that the Supreme Court of Vermont did not regard this judgment as inconsistent with its former judgment in another case, reported in the same volume (*McDaniels v. Lapham et al.*, 21 Vt. 222), in which it was held that "the doctrine that the receiving a part of a debt due under an agreement that the same shall

be in full satisfaction is no bar to an action to recover the balance does not apply to any cases, except when the plaintiff's claim is for a fixed and liquidated amount, or where the sum could be ascertained by mere arithmetical calculation. But when a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and attaches to his offer the condition, that the same, if taken at all, must be received in full, or in satisfaction, of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party, at the time of receiving the money, declare that he will not receive it in that manner, but only in part satisfaction of his debt so far as it will extend."

In this case there is a dispute which grew out of the inability of the defendant to fulfill his contract to deliver 10,000 bushels of oats during the month of August at 37 cents a bushel. The defendant sought to limit his liability by securing a settlement at the highest market price on August 17th; and he insists that he succeeded in doing so and paid the amount agreed upon, although the plaintiff attempted to recede from the settlement and sought to hold him on the original contract. The plaintiff denies all of this, except the payment of the money. Here was a real controversy, which yet exists, over the amount of the defendant's liability. It was a dispute over a demand which was yet contingent and the amount of which was not yet determined. We have at present no concern as to the merits of this contention. It is enough for our present purpose that it plainly appears that there was such a difference between these parties, and that the defendant sent to the plaintiff his check, indorsed on the face of it, "Settlement in full August account," and accompanied it with a letter saying, "Enclosed find my check for \$300, which, according to our talk over the phone to-day is settlement in full for the 10,000 bushels oats sold you May 29, 1907, for August shipment." There was no other claim or account between them, and this plainly expressed condition of payment was never withdrawn; for mere silence by the debtor under the circumstances of this case does not amount to a withdrawal of the condition, nor a waiver of it. The plaintiff had only one alternative, to accept the check as payment in full or to return it. He kept it and drew the money on it, knowing the condition imposed, and thereby completed the transaction as an accord and satisfaction.

The judgment of the court below is affirmed.

SUMMERS, C. J., and CREW, SPEAR, SHAUCK, and PRICE, JJ., concur.

(83 Oh. St. 246)

In re THATCHER.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 61*)—DISBARMENT—APPLICATION FOR REINSTATEMENT—SCOPE OF INQUIRY.

On an application for reinstatement by one who has been removed from the bar, the sole question to be determined is whether the granting of his application would probably be promotive of the right administration of justice.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 84; Dec. Dig. § 61.*]

2. ATTORNEY AND CLIENT (§§ 49, 61*)—DISBARMENT PROCEEDINGS—NATURE.

Whether the hearing be in an original proceeding to remove from the bar, or upon an application for reinstatement, it involves no consideration respecting the punishment of the respondent since his exclusion merely annuls an extraordinary privilege originally conferred in reliance upon his possession of good character, and leaves him in the full enjoyment of all the rights of citizenship.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 48, 66-84; Dec. Dig. §§ 49, 61.*]

3. ATTORNEY AND CLIENT (§ 42*)—UNPROFESSIONAL CONDUCT INVOLVING MORAL TURPITUDE.

This court has found the respondent guilty of a specification which in substance was that, for the purpose of procuring for himself a large sum of money disproportionate to legitimate fees for services as an attorney, he caused suit to be brought on notes which had been paid and which he knew had been paid, and procured a reputable attorney who did not know that said notes had been satisfied to bring the action thereon and verify the petition, and such finding by the court establishes the charge that he was guilty of unprofessional conduct involving moral turpitude.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 54; Dec. Dig. § 42.*]

Charles A. Thatcher, an attorney at law, having been disbarred, moved for a reinstatement. Motion overruled.

Charles A. Thatcher having been removed from the bar of the state by the order of this court made in June, 1909, now moves for his reinstatement to all the rights and privileges of an attorney and counselor at law in all the courts of the state. As grounds therefor he alleges "that since the said decree was entered respondent has endeavored to fully and faithfully follow and comply with said order, and without reservation or equivocation here fully submits to the language, spirit, and effect of the said decree and with the full assurances that the errors therein found will be hereafter consistently avoided." He also alleges with some detail that since the filing of the original charges against him he has been put to large expense in making his defense thereto, that he has sustained serious loss in the interruption of his legal business, and that there are pending in the state and federal courts many causes whose prosecution he had undertaken, and that, unless he is

permitted to attend to them, his clients will be subjected to expense and loss. His motion concludes with the allegation "that up to the date of the filing of this application, including the time of the disbarment so far passed, respondent's suspension from the practice of his profession has amounted practically to the period of a year or more, and he submits that this consideration, together with his loss of money and business incident to these proceedings, are penalties sufficient for the adequate prevention and punishment of the errors found against him and a sufficient vindication of the law of the land and the judgment of this honorable court."

E. B. King, John J. Sullivan, and R. P. Cary, for respondent.

SHAUCK, J. (after stating the facts as above). The original case for the disbarment of the respondent is very fully reported in 80 Ohio St. 492-875, 89 N. E. 89. The report gives the charges upon which he was heard, a sufficient statement of the evidence relating thereto, the conclusions of fact to which the evidence led, and the considerations which were regarded as requiring the order of disbarment. If the respondent had been dealt with for a single act of wrongdoing, inconsistent with a life of general rectitude, perhaps an order for his suspension for a definite term would have been thought sufficient to serve as a corrective to him, and to maintain the required standard of professional ethics. But a reference to the original case will disclose that he was found guilty of numerous acts of grave impropriety and of long perseverance in a course of reprehensible conduct. An order of suspension would have afforded him opportunity during its operation to insist upon the propriety of his own ethical standards as against those prescribed by the court, and, upon its expiration, to resume practice without any acceptance of the standard fixed by the judgment of the court. Having been removed from the bar, he may in accordance with what we conceive to be correct practice file a written motion expressly accepting the judgment of the court as to ethical requirements, and offering such reasons as he may have for the conclusion that his reinstatement is justified by the considerations upon which a select few of the masses of the citizens of the state are permitted to enter and remain at the bar to participate in the high function of administering justice. Although the terms of his motion accepting the judgment of the court as to the impropriety of the conduct for which he was removed mark him as a man who is not easily carried away with enthusiasm, we accept them as sufficient for the present case.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

What questions does his motion require us to determine? Certainly not the question suggested by its concluding paragraph. So often and so clearly have courts pointed out that in proceedings of this character the punishment of the offending lawyer is neither involved or considered that repetition is not necessary. It would perhaps be unavailing to prevent appeals for sympathy upon that ground in future cases. The respondent and all who give attention to this inquiry must be fully aware that during the entire term of his disbarment he has been in the full and uninterrupted enjoyment of all the inherent rights of citizenship. Nor can there be presented for determination here any theological question respecting the remission of sin or the facility with which it may be achieved. The general question now presented has been presented twice already. It was presented when the respondent was admitted to the bar and again when the order of his disbarment was entered. That general question is, Will the public interest in the orderly and impartial administration of justice be conserved by his participation therein in the capacity of an attorney and counselor at law? In a few jurisdictions the requirement of learning in members of the bar is remitted, but, wherever there is civilization, one is required to have such character as is believed to warrant the expectation that his own interests will be held subordinate to those of his clients and of the public, that neither his zeal for victory nor his love of gain will compensate him for wrong to an adversary or for a deception practiced upon the court or for any perversion of justice, and that he will in all respects aid judges in meeting the authorized expectation that they will "administer justice without respect to persons and without fear or favor." When the respondent was admitted to the bar, he was believed to be of that character. When it appeared that he was not, he was removed. Is there good reason to believe that since the order of his disbarment was made, 18 months ago, there have gone on in his character such reforming and regenerating processes as should restore the confidence upon which he was originally admitted? The question calls for attention to the character of his offenses, though it does not require that they be again stated in detail. He procured the bringing of a suit upon a cause of action which he knew had been fully discharged, and this he did by inducing a reputable member of the bar, who was not aware of the baseless character of the claim, to prepare and sign the petition and make the required affidavit thereto. His motive for this was a stipulated compensation so large as to mark him as a mere tradesman in the ranks of an honorable profession. He persevered through years and in many cases in baiting judges by procuring affidavits of prejudice for which there was neither founda-

tion nor appearance of it. He scandalized the administration of justice by appealing from judgments rendered in the orderly course of procedure to crowds summoned by blare of trumpet to street corners and vacant lots where by false speeches, pamphlets, and cartoons he heaped contempt and ridicule upon judicial proceedings which were conducted with fairness and propriety, and which were perhaps even free from error. This he did when he had many cases pending in the courts in which he had contracts for contingent fees and a large financial interest in the judgments to be rendered in them. Notwithstanding our finding on the third, sixth, ninth, and twelfth specifications, our credence has been invited to the claim that this course was not pursued to affect pending cases, or to impress the public with the understanding that cases in which he was retained must be tried by rules more favorable than those applied in other cases; but that it was done to give expression to his yearning as a citizen for the elevation of the judiciary and to perform his duty to aid judges in administering justice without fear! He maligned one of the common pleas judges of his county as a "political judge," and when brought to account for so doing, instead of frankly confessing the falsehood, he attempted a justification of his imputation by bringing witnesses into our presence to testify that the judge named and his associates, acting together, had appointed competent jury commissioners, giving such, and only such, attention to their political affiliation as would show compliance with the statute which required the selections to be made from both political parties. Character building does not appear to be an instantaneous process, and conduct thus briefly outlined came as the fruition of more than twenty years of the professional life he lived. Common observation forbids the assumption that virtues develop more rapidly than vices. It was observation upon persistency in wrongdoing by those who are accustomed to it that suggested to the prophet the unchangeable colors of the leopard's spots.

But we are not left to conjecture with respect to the effect of discipline upon the character and conduct of the respondent. The filing of the original charges against him called upon us to act without fear or favor, and suppressing all emotional and sentimental promptings, to exercise impartially our best judgment respecting them, knowing that nothing which is required by the orderly and fearless administration of justice could be unjust to him, and that any action adverse to him would be unjust if not so required. During their pendency numerous letters were received by members of the court appealing to sympathy in his behalf. Some of these were accompanied, some followed, by letters of apology and explanation; the explanation being that he

had solicited the letters. Even since his counsel argued and submitted the motion we are now considering, he has approached this court with the suggestion, made personally to one of its members, that by an early disposition of the case we might avert unfavorable comment upon the court by a political convention. The motion asks us to decide that he should be permitted to exercise important functions in the administration of justice at a time when it is within familiar observation that, even according to the standards which are maintained in athletic contests, an offending player is expelled from the field for baiting the umpire.

In August, 1907, the American Bar Association, having a membership in nearly, if not quite all, the states of the Union, adopted canons of professional ethics and suggested an oath of admission consistent with them. In July, 1909, within a month after the order of disbarment in the present case, the canons and the oath were unanimously adopted by the bar association of this state. Pursuant to the unanimous recommendation of that association, the oath of admission has been adopted by this court. Both the canons and the oath may be found in the reports of the various associations by which they have been adopted. In neither canons nor oath is there addition to the implied obligations of an attorney as they have been understood for generations by the honorable and the right-minded who appreciate the importance of the lawyer's function. It may be interesting to those who care to pursue the subject further to contrast the clearly and correctly expressed statement of the lawyer's duty as presented in the code and oath with the conduct of the respondent as more fully detailed in the original report of his case. We appreciate and commend the high purposes of our brethren of the bar in the promulgation of the code and oath, and we shall be guilty of a palpable dereliction from duty if, upon any occasion, we fail to uphold the standards of professional duty which they suggest. Finding no reason to believe that the public interests will be conserved by the respondent's participation in the administration of justice we overrule his motion.

Motion overruled.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(33 Oh. St. 162)

NICHOLS v. FRENCH,
(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. HOMESTEAD (§ 141*)—RIGHTS OF WIDOW IN LIEU OF HOMESTEAD.

When one dies intestate leaving a widow, who, having separated from him, is permanently

residing elsewhere, and the property on which he resided is brought to sale for the payment of a mortgage lien thereon and for the payment of his debts, she is not entitled to an allowance out of the proceeds in lieu of homestead; the widow's right in that regard being fixed by section 5437, Revised Statutes, which confines the right to "a widow composing a part of the decedent's family at the time of his death." *Elliott v. Plattner*, 43 Ohio St. 207, 1 N. E. 222, approved and followed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 262; Dec. Dig. § 141.*]

2. DOWER (§ 25*)—PROPERTY SUBJECT.

The widow of a purchase-money mortgage; mortgage given before marriage, and property sold by executors to pay the mortgage debt, is not dowerable of the whole proceeds, but only of the surplus remaining after satisfying the mortgage. *Culver et al., Ex'rs, v. Harper*, 27 Ohio St. 464, approved and followed; *Kling v. Balentine*, 40 Ohio St. 391; and *Mandel v. McClave*, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627, distinguished.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 77; Dec. Dig. § 25.*]

Error to Circuit Court, Portage County.

Proceedings by one French, administrator of James H. Nichols, for an order to sell realty to pay debts, in which decedent's widow interposed, claiming an allowance in lieu of homestead. There was a judgment denying such allowance and awarding dower, and the widow brings error. Judgment denying an allowance in lieu of homestead affirmed, and judgment awarding dower reversed.

The record to be reviewed was made in the court of common pleas, to which an appeal had been taken from the probate court, and the record of the circuit court, where the former record was reviewed. The proceeding was instituted by the defendant in error, who alleges that he is the duly appointed and qualified executor of the estate of James H. Nichols, deceased, but, as no will appears in the record, we assume that he is the administrator of the estate of James H. Nichols. The proceeding was for an order to sell the real estate of the decedent to pay his debts; the personal estate being insufficient for that purpose. The plaintiff in error, Anna B. Nichols, is the widow of James H. Nichols. In her answer she waived the assignment of dower by metes and bounds and consented to the sale of the premises; and asked for the payment to her out of the proceeds of sale of \$500 in lieu of a homestead, and also of the value of her dower in the entire proceeds of the sale, not diminished by the amount required to discharge the admitted lien of a mortgage upon the premises. Whether she is entitled to allowance in lieu of homestead and whether she is dowerable of the entire proceeds, or only of the surplus remaining after the discharge of the mortgage, are questions controverted in the case.

The material facts are as follows: A former wife of James H. Nichols had died intestate and seised in fee of these lands,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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which thereupon descended to her two children. Thereafter James H. Nichols, father of the children, purchased the lands from them and executed the mortgage mentioned for the purchase money. Thereafter, on the 14th of November, 1899, he intermarried with the plaintiff in error, and they lived together upon the premises until May, 1905, when, in consequence of disagreements, they separated permanently, she going to reside with her parents, and not thereafter residing upon these premises. No children were born of this marriage. This proceeding was instituted February 9, 1909. The court of common pleas adjudged to the widow \$500 in lieu of a homestead and dower in the entire proceeds of the sale. On a proceeding in error to the circuit court there was a reversal of the judgment making an allowance in lieu of a homestead, and an affirmance of that awarding her alimony in the entire proceeds of sale. Mrs. Nichols files a petition in error here, asking for a reversal of the judgment of the circuit court as to the allowance in lieu of a homestead, and the defendant in error files a cross-petition in error, asking a reversal of the judgment of the circuit court in awarding dower in more than the surplus.

I. T. Siddall and C. D. Ingell, for plaintiff in error. R. S. Webb and R. J. Webb, for defendant in error.

SHAUCK, J. The conclusion of the circuit court that Mrs. Nichols is not entitled to an allowance in lieu of a homestead is, in view of the facts stated, justified by the terms of the statute and by *Elliott v. Plattor*, 43 Ohio St. 207, 1 N. E. 222. The right to a homestead to a decedent's family is defined in section 5437, Rev. St. There being no child, the right is to a "widow * * * composing a part of the decedent's family at the time of his death." An important part of this descriptive language would be disregarded if we should apply it in a case where, as here, the widow does not compose a part of the decedent's family at the time of his death. Not only does the language import that a widow may not have composed a part of the decedent's family, but the general rights which this statute confers are in homesteads and for those who use them as homes. Section 5440, Rev. St., does not enlarge the class of persons who are entitled to a homestead. It merely provides for its equivalent to those entitled under other provisions of the statute, when they are precluded by a lien from taking the homestead in form.

Is the widow in the present case dowable of the entire proceeds of sale, or only of the surplus thereof that may remain after the payment of the mortgage? The mortgage being for purchase money, and executed before the marriage, the question is definitely settled in *Culver v. Harper*, 27 Ohio St. 464,

where it was held that "the widow of a purchase-money mortgagor, mortgage given before marriage, and property sold by executors to pay the mortgage debt, is not dowable of the whole proceeds, but only of the surplus remaining after satisfying the mortgage." The syllabus was prudently limited to the requirements of the case where, as here, the purchase-money mortgage was executed before the marriage. That the principle upon which dower is allowed would not necessarily restrict it to this precise case appears in *Fox v. Pratt*, 27 Ohio St. 512, where the right of dower was restricted to the surplus after the payment of a purchase-money mortgage, though that mortgage was excluded after the marriage. As early as *Welch v. Buckins*, 9 Ohio St. 331, it was held that, where land is conveyed to one who executes a mortgage for the purchase price, his seisin is technical only, and there does not vest in him an estate to which dower attaches.

The only doubt as to the conclusive effect of these decisions upon the present controversy is raised by the suggestion that *Culver v. Harper* has been substantially, though not formally, overruled by *Kling v. Ballentine*, 40 Ohio St. 391, and *Mandel v. McClave*, 46 Ohio St. 407, 22 N. E. 290, 5 L. R. A. 519, 15 Am. St. Rep. 627. This view must follow a consideration of what was said, rather than of what was decided, in the later cases. In *Kling v. Ballentine*, the husband was seised of the lands unincumbered, and, after becoming so seised, he executed a mortgage to secure his own debt; the wife joining in the mortgage. As against others than the mortgagee, she was held to be dowable of the entire proceeds; and this was correct because the entire proceeds represented the extent and value of the estate of which he was seised at one time during her coverture. The question presented in *Mandel v. McClave et al.* was in no respect different, except that the wife's claim was for contingent dower. Apparent differences in these cases will disappear if it is borne in mind that the husband's mortgage for purchase money is effective without the wife's signature, because it is upon the same consideration as the mortgagee's equitable lien for unpaid purchase money, and that, under section 8606, Gen. Code, the extent of the estate of which the husband was seised as an estate of inheritance at any time during the marriage indicates the extent to which the wife is dowable. When, as here, and in some of the cases cited, he had at no time during the marriage more than an equity of redemption, she is dowable only of the surplus, but when, as in others of the cases, he was seised of the entire estate, she is dowable of the entire proceeds of sale as against all persons, except those as to whom she has waived her right. Does not the elementary proposition that a vendor's lien takes precedence of

the right of dower logically require this conclusion? The precise subject is thus treated by Chancellor Kent in 4th Commentaries, page 39: "Nor is the seisin sufficient when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase money in whole or in part. Dower cannot be claimed as against rights under that mortgage. The husband is not deemed sufficiently or beneficially seised by such an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgage, and this conclusion is agreeable to the manifest justice of the case. The widow in this case, on foreclosure of the mortgage and sale of the mortgaged premises, will be entitled to her claim to the extent of her dower in the surplus proceeds after satisfying the mortgage; and if the heir redeems, or she brings her writ of dower, she is let in for her dower, on contributing her proportion of the mortgage debt." And here the doctrine of *Welch v. Buckins* seems to be approved. Our decisions upon this subject were intelligently and carefully analyzed and compared in the opinion of Warrington, Circuit Judge, in *Hays v. Hays*, 16 O. F. D. 436, where it was decided that in a case of this character the wife is dowerable in the surplus only.

The judgment of the circuit court denying an allowance in lieu of homestead is affirmed. Its judgment awarding dower in excess of the surplus is reversed.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(83 Oh. St. 200)

FIESLER v. FIESLER.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

DIVORCE (§ 280*)—AGGRESSION OF WIFE—ORDER AS TO ALIMONY—APPEAL—"ORDER GRANTING OR REFUSING ALIMONY."

An order adjudging or refusing to adjudge a share of the husband's property to the wife when a divorce is granted to the husband by reason of the aggression of the wife, as provided by section 5700, Revised Statutes, is an order granting or refusing alimony, within the meaning of section 5706, Revised Statutes, and either party may appeal from such order.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 764; Dec. Dig. § 280.*]

Error to Circuit Court, Cuyahoga County. Action by Wallace M. Fiesler against Emma D. Fiesler for divorce. Decree for plaintiff, and appeal by defendant was dismissed by the circuit court, and she brings error. Reversed.

McKisson & Minshall, for plaintiff in error. Glenn E. Griswold and M. P. Mooney, for defendant in error.

SUMMERS, C. J. The husband, Wallace M. Fiesler, was granted a divorce on account of the aggressions of his wife, Emma D. Fiesler, the plaintiff in error.

The wife had filed a cross-petition for alimony, and duly appealed the cause to the circuit court. The circuit court dismissed the appeal for want of jurisdiction, and error is prosecuted in this court. In the final decree the court of common pleas ordered that the cross-petition of the wife for alimony be refused, and dismissed the cross-petition. No alimony was allowed to the wife, and the husband was ordered to pay the costs of the action and an attorney's fee to the wife's attorney.

It is contended that the statutes make no provision for an allowance of alimony where divorce is granted by reason of the aggression of the wife, but only that the court may adjudge to her a share of the husband's real or personal property, or both, as it deems just and reasonable, and that therefore there can be no appeal, as the statutes provide only for an appeal from an order granting or refusing alimony.

The chapter of the Revised Statutes relating to divorce and alimony (Rev. St. 1908, §§ 5689-5706) is substantially the same as the act of 1853 (51 Ohio Laws, p. 377). That act expressly provided that there should be no appeal from a decree for divorce or for alimony, but that there might be an appeal in cases arising under the section, providing that the wife may file a petition for an injunction to prevent her husband from disposing of his property. That act was construed in the case of *Tappan v. Tappan*, 6 Ohio St. 64, decided in 1856. It is there pointed out that it is expressly provided by the act that there shall be no appeal from decrees for divorce or alimony, and that there can be no appeal in such cases under the provisions of the Civil Code, for the reason that the Civil Code excepts such cases from its provisions. In the opinion, Scott, J., suggests that it might be a proper subject of legislative consideration whether a review of that part of the decree which relates to alimony and the custody of children might not be permitted. Accordingly the act was amended on April 15, 1857 (54 Ohio Laws, p. 131), and an appeal was provided for from any final judgment allowing alimony, to so much of the judgment or order as related to the alimony. It is provided by the statutes that the wife may file a petition for alimony alone, or that in case her husband files a petition for divorce she may file a cross-petition for alimony, and it is further provided that when a divorce is granted by reason of the aggression of the husband, that the wife shall be allowed such alimony out her husband's real and personal property as the court deems reasonable, hav-

ing due regard to the property which came to him by marriage and the value of his real and personal estate at the time of his divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments, as the court deems just and equitable; and when the divorce is granted by reason of the aggression of the wife nothing is said about allowing her alimony, but the statute provides that "the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just and reasonable."

Section 5706, Rev. St., reads as follows: "No appeal shall be allowed from any judgment or order of the court of common pleas under this chapter, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony, or in cases under section *fifty-seven hundred and five*; when judgment is rendered for both divorce and alimony, the appeal shall apply only to so much of the judgment as relates to the alimony; and when an appeal is taken by the wife, she shall not be required to give bond." And the contention here is, as already stated, that this section does not authorize an appeal, for the reason that the divorce was granted by reason of the wife's aggression, and that in such cases the statute does not provide for alimony, but only for a share of the husband's real or personal property, and that within the meaning of this section there was no refusal of alimony.

The injustice in many cases in not allowing the wife anything in the way of alimony, when the divorce is granted by reason of her aggression, has been pointed out in many cases. The property that the husband has may have been hers before marriage, or she may have contributed as much as he to its acquisition, and in many cases it would not be right that she should be turned away empty handed, merely because she can no longer live with her husband. And in some states such a division of the property has been decreed as alimony, even in such cases; and it is for such reason that our statute provides that the court may adjudge her a share of the property. It is in reality an allowance of alimony, or in lieu of alimony, and in view of the suggestion of the court made in the case in 6 Ohio St., above referred to, and of the subsequent legislation, we think the Legislature must have contemplated that such share of the property was alimony, and consequently that it is included in the word "alimony," where that word is used in section 5706, providing for an appeal. No reason occurs to us, and none is suggested in the statutes, or in the cases, why a distinction should be made as

to an appeal between an allowance of alimony, properly so called, and an order for a division of the property, and we think the circuit court was in error in dismissing the appeal. The right to appeal was not raised in *Hassaurek v. Markbreit*, Adm'r, 68 Ohio St. 554, 67 N. E. 1086.

Judgment reversed.

CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(33 Oh. St. 178)

HAYNER v. STATE.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1214*)—STATUTES (§ 73*)—EXCESSIVE PUNISHMENT.

Section 4 of the act passed March 12, 1909 (100 Ohio Laws, p. 89), entitled, "An act to amend and supplement section 5 of an act entitled, 'An act providing against the evils resulting from the traffic in intoxicating liquors,' passed May 14, 1886, as amended March 28, 1906, and to further provide against the evils resulting from the traffic in intoxicating liquors," which section makes it an offense to solicit orders for intoxicating liquor in any county where the sale as a beverage is prohibited, is not violative of the Constitution of the state, and is a valid law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1214;* Statutes, Cent. Dig. §§ 73, 74, 75; Dec. Dig. § 73.*]

2. INTOXICATING LIQUORS (§ 148*)—SOLICITATION OF ORDERS IN DRY TERRITORY—PROSECUTION.

To prove a violation of this section it is not necessary to show a number of solicitations. By virtue of section 6794 of the Revised Statutes, which provides that words in the plural include the singular, and in the singular include the plural, proof of one solicitation satisfies the requirements of the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.*]

3. INTOXICATING LIQUORS (§ 148*)—SOLICITATION OF ORDERS IN DRY TERRITORY—PROSECUTION—"SOLICIT."

Such solicitation may be made by letter, as well as in person.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 148.*]

For other definitions; see Words and Phrases, vol. 7, p. 6548; vol. 8, p. 7802.]

4. CRIMINAL LAW (§ 112*)—PROSECUTION—VENUE.

Where a letter soliciting an order for the sale of liquor provides, as a condition of sale, that the person solicited, on receiving the liquor, has the option to accept or not, and to send the price named only in case he approves the goods and concludes to purchase, otherwise to return them at the sender's expense, such approval and conclusion to purchase are necessary to complete a sale. Therefore the solicitation is for a sale to be completed in the county of the residence or business of the one solicited, and prosecution for violation of the act is properly conducted in such county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 220-226, 230; Dec. Dig. § 112.*]

Error to Circuit Court, Knox County.

W. M. Hayner was convicted of unlawfully trafficking in intoxicants, and he brings error. Affirmed.

At the November term, 1909, of the common pleas of Knox, the plaintiff in error, W. M. Hayner, was indicted for a violation of the act providing against the evils resulting from the traffic in intoxicating liquor, passed May 14, 1886 (83 Ohio Laws, p. 157), as amended March 28, 1906 (98 Ohio Laws, p. 99), and further amended March 12, 1909 (100 Ohio Laws, p. 89); the charge being that of soliciting, October 11, 1909, an order for the sale of intoxicating liquor as a beverage in the county of Knox, a county in which the sale of intoxicating liquor as a beverage had been and then was prohibited.

To this indictment the defendant pleaded not guilty. On trial he was convicted and sentenced to pay a fine of \$300 and the costs. This sentence and judgment was affirmed by the circuit court. The accused brings this proceeding to reverse both judgments.

McMahon & McMahon and Waight & Moore, for plaintiff in error. James A. Schaeffer, Pros. Atty., W. B. Wheeler, and James A. White, for the State.

SPEAR, J. The statute which the plaintiff in error, Hayner, was convicted of violating is the fourth section of the act passed March 12, 1909, entitled, "An act to amend and supplement section 5 of an act entitled, 'An act providing against the evils resulting from the traffic in intoxicating liquors,' passed May 14, 1886 (83 Ohio Laws, p. 157), as amended March 28, 1906 (98 Ohio Laws, p. 99), and to further provide against the evils resulting from traffic in intoxicating liquors" (100 Ohio Laws, p. 89). Section 4 provides as follows: "Any person, or persons, firm, or any officer of any corporation, who, directly or indirectly, after April 15 1909, solicits orders for intoxicating liquor in any county or territory where the sale of such liquor as a beverage is prohibited shall be subject to a fine of not less than one hundred and fifty dollars nor more than four hundred dollars for the first offense, and for the second offense not less than four hundred dollars nor more than eight hundred dollars."

The record shows that the soliciting charged was done by the mailing at Dayton, Montgomery county, Ohio, by the defendant, addressed to the J. B. Foote Foundry Company, Fredericktown, Knox county, Ohio, on October 11, 1909, of a certain letter, circular and post card, and that the same were received by the Foote Foundry Company, by due course of mail, at Fredericktown, Knox county, Ohio. The letter reads as follows:

"Dayton, Ohio, October 9, 1909.

"The J. B. Foote Fdry. Co., Fredericktown, Ohio—Dear Sir: That special 'lock-stopper' offer we wrote you about has created a sensation. We've never known anything to

equal it. Orders are coming in a perfect flood from every state in the Union. The response is so tremendous—so almost unanimous—that we are wondering why you, too, did not take advantage of it. The offer is still open and we urge you to send us your order now. We want to place some of this magnificent whisky before you. We want to prove to you how rich, pure and delicious it is. We want to show you how much you save by our 'direct from distillery' plan of selling. We want you to have one of those handsome lock-stopper decanters we send with each order. You need not send us any money in advance. Just sign and mail us the enclosed order card and we will send you in plain sealed case express charges paid three quarts of Hayner private stock bottled-in-bond whisky, and one quart of fine old W. S. K. straight whisky, and we will include absolutely free Hayner's sideboard decanter with combination lock-stopper as described in the circular enclosed. When the goods arrive try the whisky and examine the lock-stopper and decanter, and if you find them all we claim then remit us the price—\$3.70. Otherwise you may return the goods at our expense and you will not be out one cent. The guarantee is clear and distinct. It means what it says. We must please you, we must send you a quality that will surpass your highest expectations, and we will do it. Put us to the test. Sign and mail the post card to Mr. Kidder, manager at Dayton, and do it now while it is before you. Very sincerely, The Hayner Distilling Co., W. M. Hayner, President."

The circular is directed particularly to setting forth the advantages of the lock-stopper decanter mentioned in the letter, and to depicting the high quality of certain brands of whisky manufactured at the defendant's distillery, and commending the goods to the consumer as "absolutely pure," "distilled from the choicest grain," "of the most distinguished quality," and "guaranteed under the United States pure food and drugs act," the text ornamented with an attractive cut of the lock-stopper decanter; but the circular is mostly in fine type and too long for insertion here.

The post card is as follows: "Postcard. [Stamp.] W. S. Kidder, Dayton, Ohio. [This side for address only.] Dear Sir: You may send me by prepaid express the package as per your recent proposition. It is understood that if, after trying your product, I find that it is not as represented, I am privileged to return balance by express at your expense. If the goods are as represented and I keep them I agree to remit \$3.70. Remember, I bind myself only as above. Name Post Office Express Office State If member of firm, give firm name."

It is further shown by the record that, by force of the county local option law, the sale

of intoxicating liquor as a beverage was prohibited in Knox county, Ohio, on and prior to October 11, 1909, and that Fredericktown, Ohio, is located within the boundaries of Knox county.

Upon this state of facts the question presented is whether or not an offense has been proven against the provisions of section 4 of the act and whether, if such violation has been shown, the section itself is a valid law. The court has been favored by the learned counsel with very extended argument for and against. Such argument usually invites to enlarged discussion, but it seems to us that the real, essential issues are comparatively simple, and do not require extended discussion on the part of the court, although it is proper to briefly notice the points presented.

We assume that the act of soliciting may be done by letter, as well as in person. The dictionary term "solicit" implies "an application to another for obtaining something." It is the everyday experience of all of us that in other matters it is so done, and as there is no reason to presume that the general assembly used the word in any sense other than the ordinary sense, we give that construction to the term. We suppose, also, that the letter was intended to take effect in the county of Knox. If it was so intended, then we see no reason why the prosecution was not properly commenced in that county. We call attention to the following authorities, and pass this matter without further comment: *In re Paliser*, 136 U. S. 257, 10 Sup. Ct. 1084, 34 L. Ed. 514; *The King v. Girdwood*, 1 Leach, 142; *The King v. Johnson*, 7 East, 65; *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; *People v. Rathbun*, 21 Wend. (N. Y.) 509; *People v. Adams*, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; *Fouts v. State*, 15 Lea (Tenn.) 712; *United States v. Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919; *Burton v. United States*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1067; *Rose v. State*, 4 Ga. App. 588, 62 S. E. 117.

Many points of objection to the judgments below are urged by counsel for plaintiff in error. In the first place it is contended that the statute has not been violated, because the sending of one letter only is involved in this transaction, while the thing forbidden by the statute is the soliciting of orders, not the solicitation of an order. It would seem that our statute, section 6794, Rev. St., a statute intended to do away with mere technicalities, sufficiently answers this objection. Among other like provisions relating to other subjects, it provides that "words in the present include the future tense, and in the masculine include the feminine and neuter genders, and in the singular include the plural, and in the plural include the singular number." It appears clear that unless it is manifest, as it is not in this case, that

more than one solicitation is necessarily required to bring about the desired result, that is, a sale, that the statute is as well satisfied by one instance as it would be by a dozen. Authorities are abundant in support of this conclusion. We cite a few of the many: *King v. Hassell*, 1 Leach, 1; *State v. Main*, 31 Conn. 572; *Lynch v. State*, 12 Ohio Cir. Ct. R. (N. S.) 330; *Id.*, 81 Ohio St. 489, 91 N. E. 1133; *Belle Center v. Welsh*, 24 Wkly. Law Bul. 176.

It is further insisted that the statute cannot be violated unless the solicitation, if effectual, would result in an illegal sale, which could not be the result in the present case, because the sale, if induced, would be made at Dayton, in the county of Montgomery (wet territory), and not at Fredericktown, in the county of Knox, and the Legislature is without authority to make solicitation of a legal sale an offense. But would the sale, if brought about, be made at Dayton? The letter specifies, as an element of the solicitation, the condition that the purchaser need not send any money, but simply sign and mail the card, the terms of which authorize the shipment of the package on the condition that, if the purchaser finds the product not as represented, he is privileged to return balance by express at sender's expense. Surely at this stage there is no contract of sale. But if the party solicited finds the goods as represented, and he keeps them, then he agrees to remit \$3.70. That conclusion, and his consequent action thereon, would all be done in Knox county. Compliance with the condition by the purchaser would conclude a bargain, but at no stage prior to that could either party enforce any contract liability against the other. We understand the rule to be, as stated in *Benjamin on Sales* (5th Ed.) 319, that: "Where the buyer is by the terms bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Nor would there be delivery until the buyer had determined to accept; the rule being that an acceptance by the purchaser is as necessary an incident to delivery as a tender by the seller. See, generally, *Bonham v. Hamilton*, 66 Ohio St. 82, 63 N. E. 597. It is clear that, by reason of this principle, the general rule that the title to goods shipped passes to the buyer on delivery by the seller to a common carrier has no application to this case, and that the sale, had one been induced, would have taken place in Knox county (dry territory), and would therefore have been an illegal sale.

Nor does there seem to be support in reason, and certainly not in authority, for the proposition that the General Assembly does not possess authority to forbid solicitation for orders for intoxicating liquor in dry ter-

ritory, even though the sale might be had in wet territory. It would be a needless use of space to stop to set forth at length the main purpose of our temperance legislation, for the same has been given in detail in many previous decisions. We need but suggest here that one purpose is the removal and suppression of temptation to overindulgence on the part of a large class who are weak of will and likely to be controlled to their injury by the cravings of appetite. To accomplish this purpose it would seem that legislation of the character in review, reasonable in its provisions, would afford material aid in bringing about the condition of society which the general legislation on the subject of intoxicating liquors seeks to establish. And as to authority in support of this specific provision, there seems to be abundance, and that of the highest character. We call special attention to the case of *Delamater v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724. That is a liquor case wherein *Delamater* was charged with soliciting in South Dakota (dry territory), a contract for the sale of liquor by a concern of another state (wet territory), in violation of the statute of South Dakota forbidding such soliciting and punishing the same as a misdemeanor. The special defense interposed was that the act was repugnant to both the law of the United States respecting interstate commerce, and the commerce clause of the Constitution, and the opinion is devoted largely to a discussion of that phase of the contention; but the general subject of the validity of the South Dakota act is also discussed. The holding is that the Dakota statute is not repugnant to the act of Congress respecting commerce, nor to the commerce clause of the federal Constitution; that "the general powers of the states to control and regulate, within their borders, the business of dealing in, or soliciting orders for, the purchase of intoxicating liquors is beyond question"; and that, "although a state may not forbid a resident therein from ordering for his own use intoxicating liquor from another state, it may forbid the carrying on, within its borders, of the business of soliciting orders for such liquor, although such orders may only contemplate a contract resulting from acceptance in another state."

Attention is called to two Arkansas cases which deserve notice. *Carter v. State*, 81 Ark. 37, 98 S. W. 704, decided December 3, 1906, holds that, within the meaning of section 5133, Kirby's Dig., making it unlawful for any person, firm, partnership, or corporation engaged in the sale of liquors to solicit orders for the sale of liquors in any place where the same is prohibited by law, an advertisement in a newspaper published in a prohibition district, that liquor may be obtained from a licensed liquor dealer doing business elsewhere, is not a solicitation.

The validity of the act itself forbidding soliciting is not questioned. In the following year, to wit, April 1, 1907, the statute was repealed and a new act of a more comprehensive character passed, which is given construction in *Zinn v. State*, 88 Ark. 273, 114 S. W. 227, the decision rendered November 30, 1908. The holding is: "A statute making it unlawful to solicit orders for intoxicating liquors in prohibition territory, through agents, circulars, posters, or newspaper advertisements, is a valid exercise of the state's police power," and " * * * is not unconstitutional as infringing the power of Congress under Const. U. S. art. 1, § 8, to establish post offices, and designating what shall be excluded from the mails."

As the case at bar does not relate to the matter of advertising, we are not called upon to discuss or consider that phase of the subject. Counsel for plaintiff in error cite *State v. Wheat*, 48 W. Va. 259, 37 S. E. 544, as sustaining their contention that soliciting in a dry county is not unlawful. The question in that case involved construction of a license statute. *Wheat* was licensed as a wholesale liquor dealer in Ohio county. The solicitation was by circulars mailed in that county to persons in Brooke county. Some of the reasoning of the court seems to favor the claim of counsel, but as a whole the case rests on the effect to be given to the license, and to turn largely upon the situs of the solicited sales, the opinion holding: "The Code says that if one has a sale license he may solicit orders, and it seems to me that such licensee may solicit custom anywhere as an incident to that license. It would seem immaterial that the law confines the licensee to business at a particular place or one county, since the solicitation and receipt of orders are not for sale and delivery in other counties, but for sales to be executed as consummated contracts at the place and in the county designated in the license; that is, the place of sale." On the whole, the decision does not afford much aid in disposing of the contention in the case at bar. *Lewis v. State* (Tex. Cr. App.) 127 S. W. 808, is also cited. An examination of this case shows that the resemblance to our case is too faint to afford light in disposing of any of the questions which we have, or indeed to justify a fuller statement of it.

It is further contended that the act is invalid, because violative of the Constitution in the imposition of excessive fines. The fines prescribed are larger than in many other sections of the liquor laws, but is it shown that punishment of less amount would prove effective? We think not. The answer of counsel for the state appears to fully meet this objection. In substance, it is that, as matter of common knowledge, the profit in the wholesale dealing in liquor is so great that a small fine would utterly fail to prove a deterrent, inasmuch as the dealers could easily afford to pay such fine and continue

the soliciting of orders. The subject is clearly a matter of legislative discretion with which the courts should not interfere, unless the punishment is so excessive as to amount to cruelty or confiscation, which clearly is not the case here.

Further contention is made that the whole statute is unconstitutional; the first part as being a license law, and the fourth section as being a general law not of uniform operation. It seems to us that it cannot be necessary at this late day to enter into a discussion as to whether our liquor taxing laws are license laws. The ground has been fully plowed and harrowed in many previous decisions. And section 4 does operate uniformly within the meaning given that requirement of the Constitution as to general laws, because the operation of the statute is the same in all parts of the state where the same circumstances and conditions exist. An act is not required to be of universal operation in order to be of uniform operation. To sustain this objection would be to overrule all the decisions of this court relating to local option. We regard the policy of the state in that respect as established by those decisions, and are not disposed at this late day to disturb it.

It is further urged that section 4, as construed by the courts below, would prevent mail order houses from using the mails for lawful purposes, in the ordinary transaction of their business, and that would be an invasion of the right of the citizen to use the mails and of the general government to receive large revenues from a business recognized by it as lawful and equally legitimate under state laws. This objection, though plausible, we think is without force. No reason is perceived why it should be any more of a hardship for the mail order people to pay respect to the laws of the states, with whose citizens they desire to deal, than other people. If the section as to other objections is a valid law, and we have found that it is, it would seem that the inconvenience visited upon a few large stores here and there would hardly afford a ground for holding it invalid. As to the loss of revenue to the general government, it would seem sufficient to recall the Delamater Case, supra, where the decision of the highest court of the land supports the power of the states to enact just such legislation.

Objection is urged that, as construed by the courts below, the act is unreasonable and oppressive. Courts are not concerned with the question of the wisdom or the usefulness of this class of legislation. All such questions are within the exclusive province of the lawmaking body, the General Assembly. In many counties of the state—the most, we understand—a majority of the people have shown by their votes approval of such measures, and the General Assembly has heeded

this sentiment by, from time to time, perfecting such legislation with the hope, if possible, of fully accomplishing the purpose designed. The courts will do their whole duty when they determine whether or not the particular act, in the provisions challenged, is or not within the competency of the law-making body, and if it be, then to give construction to the language employed, as it is found in the statutes, and award judgment accordingly.

We are of opinion that the record shows that an offense has been committed by the plaintiff in error in violation of the fourth section of the act, and that the section thus offended against is a valid law.

The judgment of the circuit court will be affirmed.

SUMMERS, C. J., and CREW, DAVIS, and PRICE, JJ., concur.

(33 Oh. St. 390)

LEAVITT & MILROY CO. v. ROSENBERG BROS. & CO.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 239*)—MOTION FOR DISCHARGE.

A defendant at any time before judgment under section 5562, Revised Statutes, may move for a discharge of an attachment under which his property has been taken, although he has previously given bond for its discharge under section 5545, Revised Statutes.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 825; Dec. Dig. § 239.*]

2. ATTACHMENT (§ 92*)—FOREIGN CORPORATION—SUFFICIENCY OF AFFIDAVIT.

In an affidavit for attachment under paragraph 1 of section 5521, Revised Statutes it is necessary to negative the exceptions in that paragraph.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 92.*]

3. ATTACHMENT (§ 90*)—AFFIDAVIT.

An affidavit in attachment cannot be made before a notary public who is the attorney for one of the parties in the action.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 228; Dec. Dig. § 90.*]

4. ATTACHMENT (§ 122*)—SUFFICIENCY OF AFFIDAVIT—AMENDMENT.

The levy of an order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 122.*]

Error to Circuit Court, Mahoning County.

Action by the Leavitt & Milroy Company against Rosenberg Bros. & Co. Judgment discharging the attachment was affirmed in the circuit court, and plaintiff brings error. Affirmed.

W. W. Zimmerman, for plaintiff in error. Kline, Tolles & Morley, for defendant in error.

SUMMERS, C. J. The plaintiff in error filed a petition in the court of common pleas

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Mahoning county against the defendant to recover damages for a breach of contract. At the same time the plaintiff filed an affidavit for attachment and garnishee process. Each affidavit stated as ground for attachment that the defendant was a foreign corporation. Neither affidavit nor the petition negatived the exceptions as to foreign corporations in section 5521, Rev. St., and each affidavit was sworn to before a notary public, who was also the attorney for the plaintiff. The defendant, within a day or two after the levy of the order of attachment, gave bond under section 5545, Rev. St., and obtained possession of its property. Subsequently the defendant, without entering its appearance, filed a motion to discharge the attachments on the ground that the affidavits were defective in failing to negative the exceptions, and on the ground that the affidavits were not authorized to be made before a notary who was the plaintiff's attorney. When the motion came on for hearing, the plaintiff applied for leave to amend its affidavit in attachment, said amendments to operate as of the dates of the original affidavits, by adding to that part of said affidavits which states the grounds of attachment as the nonresidence of the defendant corporation the words "and has not filed with the Secretary of the State of Ohio, the statement required or provided by section 148c, Revised Statutes of Ohio, nor procured from the Secretary of the State of Ohio, the certificate required or provided by section 148d, Revised Statutes of Ohio, nor complied with the provisions of either or both of said sections." This application was overruled, and on hearing of the motion to discharge it was granted and the attachment was discharged. On error the judgment was affirmed in the circuit court, and error is prosecuted in this court.

The first contention on the part of plaintiff is that the giving of the bond discharged the attachment and waived any defect in the affidavit. Section 5545, Rev. St., reads as follows: "If the defendant, or other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by sufficient surety resident in the county, to be approved by the court, in double the amount of the plaintiff's claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution made of any property taken under it, or the proceeds thereof; and such undertaking shall also discharge the liability of a garnishee in the action, for any property of the defendant in his hands; provided that, when plaintiff's claim is for causing death or a personal injury by a negligent or wrongful act, the undertaking required shall be in such amount as shall be fixed by the court where the action is pending, or a judge thereof, if application is made in vacation." This contention is decid-

ed against the plaintiff in *William Edwards Company v. Goldstein*, 80 Ohio St. 303, 88 N. E. 877, in which case proceedings in attachment before a justice of the peace were under consideration. It was there pointed out that the provisions of sections 5529 and 5545 were like the provisions relating to the justice of the peace. And it was there held that the defendant may, at any time before judgment, move for the discharge of the attachment, although he has previously given bond for its discharge under section 6513. And this court since the decision in that case has ruled that the giving of a discharge bond under section 5545, Rev. St., did not deprive the defendant of the right at any time before judgment to move for and obtain a discharge of the attachment under section 5562, Rev. St. It was so held in *Brown & Ketcham Iron Co. v. L. P. Hazen & Co.*, 11 Ohio Cir. Ct. R. (N. S.) 48, and that judgment was affirmed by this court without opinion in 81 Ohio St. 511, 91 N. E. 1133, on authority of the case in 80 Ohio St., 88 N. E., supra.

Next it is contended that it was not necessary to negative the exceptions in section 5521, Rev. St. That section reads: "That in a civil action for the recovery of money the plaintiff may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds herein stated. (1) When the defendant, or one of several defendants, is a foreign corporation, except as provided by an act entitled 'An act to further supplement section 148 of the Revised Statutes,' passed May 16, 1894 (91 O. L. 272), and except as provided by an act entitled 'An act to amend section 1 of an act,' etc., passed May 19, 1894 (91 O. L. 355) (sections 148c, 148d); or a nonresident of this state." It will be observed that the section does not provide for an attachment against all foreign corporations, but only against those that do not come within the exceptions. The proceedings in attachment are statutory remedies, and it is too well settled to need the citation of authorities that where a statute confers a right or gives a remedy unknown to the common law that the party asserting the right, or availing himself of the remedy, must in his pleadings bring himself or his case clearly within the statute. The statute does not provide for an attachment against all foreign corporations, but only on those that do not come within the exceptions, so that it is necessary to negative the exceptions in order that it may appear that the fact that the corporation is a foreign corporation is a ground of attachment.

It is further contended that an affidavit in attachment may be made before a notary public who is the attorney for the plaintiff. Section 5264, Rev. St., provides that an affidavit may be made before any person authorized to take depositions. Section 5271, Rev. St., provides that the officer before

whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding. Section 5107, Rev. St., provides that the affidavit verifying the pleading may be made before any person authorized to administer oaths, whether an attorney in the case or not. An affidavit is a written declaration under oath, made without notice to the adverse party, and in view of the very important purposes for which it may be used it would seem that it is just as important that the officer before whom it is made should be disinterested as it is in the taking of a deposition for which notice is required. This was the sole ground of objection to the affidavit in the case last above cited, and the affirmance of the judgment of the circuit court necessarily raised that question.

Lastly it is contended that the court erred in refusing leave to amend the affidavit. A sufficient affidavit is essential to jurisdiction in a proceeding in attachment. In *Lessee of Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585, it is held that the court acquires jurisdiction in attachment, by the issuing of process, predicated upon the requisite affidavit, and the attaching of the property. In *Pope et al. v. Hibernia Insurance Co.*, 24 Ohio St. 481, the attachment was based upon the ground of nonresidence. The affidavit was defective, in that it failed to show that the cause of action is one arising upon contract, judgment, or decree. An order of attachment issued, and the insurance company was garnished. After the service of the writ, the plaintiff by leave of court amended the affidavit to show the omitted fact, but a new writ of attachment was not issued. It was held: "Jurisdiction of a defendant cannot be acquired by proceedings in attachment, on the ground of his nonresidence in the state, when the petition in the case, and the affidavit for attachment, fail to show that the cause of action is one arising upon contract, judgment or decree. Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit showing a cause of action arising upon contract, without the issuance of an attachment after the amendment." In the present case it was sought, not only to amend the affidavits, but also to nunc pro tunc the amendment so as to vivify the void writ. This, of course, could not be done. Moreover, if the amendment had been made, still the affidavits would have been fatally defective on the ground that they were made before the attorney.

The judgment is affirmed.

Judgment affirmed.

CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(247 Ill. 564.)

FRY et al. v. SOUTHERN PAC. CO.

(Supreme Court of Illinois. Oct. 28, 1910. On Petition for Rehearing, Feb. 8, 1911.)

1. STATES (§ 4*)—EFFECT OF LAWS OF THE UNITED STATES.

Under Const. U. S. art. 6, § 1, cl. 2, providing that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land, laws made by Congress under the Constitution are paramount to the laws of the several states.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 2; Dec. Dig. § 4*.]

2. CONSTITUTIONAL LAW (§ 302*)—DUE PROCESS OF LAW.

The right to contract is held by an individual or corporation, subject to such reasonable regulations, restrictions, and provisions as Congress may legitimately, under the Constitution, impose upon it; and under article 1, § 8, cl. 3, giving Congress power to regulate commerce among the several states, etc., and article 1, § 8, last clause, giving Congress power to make all laws necessary for carrying into execution the powers granted, Congress can provide that a carrier engaged in interstate commerce shall furnish the shipper a bill of lading to destination of the shipment, and shall be liable for damages to the shipment, caused by any carrier over whose line the shipment passes from its delivery to the initial shipper until its delivery to the assignee at the point of final delivery; and Interstate Commerce Act Feb. 4, 1887, § 20, c. 104, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), so providing, is not violative of Const. U. S. Amend. 5, providing that no person shall be deprived of life, liberty, or property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 851-856; Dec. Dig. § 302*.]

3. COURTS (§ 489*)—JURISDICTION—INTERSTATE COMMERCE ACT.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Hepburn Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1909, p. 1163), requiring the initial carrier, on receiving interstate shipments, to give a through bill of lading and giving a right of action against the carrier for any loss caused by such carrier or any connecting carrier, does not limit the jurisdiction of such an action to the federal courts, and where the amount involved exceeds \$2,000 such courts and the state courts have concurrent jurisdiction, and where the amount involved is less the state court has exclusive jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1824; Dec. Dig. § 489*.]

Error to the Municipal Court of Chicago; William N. Gemmill, Judge.

Action by M. Fry and others against the Southern Pacific Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

John Maynard Harlan and Lewis W. McCandless, for plaintiff in error. Charles A. Butler, for defendants in error.

HAND, J. This was an action commenced by the defendants in error against the plaintiff in error in the municipal court of Chi-

cago to recover damages sustained by the defendants in error in consequence of the failure of the plaintiff in error to use and exercise proper care in the shipment of 153 boxes of pears and 650 crates of plums from Hollister, state of California, to the city of Chicago, state of Illinois. The shipment was made over the plaintiff in error's railroad from Hollister, Cal., to Ogden, Utah, the Union Pacific Railroad from Ogden to Council Bluffs, Iowa, and the Chicago & Northwestern Railroad from Council Bluffs to Chicago. The fruit, on its arrival at Chicago, was in a damaged condition. The jury returned a verdict in favor of defendants in error for the sum of \$95.75, upon which verdict the court, after overruling a motion for a new trial and in arrest of judgment, rendered judgment in favor of the defendants in error, and the plaintiff in error has sued out this writ of error to review the judgment of the municipal court.

The plaintiff in error, at the close of all the evidence, moved the court for a directed verdict in its favor, which motion the court overruled. The plaintiff in error thereupon asked the court to instruct the jury that section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 8169]), as amended by Act June 29, 1906, c. 3591, 34 Stat. 598 (U. S. Comp. St. Supp. 1907, p. 909), upon which the action was based, was unconstitutional and void, and that as the shipment was made from Hollister, in the state of California, to Chicago, in the state of Illinois, under a bill of lading which limited the liability of the plaintiff in error to damages accruing upon plaintiff in error's own line, and the evidence showed the fruit was damaged after it left the line of plaintiff in error at Ogden, Utah, there could be no recovery against the plaintiff in error. This the court also declined to do, and instructed the jury that section 20 of the interstate commerce act of February 4, 1887, as amended by the act of June 29, 1906, was a valid and constitutional enactment, and that the provision in the bill of lading which limited the liability of the plaintiff in error to its own line was void, and if the jury found, from the evidence, that the fruit in question was damaged in transit from Hollister to Chicago in consequence of the negligent manner in which it was handled, they should find in favor of the defendants in error, regardless of what line of railroad it was injured upon.

The plaintiff in error urges two grounds of reversal in this court: First, that section 20 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 8169]), as amended by Act June 29, 1906, c. 3591, 34 Stat. 598 (U. S. Comp. St. Supp. 1907, p. 909), commonly called the "Hepburn Act," is unconstitutional and void; and, secondly, if said section of the United States statute is valid, then the municipal

court of Chicago is without jurisdiction to try this case, as exclusive jurisdiction has been conferred upon the United States courts by sections 8 and 9 of the interstate commerce act of 1887 to try all cases which fall within the provisions of said section 20 of the statute of the United States, as amended.

The amendment to section 20 of the interstate commerce act, under which plaintiff in error was held liable, reads, in part, as follows: "That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

The bill of lading upon which such shipment was made contained the following clause limiting the liability of the plaintiff in error to its own line: "It is further stipulated that * * * the responsibility of this company and each succeeding carrier for loss or damage does not extend beyond its own line." It is conceded that under the law of the state of California the provision found in the bill of lading which limits the liability of the plaintiff in error to its own line was a valid provision and binding upon the defendants in error, unless the California statute was abrogated by section 20 of the United States statute, as the shipment, but for said section of the United States statute, would be governed by the law of the state of California, that state being the state from which the shipment was made, and that it would not be controlled by the law of the state of Illinois. *Coats v. Chicago, Rock Island & Pacific Railway Co.*, 239 Ill. 154, 87 N. E. 929.

The Constitution of the United States provides the Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (article 1, § 8, cl. 3); "to make all laws which shall be necessary and proper for

carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof" (article 1, § 8, last clause); and that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land" (article 6, § 1, cl. 2). The laws of the United States are paramount to the laws of the several states, and the statute of the state of California, which limited the liability of the plaintiff in error to its own line, and the bill of lading issued to defendants in error being in conflict with the statute of the United States, the California statute must give way and the United States statute would control. *Gulf, Colorado & Santa Fe Railway Co. v. Hefley & Lewis*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910. This proposition is not controverted by plaintiff in error when the United States statute is a valid enactment; but, as applied to this case, it is urged the United States statute is in conflict with the fifth amendment to the Constitution of the United States, which provides that "no person shall be * * * deprived of life, liberty or property without due process of law," and by reason of such conflict the United States statute is invalid, hence it is said the California statute is in force and that it controls this shipment.

We cannot accede to this contention. While the right to contract is a property right within the meaning of the federal Constitution, the right to contract, nevertheless, is held by an individual or by a corporation subject to such reasonable regulations, restrictions and conditions as the Congress of the United States may legitimately, under the Constitution, impose upon such right of contract. By virtue of the interstate commerce clause of the Constitution Congress may limit the rate which a carrier may charge, and we see no reason why it may not provide that a carrier engaged in interstate commerce shall furnish the shipper a bill of lading to the destination of the shipment, and that a carrier engaged in interstate commerce shall be liable for damages to the shipment caused by any carrier over whose line the shipment passes, from the time it is delivered to the initial carrier until its delivery to the consignee at the point of final delivery. Such is the common law and such is the law of this state (*Wabash, St. Louis & Pacific Railway Co. v. Jaggeman*, 115 Ill. 407, 4 N. E. 641; *Chicago & Northwestern Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Coats v. Chicago, Rock Island & Pacific Railway Co.*, supra; *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110), subject to the limitation that the carrier engaged in interstate commerce can limit, by contract, its liability to its own line. This limitation of the common-law rule—that is, that the carrier may limit its liability to its own line—has often been abrogated by statute.

In the case of *McCann v. Eddy*, supra, the Supreme Court of Missouri held a statute constitutional which provided that "whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad company or transportation company issuing such bill of lading shall be liable for any loss, damage or injury to such property caused by its negligence or the negligence of any other common carrier, railroad or transportation company to which such property may be delivered or over whose line such property may pass," and held the initial railroad company liable for damages to a shipper of cattle which occurred upon another line of railroad, although the bill of lading provided the initial railroad should be exempted from all liability of every kind after the cattle left its road. And in this state it is held that, while the common carrier may limit its common-law liability by contract, it would be contrary to public policy to allow a common carrier to limit its liability for a loss occasioned by reason of its gross negligence or willful misconduct, and that such limitation in a bill of lading would be void. *Chicago & Northwestern Railway Co. v. Simon*, supra.

In *United States v. Joint Tariff Ass'n*, 171 U. S. 571, 572, 19 Sup. Ct. 33 (43 L. Ed. 259), it was said: "Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the states, or, in certain cases, by Congress."

In *Gibbons v. Ogden*, 9 Wheat. 1, on page 196, 6 L. Ed. 23, the court said: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

We are impressed with the view that section 20 of the Hepburn act, in so far as it makes the initial common carrier responsible for the safe transportation of property from the point of its receipt to the point of its delivery and prohibits the common carrier from limiting such liability, is a valid enactment, and that the trial court did not err in de-

clining to instruct the jury that said section of the statute was unconstitutional and void.

Counsel for plaintiff in error insist, if it is held that the section of the interstate commerce act hereinbefore set out is a valid enactment, that then the municipal court of Chicago was without jurisdiction to try this case. The sections of the interstate commerce act relied upon to confer exclusive jurisdiction upon the United States courts are found in the original act of 1897, and are numbered 8 and 9, and read as follows:

"Sec. 8. That in case any common carrier, subject to the provisions of this act, shall do, cause to be done or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"Sec. 9. That any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction, but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

In considering the question here involved, the provision of section 22 of the act which reads, "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this act are in addition to such remedies," must not be lost sight of. Neither must the provision found in the section, a construction of which is involved in this case, be overlooked, which reads, "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." As we have heretofore seen, section 20 of the interstate commerce act, in so far as it declares that the carrier receiving property for transportation to a point in another state shall be liable to the holder of the bill of lading "for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which said property may be delivered or over whose line or lines such property may pass," was merely declaratory of the common law, and that the portion of the section which provides that "no con-

tract, receipt, rule or regulation shall exempt such common carrier * * * from the liability hereby imposed," is all that is found in the section which is derogatory to the common law. We therefore have here a congressional enactment which, in effect, declares that the common law shall govern all interstate shipments, except that no contract shall be made by the common carrier with the shipper which shall limit the liability of the carrier to loss, damage, or injury accruing upon its own line, and if such limitation is incorporated in the bill of lading it shall be void.

We have, therefore, in the case at bar, a cause of action based upon a common-law liability, and the only effect of the statute is to deprive the plaintiff in error of a defense which it would otherwise have had at the common law but for the statute. There is, therefore, no new cause of action created by the statute in favor of the shipper; but his right of action is based upon a statute which is declaratory of the common law. The right, therefore, of the defendants in error to bring their action in the courts of this state, is the same as to bring their action upon any other common-law action, and such right is expressly reserved to them by section 22 of the statute, which provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," and by the very section of the statute itself which is under consideration, which section provides "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." To hold as we are asked to hold by the plaintiff in error would be to hold that Congress had given the shipper a right of action against the initial common carrier for a failure to deliver safely his shipment at its destination. But in many cases no court had been provided in which the shipper could bring his cause of action, as, if the state courts are deprived of jurisdiction of such actions, no suit could be brought to enforce such liability in favor of the shipper unless the loss, damage, or injury to the shipper was more than \$2,000, as the jurisdiction of the United States courts in common-law cases is limited to cases where the amount in dispute, exclusive of interest and costs, exceeds the sum of \$2,000. In all cases, therefore, where the amount in dispute was less than \$2,000, the shipper would be remediless. The question now under consideration was before the United States Circuit Court for the Western District of Arkansas in the case of *Smeltzer v. St. Louis & San Francisco Railroad Co.* (C. O.) 168 Fed. 420, and in the case of *Southern Pacific Co. v. Orenshaw Bros.*, 5 Ga. App. 875, 63 S. E. 885, in each of which cases, in well-considered opinions, the conclusion was reached that the courts of the

several states have jurisdiction in favor of a shipper, and against a common carrier, of a cause of action arising under section 20 of the interstate commerce act, as amended in 1906. In the *Smeltzer Case* it was held that section 20 of the interstate commerce act, as amended by the Hepburn act, which requires the initial carrier, on receiving an interstate shipment, to give a through bill of lading therefor, and gives a right of action against the carrier issuing it for any loss or damage to the property caused by such carrier or any connecting carrier, does not limit the jurisdiction of such an action to the federal courts, and where the amount exceeds \$2,000 such courts and the state courts have concurrent jurisdiction, and where the amount involved is less a state court alone has jurisdiction. And in the *Crenshaw Case*, that a petition which sets out that the plaintiff is the lawful holder of a bill of lading issued by the defendant (a common carrier) for certain property to be transported from one state to another, and that the property was found to be damaged upon its arrival at destination, is properly instituted in a state court, and sets out a valid cause of action, although the copy of the bill of lading attached as an exhibit contains certain contractual items which, but for the provisions of the federal statute, would exempt the defendant from liability in the case. The reasoning of the opinion filed in each of those cases is satisfactory, and convinces us that the municipal court of Chicago had jurisdiction of the subject-matter of this suit.

Finding no reversible error in this record the judgment of the municipal court of Chicago will be affirmed.

Judgment affirmed.

On Petition for Rehearing.

PER CURIAM. The plaintiff in error has filed a petition for rehearing. The Supreme Court of the United States, since the opinion in this case was filed, has decided the case of *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 43 Oh. Leg. N. 177, 31 Sup. Ct. 164, 55 L. Ed. —, and sustained the constitutionality of section 20 of the interstate commerce act as amended. It is said, however, that that court, in the case referred to, did not determine the right of the initial carrier to refuse a shipment designed for a point beyond its own line, nor its right to refuse to make a through route or joint rate, where such route or rate would involve the continuation of the transportation over independent lines, which is true, as that question was expressly reserved, and this case is sought to be brought within the scope of the question thus reserved. We do not think this can be done. While the shippers in this case designated the several lines of railroad between Hollister and Chicago over which they wished their fruit carried, the plaintiff

in error did not refuse the shipment by reason of such designation, but voluntarily received and billed the same over the designated lines of railroads, which brings the shipment squarely within the language of the Supreme Court of the United States in the *Riverside Case*. The shipment was voluntarily received for transportation over the route designated by the shippers, and, nothing to the contrary appearing, the presumption is that the routing was over lines with which the plaintiff in error theretofore had made its own arrangement and rate. From a re-examination of the original briefs and the petition for rehearing, in the light of the recent decision of the Supreme Court of the United States, we are constrained to adhere to the conclusion which we reached when the case was originally considered. The petition for rehearing will therefore be denied. Rehearing denied.

(248 Ill. 299.)

SOUTH PARK COM'RS v. MONTGOMERY WARD & CO. et al.

SAME v. S. KARPEN & BROS. et al.

(Supreme Court of Illinois. Dec. 21, 1910. Rehearing Denied Feb. 8, 1911.)

1. WORDS AND PHRASES—"PARK."

In the common understanding, a "park" is a piece of ground in or near a city or town for ornament and as a place for the resort of the public for recreation and amusement, and it is usually laid off in walks, drives, and recreation grounds.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, p. 5176; vol. 8, p. 7745.]

2. EMINENT DOMAIN (§ 1*) — NATURE OF RIGHT.

The right of eminent domain is an inherent power of the sovereign to appropriate private property to the public use existing independently of written Constitutions or statutory laws though regulated by appropriate legislation, and limited only by the constitutional provision for compensation extending to every kind of property.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 2362-2366; vol. 8, p. 7649.]

3. EMINENT DOMAIN (§ 67*)—QUESTIONS OF NECESSITY AND PROPRIETY.

Questions of the necessity and propriety of the exercise of the right of eminent domain are legislative and not judicial.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165, 167; Dec. Dig. § 67.*]

4. EMINENT DOMAIN (§ 67*) — PUBLIC USE — DETERMINATION OF QUESTION BY COURT.

In exercising the right of eminent domain, the Legislature is restricted by the requirements that the use shall be public and lawful, and not abused to the injury of well-recognized private rights, and its actions in such respect are subject to court review.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 165, 167; Dec. Dig. § 67.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. DEDICATION (§ 64*)—EFFECT—USE OF PROPERTY.

Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions, if the dedication is accepted, the land cannot be applied to any other use or the restrictions disregarded.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 107-111; Dec. Dig. § 64.*]

6. JUDGMENT (§ 713*)—RES JUDICATA.

The doctrine of res judicata extends not only to every matter that was actually determined in the former suit, but to every matter that might have been raised and determined in it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

7. EMINENT DOMAIN (§ 74*)—CONDEMNATION—CONSEQUENTIAL DAMAGES.

If injury results to property not actually taken for a public use by condemnation, the owner has no right to have his property condemned and his consequential damages paid before entry can be made upon the property sought to be taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188-197; Dec. Dig. § 74.*]

8. JUDGMENT (§ 713*)—RES JUDICATA.

Where the owner of property abutting on a public park sued to enjoin threatened erection of a building therein by the city in violation of the terms of the dedication, if he had no right to an injunction except a limited one, until his damages could be ascertained in condemnation proceedings and paid, it was the duty of defendants to present the question and claim their rights, and where they failed to do so, and the injunction was made perpetual, and it was held that the Legislature could not authorize construction of buildings in the park, the judgment was res judicata in a subsequent suit seeking to condemn the property right of abutting owner in the restriction of the use of the park, so that structures might be erected therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.*]

Dunn, Hand, and Carter, JJ., dissenting.

Appeal from Superior Court, Cook County; William H. McSurely, Judge.

Actions by the South Park Commissioners against Montgomery Ward & Co. and others, and by the same against S. Karpen & Bros. and others. Judgments of dismissal, and plaintiff appeals. Affirmed.

Tolman, Redfield & Sexton (John P. Wilson, Edgar Bronson Tolman, Leonard A. Busby, and John Barton Payne, of counsel), for appellant. George P. Merrick and Elbridge Haney, for appellees Montgomery Ward & Co. and others. Mayer, Meyer, Austrian & Platt (Levy Mayer, of counsel), for appellees S. Karpen & Bros. and others.

CARTWRIGHT, J. The appellant, the South Park Commissioners, a municipal corporation having charge and control of Grant Park, in the city of Chicago, appealed from four judgments of the superior court of Cook county dismissing its petitions for the condemnation of the rights and easements to have the park kept free from buildings, and to preserve it for the purposes of the original dedications which the petitions alleged were

vested in Montgomery Ward and others, as owners of lots in Ft. Dearborn addition, and S. Karpen & Bros. and Levy Mayer, as owners of lots in Fractional Section 15 addition to Chicago, opposite the park, and, inasmuch as a material question in all the cases is the same, they have been heard together. They bring up again the question of the right to erect buildings in the park, which was adjudicated as between the city and Montgomery Ward in City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185, as between commissioners of the state and Ward in Bliss v. Ward, 198 Ill. 104, 64 N. E. 705, and as between Ward and the appellant and the Field Museum in Ward v. Field Museum, 241 Ill. 496, 89 N. E. 731. Two of the petitions prayed for the ascertainment of the compensation to be paid to the owners of lots for the rights and easements, interests, and property to be taken by the erection and maintenance of the Field Museum of Natural History in the park, and two contained like prayers for the ascertainment of the compensation to be paid for the same rights to be taken by the erection and maintenance of the Crerar Library in the park. They were filed in pursuance of the provisions of the Acts of 1903 (Laws 1903, p. 263), permitting the location of this museum and public libraries in the park. The act of 1903, which was under consideration in Ward v. Field Museum, supra, authorizing park commissioners to permit the directors or trustees of a museum at that time located in a public park to erect and maintain such museum within any public park under the control or supervision of such park commissioners, also provided that if any owner or owners of any lands or lots abutting or fronting on such public park had any private right, easement, interest, or property in such park which would be interfered with by the erection and maintenance of such museum, or any right to have the park remain open or vacant and free from buildings, the authorities having control of the park might condemn the same under the act providing for the exercise of the right of eminent domain. Laws 1903, p. 263. There was a similar provision in the act of 1903 authorizing park commissioners to permit any free public library to be erected in any public park under their control. Laws 1903, p. 262. On January 5, 1910, the petitioner passed an ordinance for acquiring, by condemnation, all rights and easements in the park requisite for the construction of the museum, which was to occupy a space 1,300 feet long north and south and 800 feet wide from east to west, and another ordinance for condemning such easements for the construction and maintenance of the John Crerar Library in the park, between Madison and Monroe streets extended east. The defendants, claim-

ing that the petitioner had no lawful right to permit the erection of buildings in the park, filed their motions to dismiss the petitions; denying that the proposed uses were public in their nature; alleging that the acts of the Legislature under which the proceedings were instituted were in conflict with the Constitution and therefore void (and particularly that the act in regard to the museum was unconstitutional as applying only to the Field Museum, and granting to a private corporation an exclusive privilege or franchise), and that the prior judgments against the petitioner, or those represented by it and with whom it was in privity, were final adjudications against the right to disregard the restrictions of the original dedications. The court sustained the motions and dismissed the petitions. Inasmuch as a determination of the question whether the Legislature could authorize the erection of buildings in Grant Park contrary to the terms of the dedications of the property for park purposes will dispose of the cases, other questions will not be considered.

The Field Museum is a private corporation, and the act authorizing the erection of its building in the park, which limited the privilege to museums located in a public park on the 1st day of July, 1903, was intended to apply, and as a matter of fact did apply, only to that corporation. The superior court was of the opinion that the act was in violation of the Constitution, as granting an exclusive privilege to the corporation, but if the Legislature could not by any act authorize the erection of a building in the park, any question of a special privilege is not material. There are also questions as to the nature and limits of public uses, and in *Ward v. Field Museum*, supra, a great deal of evidence was taken to prove that such buildings as museums were situated in various public grounds called parks, in different parts of the world. We declined to consider that question, and said that questions concerning the proper uses of public parks and what buildings had been erected in other parks were not involved in that case. In the common understanding, a park, in this country, is a piece of ground in or near a city or town for ornament, and as a place for the resort of the public for recreation and amusement, and it is usually laid out in walks, drives, and recreation grounds. *Village of Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 238, 102 Am. St. Rep. 164; *Webster's Dict.*; 29 Cyc. 1684; 21 Am. & Eng. Ency. of Law (2d Ed.) 1066. Whether a public library which is not for amusement or recreation but for educational purposes, or a museum maintained mainly for scientific investigation and instruction in geology, ethnology, and other kindred sciences, and in which entertainment and amusement is only incidental, is a legitimate part of a park might be proper questions for consideration in some cases; but if

the only right which the defendants have consists of easements, in connection with their property, of an unobstructed view, and such easements can be taken from them by condemnation, it is not material to them what the uses of the building are. If buildings should be erected not proper in a public park, and therefore a public nuisance, they might be abated at the suit of any one aggrieved, but the material question in these cases is the right to erect any sort of building in the park.

The right of eminent domain is an inherent attribute of sovereignty, existing independently of written Constitutions or statutory laws, although it is regulated by appropriate legislation. It is the power of the sovereign to appropriate private property to the public use, limited only by the constitutional provision for compensation. It extends to every kind of property, including not only that which is tangible, but all rights and interests of any kind, including easements. *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 202; *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 Ill. 317; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379. Questions of the necessity and propriety of the exercise of the right are legislative and not judicial. *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake*, 71 Ill. 333; *Pittsburgh, Ft. Wayne & Chicago Railway Co. v. Sanitary District*, 218 Ill. 286, 75 N. E. 892, 2 L. R. A. (N. S.) 226. But the power is not unrestricted and without bounds. The Legislature are restricted by the requirement that the use shall be public and lawful, and the power cannot be abused to the injury of well-recognized private rights. The Legislature cannot authorize the taking of the property of the citizen for illegal uses, and the courts are not without power to determine that question. A use might be public, in the broadest sense, as being open to all alike upon the same terms and conditions, and the right of the public to use and enjoy the property taken from the citizen be an absolute right and not a mere favor, and yet the use be against public policy because destructive of the health, morals and welfare of society, or subversive of natural or constitutional right. The courts have a right to determine such questions, and may decide whether the use to which it is sought to appropriate the property is a public use; whether such use or purpose would justify the exercise of the compulsory taking of private property under the statute and Constitution; and, where the power is attempted to be exercised by a corporation, whether the power has been delegated to the corporation by the Legislature, and whether the uses and purposes for which the power is sought to be exercised fall within the legislative grant of powers. *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake*, supra; *South*

Chicago, Railroad Co. v. Dix, 109 Ill. 237; Chicago & Eastern Illinois Railroad Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Pittsburgh, Ft. Wayne & Chicago Railway Co. v. Sanitary District, supra; County of Mercer v. Wolff, 237 Ill. 74, 86 N. E. 708. Accordingly, a railroad company invested with power to exercise the right of eminent domain, but having no right to locate its road on a particular piece of property, has not been permitted by the courts to exercise such right for the purpose of appropriating that property to its use. Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co., 149 Ill. 272, 37 N. E. 91; Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 149 Ill. 457, 37 N. E. 78; Cairo, Vincennes & Chicago Railway Co. v. Woodyard, 228 Ill. 331, 80 N. E. 882. The ground of those decisions was that there was no power to appropriate the particular property to the contemplated use. If the Legislature had no power to change the uses of Grant Park, and to disregard the terms of the dedications by authorizing the erection and maintenance of buildings in the park, there could be no condemnation of the rights of the defendant that the park should be kept free from buildings, whatever the nature of such rights might be. It is not thought that the state can divest itself of the right of eminent domain to take private property for public use; but the settled law of this state is that if the owner of private property offers to donate it to the public for a specified public use, and the offer is accepted, and the property devoted to such use, the state cannot change the use and apply the property to some other use inconsistent with the dedication. Grant Park is already devoted to a public use, and the only question to be decided is whether that use can be changed.

Disregarding, for the present, the question of res judicata, the general question whether property dedicated to a particular public use can be diverted to a different use has been before this court in a number of cases, and with uniform results. In the early case of City of Alton v. Illinois Transportation Co., 12 Ill. 38, 52 Am. Dec. 479, certain lands lying between Front street and the Mississippi river, in the town of Alton, had been dedicated to the public as a public landing place, and the court declared the doctrine that, whatever title to the same might be vested in the city of Alton, the city had not the unqualified control and disposition of them; that they were dedicated to the public for particular purposes, and only for such purposes could they be rightfully used, and that for those purposes alone the city might improve and control them.

In City of Jacksonville v. Jacksonville Railway Co., 67 Ill. 540, land had been dedicated for a public square, and by an act of the Legislature the railway company was

authorized to construct and operate its railway over and across any public grounds and squares within the town. The railway company attempted to exercise the power so given by the Legislature, but was perpetually enjoined from all attempts to do so. This court held that a power could not exist in the Legislature to divert property from the purpose for which it was donated; that the donation in that case was made for a certain specific and defined purpose; that it must be preserved, or the land must revert to the original proprietors; and that a court of equity would enforce the execution of the trust, either upon the application of the owners of lots abutting upon the square or of the city. Under the law as there declared, if the Legislature should, contrary to the expressed terms on which the public grounds in Ft. Dearborn addition were dedicated, appropriate the same to inconsistent uses, the lands would revert to the United States, the original dedicator, and lands of incalculable value might be lost to the public.

The question in United States v. Illinois Central Railroad Co., 154 U. S. 225, 14 Sup. Ct. 1015, 38 L. Ed. 971, was whether the United States, as grantor of the public grounds in Ft. Dearborn addition, retained such an interest therein as entitled them to control and regulate the execution of the trusts created in the dedication, and it was held that they did not, but there was no intimation that there was not a possibility of reverter upon a violation of the condition of the dedication.

In Village of Princeville v. Auten, 77 Ill. 325, the village board of trustees attempted to locate a town hall on a public square. Although the plat did not indicate the manner in which the public might enjoy the dedication, the intention of the dedicators was proved by their oral declarations, and it was held that the village trustees had no authority to appropriate the square, in whole or in part, as a site for buildings against the wishes of any citizen interested.

In Village of Riverside v. MacLain, supra, where a tract in the village of Riverside had been dedicated as a public park, and the proprietors exhibited maps and plats showing such dedication in the sale of lots, the village, having power to lay out streets, attempted to lay one across the park. The park was a small one, set with trees and bushes, and the proposal was to put a roadway through it at an elevation of five feet, cutting the park in two and destroying its usefulness as a park. It was not permitted, although there was no express prohibition in the dedication. The court pointed out the distinction between cases where property is dedicated to public uses without restriction or has been established under statutory provisions, and cases where the dedication is restricted to particular purposes by the original owner and the dedication is accept-

ed. Presumably the dedicator would not make the donation to the public except upon terms and conditions which he specifies, and the public authorities having their election to accept or reject the donation, are bound, if they accept it, to apply the property to the declared use. It was held that the village, under its authority to lay out streets, could not lay out a street across the park. It is only where property is dedicated generally, without restriction, to the use of the public that it may be applied to such uses as the public may desire. *Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25.

These cases settle the law of this state to be that an owner making a donation of his land to the public for a particular use has a right to specify the use and impose restrictions, and, if the dedication is accepted, the land cannot be applied to any other use or the restrictions disregarded. Where a proprietor subdivides his land and sells lots with a dedication of a portion for the common use of the owners of lots, such portion is not a park nor public property, nor exempt from taxation (*McChesney v. People*, 99 Ill. 218), and a case like *United States v. Certain Lands (C. C.)* 112 Fed. 622, has no relation to the question here involved. There is in such a dedication no acceptance by the public for a specified use. In that case it was held that the erection and use of a fortification for coast defense which did not directly encroach upon private property was not a taking of property requiring compensation, and the claims were dismissed except as to a right to go upon and pass over a certain lot which was taken. The police power, which is not exercised through the right of eminent domain, is not involved in this controversy.

The question has also been finally adjudicated with respect to this particular park and between the same parties concerned in this litigation. In 1890 Montgomery Ward filed his bill in the superior court of Cook county to enjoin threatened violations of the terms of the dedications by the city, a local governmental agency of the state, and a final decree was entered restraining the city from erecting or causing to be erected, any building or structure upon the premises described in the bill, extending from Randolph street to Park Row, with certain exceptions, and that decree was affirmed in *City of Chicago v. Ward*, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185. It is urged against the application of the doctrine of *res judicata* that the question of the right to erect buildings in the park upon ascertaining the compensation to be paid to Ward was not considered or decided in that case or the subsequent cases. That is true, but the basic question whether the Legislature could authorize the construction of buildings in the park, which lies at the foundation of the right to condemn, was de-

termined. If the Legislature had no right to erect the buildings, which are now alleged to be a public use, they could not provide for taking the right of any person or appropriating his property for such use. To say that having acquired the right to ascertain and pay the damage to the property of Ward gives the right to change the use and violate the restriction which did not before exist would be reasoning backward. A superstructure does not support the foundation, and a lawful public use lies at the very foundation of the right to appropriate property or property rights. Moreover, the existence of an act authorizing a proceeding to condemn was immaterial. If it were conceded that Ward merely had a property right in the nature of an easement, which could be taken by process of condemnation, he could not have had an injunction against the erection of buildings in the park. Ward did not own or claim to own the fee in the park or any part of it, and if injury results to property not actually taken for a public use, the owner has no right to have his property condemned, but is left to his action at law. The Constitution forbids taking or damaging property for the public use without just compensation, but if no portion of a lot or tract of land is taken for the public use, the owner is not entitled to have proceedings instituted to ascertain what damages his property will sustain. An abutting owner has rights in a street for ingress and egress and easements of light and air, but the public authorities are not bound to stop and litigate with him the question of his damages nor institute a proceeding for condemnation. *Penn Mutual Life Ins. Co. v. Helss*, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273; *Stetson v. Chicago & Evanston Railroad Co.*, 75 Ill. 74; *Peoria & Rock Island Railway Co. v. Schertz*, 84 Ill. 135; *County of Mercer v. Wolff*, *supra*. In the case last cited it was said: "But when no part of the land of an abutting owner is taken, the Constitution does not require the ascertainment and payment of his consequential damages before entry can be made upon adjoining property." *Rigney* had rights in a street which were interfered with by the construction of a viaduct cutting off access from his house and lot to an intersected street except by means of stairs, and he was permitted to recover damages for the injury to his property (*Rigney v. City of Chicago*, 102 Ill. 64), but he could not have had an injunction against the construction of the viaduct. So, also, the city interfered with the ingress and egress to the property of Jackson by changing the grade of the street in the construction of a subway under a track elevation ordinance, and he was permitted to recover his damages, but could not have had an injunction. *City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135. In the second case, *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705, the Legislature had under-

taken to authorize the construction of an armory and parade grounds in the park, so that the Legislature had made a direct attempt to change the use and disregard the restriction, but it was held that the Legislature did not have such power. If the injury to Ward consisted merely in damages to his property, and his only right was to have compensation for such damages, the commissioners of the state would never have been enjoined from building the armory. The act of 1861, amending the charter of the city of Chicago (Priv. Laws 1861, p. 136), did not give a right to an injunction, except to prevent violations of section 64 and a certain ordinance forbidding encroachments by any railroad company on the land between Michigan avenue and the Illinois Central Railroad. Ward acquired no right by that act to enjoin the building of the armory or Field Museum. When the last case (Ward v. Field Museum, *supra*), was instituted, the act providing for condemnation of his rights had been passed, and, if the fact was of any importance, it was the duty of the appellant and the Field Museum to set it up and claim such rights as it gave them. In fact, it was set up by answer and cross-bill, and if the act was valid and the Legislature had power to change the use by compensating Ward for the depreciation of his property, there could have been no injunction, except one restraining the erection of the building, until his compensation should be ascertained and paid. The doctrine of *res judicata* extends not only to every matter that was actually determined in the former suit, but to every other matter which might have been raised and determined in it. *Rogers v. Higgins*, 57 Ill. 244; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 18 N. E. 161, 5 Am. St. Rep. 502; *Harvey v. Aurora & Geneva Railway Co.*, 186 Ill. 288, 57 N. E. 857; *Ward v. Field Museum*, *supra*; *People v. Superior Court*, 234 Ill. 186, 84 N. E. 875. If Ward had no right to an injunction, except a limited one, until his damages would be ascertained and paid, it was the duty of the defendants to present that question and claim their right under the act. The injunction was made perpetual, and all questions that might have been raised were determined adversely to the petitioner in this case, although, as we have already seen, a court of equity would not have given Ward an injunction if the proposed use had been lawful. The question considered in the former cases was simply whether the Legislature, or any of its subordinate agencies, could disregard the prohibition against buildings in the park, and that was the question decided. It was determined in each case that he occupied a position which gave him a right to enforce the restriction as one having a special interest in having it enforced. It was decided in the previous suits that there was no lawful authority for the erection of buildings in Grant Park, and without

such authority there could be no valid law authorizing the condemnation of property for that purpose. If the provisions contained in the first sections of the two acts of 1906 for the erection of the museum and public libraries in the park were beyond the power of the Legislature, they were not brought within it by filing petitions under the other provisions of the same sections.

The judgments are affirmed.

Judgments affirmed.

DUNN, J. (dissenting). These appeals present a new aspect of the controversy in regard to the erection of buildings in Grant Park in the city of Chicago. In previous cases it has been decided that under the terms of the dedication no building of any kind can be erected upon any part of the park. *City of Chicago v. Ward*, 169 Ill. 892, 48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185; *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705; *Ward v. Field Museum*, 241 Ill. 496, 89 N. E. 731. The opinion in the last case contains a statement of the material facts governing the rights of the parties and a history of the litigation by which the restrictions imposed by the dedication of the park have been hitherto enforced.

The act of May 14, 1903, giving the corporate authorities of park districts power to erect and maintain museums in any park, and to permit the directors or trustees of any museum to erect the same in any park, by the authority of which the South Park Commissioners entered into the contract with the Field Museum of Natural History for the erection of its museum in Grant Park, as mentioned in the case of *Ward v. Field Museum*, *supra*, contained the further provision that if any owner of lands adjacent to such park should have any private right or easement in such park appurtenant to his lands or any right to have such park remain open or vacant and free from buildings, the corporate authorities of the park district may condemn the same in the manner prescribed by statute for the exercise of the right of eminent domain. Accordingly, after the final decision of that case again declaring the existence of such private rights and easements, the South Park Commissioners, on January 5, 1910, passed an ordinance providing for the acquirement, by condemnation, of all rights and easements in Grant Park requisite for the construction of the museum, and a petition was filed against Montgomery Ward & Co. and others, the owners of lots in the Ft. Dearborn addition to Chicago, situated on the west side of Michigan avenue south of Washington street, praying for the condemnation of the rights, easements, interest, and property appurtenant to the lots of such owners in, to, or over Grant Park, so far as they will be interfered with, taken, or damaged by the erection and maintenance of a museum. A like petition was filed against S. Karpen & Bros. and Levy Mayer, the own-

ers of lots in Fractional Section 15 addition to Chicago, situated on the west side of Michigan avenue.

On May 14, 1903, there was also passed an act authorizing the corporate authorities of park districts to permit any free public library organized under the act "to encourage and promote the establishment of free public libraries in cities, villages and towns of this state," to erect and maintain its library building within any park, and having the same provisions in regard to the condemnation of rights and easements in the park as in the case of museums. Acting under the authority supposed to be conferred by this act, the commissioners, on February 15, 1905, granted to the John Crerar Library, a corporation organized under the act above mentioned, permission to erect and maintain a library building on Grant Park, having its west front on a line with the west front of the Art Institute, its north and south walls, respectively, equidistant from the south line of Madison street extended east, and the north line of Monroe street extended east, and not less than 40 feet from such lines, and having its east wall at least 25 feet west of the west line of the right of way of the Illinois Central Railroad Company. On January 5, 1910, an ordinance was passed providing for the acquirement, by condemnation, of the private rights and easements in Grant Park of the owners of the lots in the Ft. Dearborn addition to Chicago and the Fractional Section 15 addition to Chicago, and petitions were filed against the same persons who were made parties in the museum case, for the condemnation of their rights and easements for the benefit of the library. Motions were made by the defendants to dismiss each of the petitions for reasons stated, and on the hearing these motions were sustained, the petitions were all dismissed, and judgments were rendered against the petitioner for costs.

The opinion of the majority of the court holds that the dedication of the park imposed not only an inviolable restriction against the erection of any building whatever in the park, but also a permanent and insurmountable barrier to the exercise by the government of its power of eminent domain, and that it was so decided in the three cases cited above. This position cannot be sustained. In the first two cases the right to the exercise of such power was not mentioned. The defendants in those cases denied the existence of any right to have the park remain free from buildings, and were proceeding under the assumed authority of various ordinances and statutes to erect buildings in disregard of the claim of such right. The bills were filed in those cases to enjoin the erection of any buildings in the park, and the court sustained the claim of an easement appurtenant to each lot on the west side of Michigan avenue from Randolph street to Park Row to have the park, and every part

of it, including accretions and reclaimed land, kept forever free from buildings. It was decided that the park was held in trust for the public, subject to the restrictions imposed by the instruments of dedication that neither the state nor the city could disregard such restrictions, and that the erection of the proposed buildings would be a diversion of the property to purposes violative of the restrictions of the trust, which a court of equity could enjoin. No statute then in existence purported to authorize the condemnation of incorporeal rights of the character of those held by appellees, and no question in regard to the power of eminent domain over the easements in controversy was or could have been raised or decided in those cases.

The last of the three cases decided no more than was decided in the other two, and in the opinion it is said that the identical question in this case was decided in the former suits. "The question in the former cases," it is said (page 510 of 241 Ill., page 736 of 89 N. E.), "was not whether park buildings, museums or any particular kind of building could be erected on the premises, but whether a building of any kind could be so erected," and it is again declared that neither the Legislature, nor any municipal corporation under the authority of the Legislature, can violate the restriction imposed in the dedication of the park. It is true that the act of May 14, 1903, concerning museums in public parks, is set out in the bill in that case and averred to be null and void, while the answers admit the adoption of the act, and allege that it is legal and valid. But whether valid or void, the act could not affect the merits of that case. It was not averred that any attempt had been, or was about to be, made under the act to condemn the complainant's easement, but the averment was that the defendants were intending to permit the erection of a museum building in said park, and unless restrained would thereby destroy or irreparably injure the complainant's easement. The commissioners had no right, acting under legislative permission or otherwise, to permit a violation of the trust under which the park was held. They could not disregard the complainant's property rights. Whether they had the power to condemn them was another question not involved in the issue. The South Park Commissioners filed a cross-bill, in which, among other things, the act of May 14, 1903, was set up, and it was prayed that if it should be held that the complainant had any right in the park, whatever interest he might have affecting the right of the commissioners to permit the erection of the museum building might be ascertained and compensation made therefor. Manifestly, this was not a matter within the jurisdiction of a court of equity, and no adjudication could be made on this cross-bill of the question of the commissioners' right, under the act, to condemn

the complainant's easement in the manner prescribed by the eminent domain act (Hurd's Rev. St. 1906, c. 47). No expression on that question is found in the opinion. It was not before the court, and in the decree rendered in the circuit court, in compliance with the mandate of this court, it is expressly stated that the right of eminent domain is not passed upon, as, indeed, under the mandate it could not be passed upon.

It is said that if the passage of the act of May 14, 1903, authorizing the condemnation of the appellees' easements, was of any importance, it was the duty of the appellant to set it up and claim such rights as it gave the appellant, and that if Ward had no right to an injunction, except a limited one, until his damages would be ascertained and paid, it was the duty of appellant to present that question and claim its right under the act. Courts adjudicate the rights of parties upon the facts existing at the time of such adjudication and not upon hypothetical conditions which may or may not arise in the future. The bill which the court had under consideration was one to enforce the observance of the conditions of a trust. Under the facts then existing, the complainants, who were cestuaries, were entitled to a decree enforcing the restrictions of the dedication by enjoining acts in violation of such restrictions. It was a matter of no importance whether or not the law authorized the condemnation of the appellees' easements so long as the appellant had not made and was not making any effort to condemn them, and the existence of that power unexercised did not limit Ward's right to a perpetual injunction. He was not in the position of an ordinary abutting owner who cannot have an injunction against an entry upon adjoining premises for public purposes because of consequential damages to his property. He was entitled to enforce the terms of the trust, for a statute expressly conferred upon any person owning or interested in any lot fronting on Michigan avenue the right, by bill in chancery, to enforce the condition that the park should forever remain open and vacant, and to enjoin any violation of such condition. Priv. Laws 1861, p. 186, § 64. On the facts as they were, he was entitled to a perpetual injunction, but an adjudication to that effect did not determine that his rights could not be affected by subsequent events. If his rights should be subsequently released or otherwise terminated the injunction would no longer be effectual. The decrees in all the former cases enjoined the defendants from doing acts which they had no right to do, because such acts violated the property rights of the complainant. This proceeding, prosecuted on behalf of the public, recognizing the existence of such property rights and the validity of the former decrees, seeks to acquire the

right to perform the acts enjoined, by condemning for the public use, in the manner authorized by the Constitution, all the property rights which will be interfered with.

Eminent domain is the power of the state to appropriate private property to the public use. It is a right inherent in sovereignty, which extends to every kind of property and to every public use. *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 202. Subject to the requirement of just compensation to the owner, it is without limitation, except that it can be exercised only for the public use. The property which may be taken includes not only tangible property, but all rights and interests of any kind in real or personal property, and in easements, franchises, and incorporeal hereditaments. Whatever exists in any form, whether tangible or intangible, may, by virtue of this power, be seized and appropriated to public uses when necessity demands it. *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 Ill. 317.

It is insisted that because of the restriction imposed in the dedication of the park the state is deprived of its power of eminent domain over the property rights reserved or created by such restriction. It is said that the Legislature has no power to change the legal result of the acts of dedication or to violate the restrictions imposed by such act. The exercise of the power of eminent domain does neither. The state occupies a dual relation to the property. It is a trustee for the benefit of both the private and public interests involved. As the grantee of the title it is bound by the limitations of the instrument through which it received the title. It cannot divert the park from the particular purpose for which it was dedicated or disregard the limitations imposed. A court of equity, at the suit of private owners, will interpose to prevent a perversion of the trust by the agents or instrumentalities of the state, as it has done heretofore in the case of this park. In case public rights, only, are involved, it is through the instrumentality of the state, alone, that they can be vindicated. The Attorney General, state's attorney, city, park commissioners, or other authorized agency of the state only can maintain a bill to enforce public rights in property held for the public use. *Hill v. St. Louis & Northeastern Railway Co.*, 243 Ill. 344, 90 N. E. 676; *Patterson v. Chicago, Danville & Vincennes Railroad Co.*, 75 Ill. 588. These cases involved the right of private individuals to enjoin the operation of a railroad in a public street without authority of law, but they are pertinent, for the title of the public to its streets does not differ from its title to its parks.

In *People v. Walsh*, 96 Ill. 232, 249 (36 Am. Rep. 135) we said: "In cases of property dedicated to public uses there are most usually two classes of interests affected; one

that of the public generally, and the other that of private parties. For any change of such a use, since the adoption of our present Constitution, there can hardly be any doubt but that to the extent it damages the private individual he is entitled to recover. But he may waive this right if he chooses. If he does not sue, it concerns neither other individuals nor the public at large. They cannot litigate for him, either in his own name or in the name of the public. This is so elementary and obvious that it needs no reference to authorities. But the Legislature represents the public. So far as concerns the public it may authorize one use to-day and another and different use to-morrow. If the new use affects private rights, proceedings for condemnation may have to be invoked, but so far as it affects the public alone, its representative, in the absence of constitutional restraint, may do as it pleases."

As the grantee of the title, the state is bound by the terms of the instrument conferring title, and the Legislature cannot change the uses and conditions upon which the property is held, because such change affects private rights. So far as such change affects public rights only, the Legislature may do as it pleases. It may change the use from time to time, as the public interests require, or may abandon the property altogether. *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362; *Meyer v. Village of Teutopolis*, 181 Ill. 552, 23 N. E. 651; *People v. Kerr*, 27 N. Y. 188. So far as the public interests are concerned, the Legislature, or the South Park Commissioners, to whom the Legislature has committed the control of the park, may authorize the erection of such appropriate buildings in the park as they think best. It is only because of the existence of private interests in the park, private easements appurtenant to other property to have the park remain free from buildings, that the Legislature may not authorize the erection of buildings. Such private easements add to the value of the property to which they are appurtenant and themselves are private property. Like all other private property, they are subject to the power of eminent domain. The exercise of the right to take such property from its owners for the public use is not a change of the legal result of the acts of dedication or a violation of the restrictions imposed by such acts. On the contrary, it is a recognition of the rights created by such acts and of the inviolability of such rights. It presupposes that these rights constitute property, which the Legislature cannot destroy or impair.

The cases cited in the majority opinion of *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479, *City of Jacksonville v. Jacksonville Railway Co.*, 67 Ill. 540, *Village of Princeville v. Auten*, 77 Ill. 325, and *Village of Riverside v. MacLain*, 210 Ill.

308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164, are all based upon the proposition that the dedication of property to the public use is subject to such restrictions as may be imposed by the act of dedication. The first was an ejectment suit. In the others, injunctions were granted preventing the respective municipalities concerned from applying the property to uses other than those for which it was dedicated. In the last case it was said that it was not necessary to the maintenance of the bill that damages should be shown, but at the same time it was held that there was evidence of special damage and injury by the misuse of the park, and in the cases cited the facts were such as to show that damages would necessarily follow the perversion of the trust and use of the property in the manner threatened. It was also held that the evidence showed a threatened nuisance, that a special trust existed in respect to the park in favor of the complainants as adjoining property owners, and that a court of equity would interfere to prevent the perversion of a trust. The right of eminent domain was not considered or involved, for the village was not exercising or claiming such right, but was claiming independently of it. These cases all depended upon contract rights created by dedication. They involved no question of the right of eminent domain, and contain no intimation that the state, by the acceptance of a dedication, deprived itself of the power to exercise such right or that by any contract it could do so.

To the suggestion that the appropriation of any part of the lands in Ft. Dearborn addition to the erection of buildings would result in their reversion to the United States, the dedicator, it seems a sufficient answer that the Supreme Court of the United States has decided, in the case of *United States v. Illinois Central Railroad Co.*, 154 U. S. 225, 14 Sup. Ct. 1915, 38 L. Ed. 971, that the United States has no interest, legal or equitable, in the public ground in Ft. Dearborn addition, no jurisdiction to control the trusts or uses created in such ground for the benefit of the public, and no right to enjoin the diversion of such public grounds from public purposes to private uses, and that this court has adopted that decision. *Williams v. City of Chicago*, 247 Ill. 240, 98 N. E. 165.

The right of eminent domain is an attribute of sovereignty, of which the state cannot divest itself. By no form of contract or legislative grant can the state surrender its right to take any property within the limits of the state at any time when it may be required for the public use. *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 119 Ill. 141, 7 N. E. 627; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379. In whatever grant or contract the state may make, there inheres the implied reservation of the right to retake the property granted, or the subject-matter of the contract, whenever the public necessities require it. There-

fore a franchise granted for the erection of a bridge and the taking of tolls for passing over it, to continue for 100 years, was held subject to be taken by the state for a public highway before the expiration of the hundred years by virtue of a statute enacted after the granting of the franchise. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535. A contract by a water company to supply a city with water for a term of years may be condemned by the city before its expiration, together with all the other property of the company. *Long Island Water Supply Co. v. City of Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165. By accepting the title to the park under the instruments of dedication the state did not divest itself of the right to condemn the private rights reserved by such instruments when needed for the public use. Whether private rights are needed for the public use, and the necessity of exercising the right of eminent domain to acquire them, are political questions, which belong exclusively to the legislative department of the government. *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake*, 71 Ill. 833; *Schuster v. Sanitary District*, 177 Ill. 626, 52 N. E. 855.

It is necessary to bear in mind the two different relations which the state holds to this park and to distinguish between its governmental and its contractual relation. The distinction between the governmental functions of the state and its proprietary rights and duties is well known. The construction and obligation of its contracts are the same as in the case of individuals. The same rights and liabilities attach by reason of the ownership of private property, though the remedies which exist against private citizens for their torts and upon their contracts do not exist against the state, because it cannot be sued. By the acceptance of the dedication of the park the state became bound by the restrictions imposed in the dedication. This obligation was contractual, but the state did not, by its assent to the dedication, cease to represent the public in its governmental capacity or deprive itself of any part of its powers of sovereignty. The relation of the state to the park may be illustrated by supposing the dedication to have vested the title in a corporation authorized to hold it for the public in the same way as the state holds it. The corporation trustee, the private owners and the dedicator would then have the whole title subject to the public use, and the state would represent the public, but would be under no contractual obligation. Under such conditions, if the Legislature should think a necessity existed for taking a portion of the property for the public use, no valid objection could be made to its condemnation. The situation is not altered by the fact that the state itself is both the trustee of the title by virtue of the contract arising out of the dedication and its acceptance, and the representative of the

public by virtue of its governmental relation. A contract cannot bind the state not to exercise the power of eminent domain. That contract right is itself subject to the exercise of the power of eminent domain. The contract here is no more beyond the exercise of the sovereign power to take it by eminent domain than that in the case of *West River Bridge Co. v. Dix*, supra, where the state was bound by a contract to permit the bridge company to maintain its bridge and collect tolls for a hundred years. Yet the state there took the bridge and the franchise though it had made an irrevocable grant, because in the judgment of the Legislature the public necessity required a free bridge. It is true that a lawful public use lies at the foundation of the right to appropriate property, but if such lawful public use exists, no contract not to apply the property to such use is of any avail against the sovereign's power to so apply it on making compensation for it. The state may not violate its contract, but, when the public necessity requires, it may condemn the property rights growing out of such contract. This unfettered exercise of the governmental power is essential to the public welfare. From time to time conditions change in every community. The necessity of to-day becomes useless to-morrow. A new generation has needs which its predecessors never imagined. If the powers of the government are to be limited and circumscribed, the bonds imposed fetter its authority for all time. A changed situation may make the taking of particular property necessary to the public good, but in all time to come it cannot be taken, because the state has parted with a portion of its sovereignty and bound itself by a contract not to exercise its sovereign power.

This park extends along the lake front, in the heart of Chicago, for nearly two miles. When the dedication was made Chicago was a village of a few hundred inhabitants. Upon the theory announced in the majority opinion, if the dedication had contained the restriction that the park should forever remain free from use for any purpose of trade and that no roads should be constructed therein for general traffic or any other purpose than pleasure driving, and if afterwards docks and wharves had been built and a harbor developed and constructed opposite the park, no power would exist in the state to compel the construction of a street through this tract. The city might have grown and extended all around the park, but it would not have, and could not acquire, any access to its harbor through this two miles of territory, however necessary to the public welfare, on account of the progress and growth of the city, such access might be. If, with a like restriction, a park had been laid out for one or two miles along one or both banks of the Chicago river, it is apparent the public necessity for streets and bridge approaches would have been overwhelming.

yet the state, having accepted the dedication, would have surrendered its sovereignty, and no power would have existed to compel their construction. In 1836 the town of Chicago did not reach Park Row, the south boundary line of the park. If, instead of a tract extending 2 miles north from Park Row, the dedication had been of a tract at Park Row 400 feet wide, extending from the lake 2 miles west, with a similar restriction to that just suggested, the city's growth could not have gone south of Twelfth street. There it would have met the barrier of the park, which no street could cross. If such a park had existed across the channel desired for the drainage canal of the sanitary district of Chicago, the canal could not have been constructed. These illustrations are extreme cases, but they are legitimate deductions from the theory of the majority opinion. If it be conceded that under any circumstances the public necessity would be such as to authorize the taking of the property in the exercise of the right of eminent domain the whole case is conceded, for, as is stated in the majority opinion and held almost without exception, questions of the necessity and propriety of the exercise of the right are legislative and not judicial. Whether the use for which it is proposed to take private property is a public use is, however, a judicial question.

It is insisted that, as the Field Museum of Natural History and the John Crerar Library are private corporations of a charitable nature, the use of the property intended is for a private charitable purpose and not public. The right of eminent domain may be exercised directly by the state, but is usually exercised through the medium of a municipal corporation or a private corporation by virtue of a delegation of power. The right remains dormant until the conditions for its exercise have been prescribed by the Legislature. The instrumentalities to which the power may be delegated are not limited to any particular class, so that the purpose is public. A common example of the exercise of the power by a private corporation is the taking of land by a railroad company for its right of way. In such case it is not even necessary that the corporation shall have been regularly organized, but a de facto organization is sufficient. *Ward v. Minnesota & Northwestern Railroad Co.*, 119 Ill. 287, 10 N. E. 365. The question to whom the power is granted is not material. The material question is whether the use is public. Decisions differ as to what constitutes a public use, but it is settled in this state that something more than a public benefit is required. There must be a right in the public to an actual use and not incidental benefit, and the benefit resulting from a public use, capable of individual appropriation, must be open to all alike, upon the same terms and conditions. *Sholl v. German Coal Co.*, supra; *Gaylord v. Sanitary District*, 204 Ill. 576, 68

N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235.

The South Park Commissioners is a municipal corporation created for the management and control of the public parks within the towns of South Chicago, Hyde Park, and Lake, and having the power of eminent domain. By an act of June 17, 1893 (Laws 1893, p. 160), the corporate authorities having charge of any park were authorized to purchase or erect and maintain within such park, buildings to be used as museums for the collection and display of objects pertaining to natural history and the arts and sciences, to be open to the public free on two days each week and to school children at all times, with an admission fee for other days, regulated by statute, and required to be devoted to the maintenance of such museum. This act was amended May 14, 1903, so as to authorize the corporate authorities of the park to permit the directors of any museum of the character mentioned to erect and maintain such museum in the park, and to charge an admission fee within a fixed limit, the proceeds to be devoted exclusively to the maintenance of such museum, requiring the museum to be open to the public free three days in the week and to school children at all times. On the same day an act was passed authorizing the corporate authorities having control of any public park to permit any free public library organized under the act of June 17, 1891 (Laws 1891, p. 157), to erect and maintain, at its own expense, its library building within the park, and to manage the affairs of such library so long as said library is maintained as a free public library, the same as if the said building were not in a public park. Each of these acts contained the provision, which has been already mentioned in regard to the condemnation of private easements, to have the park kept free from buildings.

The establishment and maintenance of free public libraries has been recognized as a public purpose, and many free public libraries and reading rooms have been established by the cities of this state and are now maintained by taxation under the act of March 7, 1872 (Laws 1871-72, p. 609), which authorizes cities, incorporated towns, and townships to establish and maintain free public libraries and reading rooms. A public museum of natural history, the arts and sciences, is within the same category as a public library. Each is an institution for the promotion and advancement of knowledge; each is advantageous to the public for its instruction and recreation. The Legislature had the power to provide for the erection of a public library and a public museum. It was a legitimate exercise of power to grant to the corporate authorities of parks authority to provide for the use of the public a library building or a museum building. It was within the power of the Legislature to provide for the erection of such buildings by the park

commissioners. It was not necessary, however, that the park commissioners should own the building or museum. If, by contract with the directors or trustees in control of the library and museum, the commissioners could procure the location of the library and the museum in the park, and thus secure for the public, permanently, the use of the library and the museum, there was no constitutional or legal objection to their doing so. Under the statute, by such location the library and museum will be devoted unreservedly to the public use, and every individual of the public will be admitted on the same terms to the free and unrestricted use of them as a matter of right, which cannot be denied, but may be legally enforced. The fact that a fee may be charged on certain days for admission to the museum does not make the use private. It is not essential to the public use that it should be absolutely free to every one. Where there is cost in maintaining the service the state may demand compensation for the individual use. *Long Island Water Supply Co. v. City of Brooklyn*, supra.

It is said that the library and museum corporations are not authorized to exercise the power of eminent domain, and that the South Park Commissioners cannot exercise that power for the benefit of those corporations. In this connection the case of *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179, is cited, as well as other cases following it. The point decided in those cases was that a person or corporation having the power of eminent domain conferred by statute for a stated purpose may exercise it for that purpose and no other; that a railroad company, under authority to condemn property for its right of way, cannot condemn property for a street of a city, and a city, under authority to condemn property for streets, cannot condemn property for a railroad track, and that neither can condemn property ostensibly for the authorized purpose but really to be delivered to the other for its purpose. Here, however, the use is a public use, which the commissioners are authorized to supply, and for which they are expressly authorized to exercise the power of eminent domain. It is immaterial what agency may be employed to serve the public purpose. A municipal corporation may exercise the power of eminent domain for a public purpose though that purpose is to be subserved or accomplished by another corporation or person. A city may condemn land for the purpose of supplying its citizens with water though it has contracted with a waterworks company to construct and sell to it completed waterworks, of which the land sought to be condemned is a necessary part. *State v. City of Newark*, 54 N. J. Law, 62, 23 Atl. 129. The court said in that case: "The object of the condemnation is, and its effect will be, to vest the land in the city to be used for its water supply.

For this purpose, and for this only, does the statute transfer the title to the city and authorize it to enter upon and take possession of the land. That the same purpose of obtaining a water supply is, in part, to be accomplished by a municipal power—that of contracting with the water company—does not seem to be a good reason for denying the right to exercise this power. Both powers are granted for the same end; both are convenient for attaining that end. It is reasonable that they should be exercised therefor conjointly as well as separately, if the conditions require it." In *Ten Broeck v. Sherrill*, 71 N. Y. 276, the canal commissioners were allowed to appropriate from contiguous property gravel for repairs, though the work of repair had been let to a contractor, who was required to furnish the materials and was not otherwise able to fulfill his contract. A railroad company does not lose its power to condemn lands for a right of way, though the railroad, when constructed, is to be operated by a different corporation, and though the condemning company owns no rolling stock whatever, and does not transport passengers or freight. *Chicago & Western Indiana Railroad Co. v. Illinois Central Railroad Co.*, 113 Ill. 156; *State v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897. In *Wisconsin River Improvement Co. v. Pier*, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538, a corporation having the right of eminent domain, to be exercised in aid of navigation for the construction of a dam, contracted with a corporation organized to furnish power, but not having the right of eminent domain, for the construction of the dam at the sole expense of the latter corporation, in consideration of the receipt of all the profits arising from the sale of power generated by the dam. The first company then instituted a proceeding to acquire, by condemnation, the right to overflow the necessary land, and it was held that its right to exercise the power of eminent domain was not impaired.

The South Park Commissioners is authorized to furnish a site for a library or museum. The library and museum corporations are authorized to construct the buildings. The law authorizes the commissioners to contract with the corporations to erect buildings on the sites to be furnished by the commissioners. The purposes are public, and to acquire the right to furnish the sites so authorized to be furnished by the commissioners for such public uses, the commissioners may exercise the right of eminent domain though the buildings will be managed and the public use fulfilled through the instrumentality of the library and museum corporations. It was so held by the Supreme Court of Pennsylvania in *Laird v. City of Pittsburgh*, 205 Pa. 1, 54 Atl. 324, 61 L. R. A. 332.

To the objection that the property proposed to be taken is already devoted to a public

use, it may be answered that, even if this were true, the Legislature may, so far as the public rights are concerned, change the use to which public property is devoted. So far as private rights are concerned, they may be taken in the exercise of the right of eminent domain, and the object of this proceeding is to ascertain the compensation to be made for the right so taken. There is no rule of law, as counsel for the appellees contend, that property dedicated to public use cannot be condemned, even by legislative authority, for another public use of the same character or of a character no higher or more imperative. Property in the control of one person or corporation devoted to a public use cannot be taken for the same public use from that person or corporation and turned over to another person or corporation by the Legislature or any other authority. But property devoted to public use is frequently condemned for another public use of the same character. Railroads cross railroads and highways are laid out across railroads, and if the compensation cannot be agreed upon it is fixed by a proceeding in eminent domain. Clause 6 of section 19 of the general railroad law (Hurd's Rev. St. 1909, c. 114), authorizes a railroad company to cross the tracks of any other railroad company, and, if they cannot agree on the compensation therefor, provides that it shall be ascertained in the manner provided by law, which we have held to mean by a proceeding in eminent domain. *Chicago & Western Indiana Railroad Co. v. Illinois Central Railroad Co.*, supra; *Lake Shore & Michigan Southern Railway Co. v. Chicago & Western Indiana Railroad Co.*, 97 Ill. 506, 515. In the latter case it is said: "We find no want of constitutional power in the General Assembly to provide by law for the condemnation of a right of way for one railroad over another owned and operated by another railroad company. In so far as such property is to be regarded as public property or devoted to public use, the General Assembly may consent, in behalf of the public, that the character of the use may be so changed. In so far as the private rights of the railroad company in such property are concerned, such rights, like other private property, are subject to the power of the state to condemn and take the same for the new use upon payment of just compensation." To the same effect is *East St. Louis Connecting Railway Co. v. Union Railway Co.*, 108 Ill. 265. In this case, however, the property sought to be appropriated was not devoted to the public use. It was not sought to condemn that part of the territory within the limits of the park on which it was proposed to erect the buildings. The South Park Commissioners had sole charge of that property, with the right, given by the act already mentioned, to permit the erection of buildings on any part of it, subject to the rights of the appellees and others similarly situated. Their

rights are private property. They qualified the public use, but they are not themselves in any sense devoted to the public use. It is private property, only, which the appellant is seeking to condemn.

The contention that Grant Park is not a park within the meaning of the acts of May 14, 1903, cannot be sustained. It is not essential to the existence of a park that the public should have control of it unrestricted by any condition whatever. The language of the acts is general and applies to any public park. The fact that each of the acts authorizes the acquisition of easements of the character of those held by appellees conclusively shows that they were not intended to apply only to cases where no such easements existed.

In an act dated February 18, 1861 (Priv. Laws 1861, p. 118), amending the act incorporating the city of Chicago, the Legislature recognized and expressly declared the rights of the owners of property fronting on Michigan avenue to have the parks kept free from encroachment by the use of the following language: "The state of Illinois, by its canal commissioners, having declared that the public grounds east of said lot should forever remain vacant, neither the common council of the city of Chicago nor any other authority shall ever have the power to permit encroachments thereon without the assent of all the persons owning lots or land on said street or avenue." Priv. Laws 1861, p. 136, § 64. It is insisted that this provision has never been repealed, and is an obstacle to the exercise by the state of the right of eminent domain. This enactment had no effect upon the relations of the state, the city of Chicago and the owners of the property on Michigan avenue, to this park. Before that time their respective rights were fixed by the dedication. Without regard to this provision, neither the city nor the state, as we have three times held, could encroach upon the park by erecting any kind of building on it without the consent of every owner of property on the west side of Michigan avenue. The act does not, however, purport to limit the state in the exercise of its power of eminent domain, and if it had done so would have been unavailing for that purpose. It recognizes the property rights of the lot owners and the power of the city to contract with them for the surrender of their easements. Until the Legislature provided the method and declared the circumstances under which the right of eminent domain could be exercised there was no power to condemn. But the act of 1861 did not purport to limit the exercise of this right, and the Legislature in 1903 provided the method for exercising it.

The case of *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 119 Ill. 141, 7 N. E. 627, is cited as controlling here. In that case the act under which the cemetery association was incorporated and authorized to hold property for burial purposes provided that

streets should not be laid out or opened through said lands without the consent of the directors, nor should any corporation be authorized to take, hold, or possess any portion of said cemetery, by condemnation, without such consent. It was held that the act of 1872 (Laws 1871-72, p. 218), conferring upon cities and villages the general power to lay out streets within their corporate limits, did not repeal the special act whereby, within the village of Hyde Park, the association had been previously authorized to acquire certain lands for a public purpose and to hold them free from liability to be taken for streets by condemnation. The question was one of legislative intention, and not of legislative power. Here there is no question of the intention of the Legislature to confer upon the South Park Commissioners the powers in Grant Park mentioned in the act in question. In this case the special law merely recognized certain private rights, and provided that they should be observed, but did not declare that they might not be taken by condemnation. It is not inconsistent with the contract by which such rights were created to condemn them in the exercise of the right of eminent domain, and it is not inconsistent with the statute by which such rights were confirmed to precisely the same extent as they existed by virtue of the contract, to condemn them in the same way. Neither the city nor any other authority has now the power to permit encroachments on the part by buildings thereon without the assent of all owners of lots on Michigan avenue, but the right of such owners to object may be acquired by eminent domain, and the acquisition of such right to object is equivalent to obtaining their assent. Though the words of the acts are general, and relate to any board of park commissioners and any public park, there is no doubt of the legislative intention to apply them to this particular park. The peculiar language conferring the right to condemn where any owner of abutting land or other person has "any right to have such public park, or any part thereof, remain open and vacant and free from any buildings," applies precisely to the unusual condition which exists in the case of this park and is conclusive of the legislative intention.

It is contended that the acts of May 14, 1903, are invalid because they impair the obligation of contracts, in violation of section 10 of article 1 of the federal Constitution; that the subjects of the act are not sufficiently expressed in the title and that each act embraces more than one subject, in violation of section 13 of article 4 of the state Constitution of 1870; and that the acts constitute special legislation, in violation of section 22 of article 4 of the state Constitution.

The contracts, the obligations of which are said to be violated, are those claimed to have been created by the dedication and by the acts of 1861 and 1863 (Priv. Laws

1863, p. 40). Whatever contract rights exist growing out of the dedication or those statutes are property rights, and are subject, as we have seen, to the exercise of the right of eminent domain. The obligation of such contracts is not impaired by taking them through the power of eminent domain. *West River Bridge Co. v. Dix*, supra; *Long Island Water Supply Co. v. City of Brooklyn*, supra.

The titles of the acts of May 14, 1903, are general. They are "An act to amend an act entitled 'An act concerning museums in public parks,'" and "An act concerning free public libraries in public parks." The generality of a title is no objection to it. If all the things authorized or required by the act to be done are reasonably included within the general subject expressed in the title, and legitimately tend to effect the legislative purpose in regard to that subject, they are properly included in the act, and the title is sufficiently expressed. *People v. Sayer*, 246 Ill. 382, 92 N. E. 900; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82; *Meul v. People*, 198 Ill. 258, 64 N. E. 1106; *Town of Manchester v. People*, 178 Ill. 285, 52 N. E. 964; *People v. Nelson*, 133 Ill. 565, 27 N. E. 217; *Blake v. People*, 109 Ill. 504. An act concerning libraries in public parks may properly deal with the time, manner and circumstances under which they may be placed there; the regulation of the relations between the park authorities, the library authorities, and the public; the rights of all persons interested in the park and in the library, and all things essential to a determination thereof. Each of these acts deals with the single subject, which was sufficiently expressed in the title.

It is said that the acts violate section 22 of article 4 of the state Constitution because they grant special privileges to museum and library corporations, and are restricted to public parks where abutters have an easement to have them kept vacant. The latter part of the argument is inconsistent with the position taken that because Grant Park is such a park the acts do not apply to it, and it is also unfounded because the acts, in terms, apply to all public parks. The power to condemn private rights is, of course, restricted to cases where private rights exist. So far as the acts confer upon museum and library corporations privileges not conferred upon other private corporations or other charitable organizations, there are obvious differences between the character and purposes of such corporations and all other organizations which form a reasonable basis for the distinction between them and all other organizations and between one another. As to the question whether the museum act violates this section of the Constitution because applicable only to a museum located in a public park on July 1, 1903, no opinion is expressed, but the act of May 14, 1903, "concerning free public libraries in

public parks," is, in my judgment, a valid enactment authorizing the South Park Commissioners to condemn the private rights mentioned in it.

HAND, J., I concur in the foregoing dissenting opinion of Mr. Justice DUNN.

CARTER, J. (dissenting). I concur in the dissent of Mr. Justice DUNN, but the questions under discussion are so important that I desire to make a few additional suggestions.

I cannot see how the former decisions in the Lake Front Cases that have been heretofore referred to control in any way the questions raised in this case. The doctrine of *res judicata* cannot apply here. The cause of action in the case now under consideration is not identical with, but different from, the causes of action in all of the former Lake Front Cases. Those cases, therefore, are not conclusive in this case as to what might have been decided, but only as to the precise point actually decided in such cases. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65; *Stone v. Salisbury*, 209 Ill. 56, 70 N. E. 605; *Cramer v. Wilson*, 202 Ill. 83, 66 N. E. 869; *Chicago Theological Seminary v. People*, 189 Ill. 489, 59 N. E. 977; *Leopold v. City of Chicago*, 150 Ill. 568, 87 N. E. 892; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Merrifield v. Canal Com'rs*, 212 Ill. 458, 72 N. E. 405, 587, 67 L. R. A. 369; *Sawyer v. Nelson*, 160 Ill. 629, 43 N. E. 728. The same rule of law was laid down in one of the Lake Front Cases. *Bliss v. Ward*, 198 Ill. 104, 64 N. E. 705. It has frequently been held by this court that no estoppel arose from a former judgment, where the causes of action were not identical, and where the question was not actually decided in the former case. *First Nat. Bank v. Leech*, 207 Ill. 215, 67 N. E. 890; *Gaffield v. Plumber*, 175 Ill. 521, 51 N. E. 749. From a consideration of the opinions in the former cases, I am unable to see that what is there stated supports the statement in the majority opinion that the question here involved was intended to be decided in any of the so-called Lake Front Cases. It is a familiar rule that the authority of judicial decisions arises from what the court decides in reference to the facts before it, rather than from what the judge who delivers the opinion may say in illustration or support of such ruling. *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45; *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257.

I wish to emphasize especially what is stated in Mr. Justice DUNN'S dissent, that all private rights are held upon the implied condition that they may be retaken by the sovereign. *People v. Mayor of New York*, 32 Barb. (N. Y.) 102; *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36. I cannot agree

with the conclusion of the majority opinion in this case, that the public authorities had the right to accept the dedication of the lake front under such conditions that the Legislature of this state would be deprived of the right to change the use of Grant Park if all the private rights affected thereby were first acquired and paid for through condemnation proceedings. Such acquiring of private rights under the sovereign power of eminent domain is no violation of the trust under which this park was accepted. There can be no violation of private rights in the exercise of the right of eminent domain. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. Ed. 535; *R. F. & P. R. R. Co. v. L. R. R. Co.*, 18 How. 71, 14 L. Ed. 55. The Legislature, by authorizing, under the act here in question, the change of use contemplated, did not violate public rights, because it represented the public. The majority opinion cites on this point *City of Jacksonville v. Jacksonville Railway Co.*, 87 Ill. 540, *Village of Princeville v. Auten*, 77 Ill. 325, *City of Alton v. Illinois Transportation Co.*, 12 Ill. 38, 52 Am. Dec. 479, and *Village of Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 238, 102 Am. St. Rep. 164, among other cases, as holding that public authorities cannot change the terms of a restricted dedication. In all those cases there was no prior exercise of the right of eminent domain. Those decisions fully supported the conclusions of this court in the former Lake Front decisions, but it seems clear to me that they are not in point on the question here under consideration, viz., that the use of public property can be changed by the proper public authorities after private rights have been acquired by condemnation. The reasoning of this court in many decisions leads to the opposite conclusion on this question from that reached by the majority opinion. *Carter v. City of Chicago*, 57 Ill. 238; *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *Lake Shore & Michigan Southern Railway Co. v. Chicago & Western Indiana Railroad Co.*, 97 Ill. 506; *Meyer v. Village of Teutopolis*, 131 Ill. 552, 23 N. E. 651; *City of Chicago v. Pittsburg, Cincinnati, Chicago & St. Louis Railway Co.*, 242 Ill. 80, 89 N. E. 648; *City of Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362. It would be contrary to the provisions of the Constitution for the Legislature to authorize the city authorities of any city to open and construct a street across private property without first having acquired the right so to do by purchase or condemnation. If this were attempted it could be enjoined under the authorities cited in the majority opinion, but the decree in such injunction proceeding certainly would not be *res judicata* as to condemnation proceedings thereafter brought against the complainant (the owner of the land) in the injunction proceedings.

The question whether private property can be taken for public use by the exercise of

eminent domain is a legislative one. The courts, in considering that power, are required only to decide, "Is the proposed use a public use?" "Has the power to condemn been delegated by the Legislature?" "Is the act so delegating it in conformity with the Constitution?" "Has the act been complied with?" I do not understand that the courts have ever claimed any general power to decide whether the use justifies the taking. The right of eminent domain is an attribute of sovereignty, of which the government cannot be deprived by grant or contract. Whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of this power. Any contract or grant in restraint of the full exercise of this right is not obligatory upon the state, and is unwarranted and void. The state is without power to divest itself of this right. *Village of Hyde Park v. Oakwoods Cemetery Ass'n*, 119 Ill. 141, 7 N. E. 627; *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 Ill. 817; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; *Offield v. N. Y., N. H. & H. Co.*, 208 U. S. 872, 27 Sup. Ct. 72, 51 L. Ed. 231. If the rule laid down in the majority opinion be followed to its logical conclusion, this transcendent power of eminent domain will be transferred from the legislative to the judicial branch of the government. The courts will then be compelled to decide in every case, not only that the use is a public one, which is being exercised under legislative authority and not in conflict with the Constitution, but also that such public use is wise or necessary. Such a rule of law, in my judgment, is not only in conflict with the authorities on this subject, but also with sound public policy.

(207 Mass. 508)

MAYBERRY v. SPRAGUE.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1911.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 365*)—LIABILITY OF ASSIGNEE.

A bill lies by a creditor or his executor to compel an accounting by an assignee for the benefit of creditors, who fraudulently refuses to turn over money collected under an agreement whereby the creditor transferred a claim to the assignee, on the assignee's agreement to pay therefor from funds collected from the assignor's debtor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Dec. Dig. § 365.*]

2. JUDGMENT (§ 24*)—SUBJECTS.

The law knows no such judgment as one against the "goods and estate" of a person named.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 24.*]

3. ELECTION OF REMEDIES (§ 3*) — SUIT AGAINST ASSIGNEE FOR CREDITORS—BENEFIT.

A bill by a creditor's executor to compel an accounting by an assignee for the benefit of

creditors, who fraudulently refuses to turn over money collected under an agreement whereby the creditor transferred a claim to the assignee, on the assignee's agreement to pay therefor from funds collected from the assignor's debtor, is not precluded by a judgment obtained by the executor against the assignor's "goods and estate" in the assignee's hands for the amount due him.

[Ed. Note.—For other cases, see Election of Remedies, Dec. Dig. § 3.*]

4. EQUITY (§ 418*)—DECREE PRO CONFESSO—EFFECT.

Taking a bill pro confesso merely means that the truth of facts pleaded is established, and hence it is no objection thereto that the facts alleged do not show a cause of action.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 418.*]

5. APPEAL AND ERROR (§ 460*)—ENTRY—TIME.

Pendency of exceptions suspends power to enter a final decree.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 460.*]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Bill by George L. Mayberry, executor, against Charles H. Sprague. Decision for plaintiff, and defendant brings exceptions. Partly sustained, and partly overruled.

Warner V. Taylor, for plaintiff. H. J. Jaquith, for defendant.

LORING, J. The only question presented by the first bill of exceptions is whether the defendant's demurrer to the plaintiff's bill in equity was rightly overruled.

The following facts are alleged in the bill: The plaintiff's testator was a creditor of the firm of Hapgood & Long, and the defendant was a common-law assignee of their property for the benefit of their creditors. Before the assignment the plaintiff's testator had brought an action against the firm in which he had trusted one Turnbull. The firm claimed that Turnbull owed them upwards of \$1,400, but this was disputed by Turnbull. Thereupon, on a day in April, 1902, not stated, the testator and the defendant assignee came to the following agreement, to wit: The assignee purchased the testator's claim and agreed to pay him therefor \$1,375 from the funds collected from Turnbull, and if so much as \$1,375 should not be collected from Turnbull, then the assignee was to make up the difference from other funds belonging to him as assignee as aforesaid. The "repondent Sprague subsequently received from said Turnbull \$1,000 in settlement, which he holds as trustee for your complainant and which he wrongfully and fraudulently refuses to turn over to your complainant, and which he has wrongfully and fraudulently appropriated to his own use." The plaintiff brought an action at law "against respondent Sprague in his capacity as assignee aforesaid," a verdict was ordered for the plaintiff, and he now holds an unsatisfied execution against the goods and estate of the firm in the hands of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Sprague (the defendant) for \$1,249.07. A copy of this execution is annexed to the bill, and it appears from it that the sum of \$1,249.07 is due, with interest from July 6, 1908.

By the allegations of the bill, which the defendant has admitted to be true, he received from Turnbull \$1,000, which he "fraudulently appropriated to his own use." Under the agreement between the testator and the defendant the money received from Turnbull was the money of the plaintiff's testator in the hands of the defendant, and therefore he could maintain a bill in equity against the defendant for an accounting and to recover it. It follows that this bill is well brought unless there is something in the technical defenses set up by the defendant to escape from accounting to the plaintiff for the money of the testator which he admits he "wrongfully and fraudulently appropriated to his own use." His main reliance is on the fact that the plaintiff brought an action at law on the contract. If he had sued the defendant personally for a breach of the contract there would have been ground for the contention that he had elected not to treat the fund of \$1,000 as his own. But so far as appears the plaintiff did not undertake to hold the defendant liable for breach of the contract. What he seems to have undertaken to do was to bring an action at law which would result in a judgment against the funds of the firm in the defendant's hands. The execution recites that the plaintiff has "recovered judgment against the goods and estate which were of Everett E. Hapgood of Boston, in our county of Suffolk, and Swift N. Long of Cambridge, in said county of Middlesex, in the hands and custody of Charles H. Sprague, of said Cambridge, assignee for the benefit of creditors of said Everett E. Hapgood and Swift N. Long, for the sum," etc. It would seem that what the plaintiff tried to do was to recover against this defendant as assignee the same sort of judgment that a creditor of a deceased person recovers against his executor or administrator. But the creditor of an assignor cannot recover such a judgment against his common-law assignee. Moreover the judgment recited in the execution here in question is not the judgment entered in an action by a creditor of a deceased person against his executor or administrator. The judgment in such a case is that the defendant, as he is executor or administrator of the deceased, owes the plaintiff so much money, and the execution issued on that judgment runs against the goods and estate of the deceased in the hands and possession of the executor or administrator. A "judgment against the goods and estate" of a person named is not a judgment known to the law, and for that reason it might perhaps be treated as a nullity. But however that may be, by taking such a judgment (if it is to be treated as a judgment)

the plaintiff did not elect to look to the defendant personally for breach of his contract and to give up his right to the \$1,000 in the defendant's hands as his money. See *Attorney General v. American Legion of Honor*, 196 Mass. 151, 81 N. E. 936. There is nothing in the other technicalities raised by the defendant which requires notice.

The second bill of exceptions presents the question whether, the defendant having failed to answer, the judge was right in directing the bill to be taken pro confesso. The defendant urges that he was wrong in so doing because the facts alleged do not warrant any decree. If it were true that the facts alleged do not state a cause of action and so do not warrant a decree, that is no reason for not entering a decree that they are true. All that taking a bill pro confesso means is that the truth of the facts pleaded is established.

The third bill of exceptions sets forth two exceptions: One to a refusal to rule that the bill would not support a decree. That we have disposed of in deciding that the demurrer was rightly overruled. The other is an exception to entering any decree at all. This exception must be sustained. So long as exceptions are pending the power of the court to enter a final decree is suspended. *McCusker v. Geiger*, 195 Mass. 46, 80 N. E. 648.

The last exception must be sustained. All other exceptions must be overruled.

So ordered.

(307 Mass. 442)

CASEY v. NEW YORK, N. H. & H. R. CO.
(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 6, 1911.)

CARRIERS (§ 318*)—INJURY TO PASSENGERS—
NEGLIGENCE—EVIDENCE.

In an action for injuries to a passenger, caused by the door of the car closing on his fingers while he had his hand on the jamb of the door to steady himself, evidence held not to show negligence of the carrier.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1307; Dec. Dig. § 318.*]

Exceptions from Superior Court, Bristol County; William Schofield, Judge.

Action by Patrick Casey against the New York, New Haven & Hartford Railroad Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

Higgins & Hanify, for plaintiff. Frederick S. Hall and Chas. C. Hagerty, for defendant.

LORING, J. In this case the plaintiff, while passing through the forward door of a combination car in alighting at his destination, put his hand on the jamb of the door to steady himself in turning round, when the door closed on his fingers. It appeared that in the top of the door there was an arrangement which automatically closed the door and at the bottom a catch designed to hold

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

it open. The door was open when the plaintiff reached it and the train was then at a standstill. A companion of the plaintiff got off immediately before the plaintiff, and this companion, called by the plaintiff, testified that an unknown man and a newsboy got off ahead of him and that the door was opened by the newsboy. The forward part of the combination car here in question was used as a baggage car. The baggage master, called by the plaintiff, testified that he did not open the door in question; that there was no newsboy on the train, and that he was "most sure" that the door was opened by the plaintiff's companion; that the plaintiff's companion was the first to go out, then the plaintiff, and then an unknown man, who said he "didn't pull the door onto his [the plaintiff's] fingers." The plaintiff testified (as we understand the bill of exceptions) that "two or three people went out ahead of" him, and that "he was the last passenger out of the car." The only other person in the car was the motorman, and it was admitted that he remained in his box. There was no evidence that the door was opened by an employé of the defendant and there was no direct evidence that the catch was defective.

On this evidence there was no more reason to suppose that the door swung to because of a defect in the catch than to suppose that it was not properly set on the catch when opened by one of the persons who got off before the plaintiff; and therefore no case of negligence on the part of the defendant was made out. *Faulkner v. B. & M. R. R.*, 187 Mass. 254, 72 N. E. 976; *Hunt v. Boston Elev. Ry.*, 201 Mass. 182, 87 N. E. 489. The plaintiff has argued that he was entitled to go to the jury because the baggage master testified that it was his duty to open the car door when the train stopped, and that he did not do it on this occasion because it had been opened before the train stopped, and further that if the door was opened by a passenger it was the defendant's duty to see that it was properly set back on the catch. We have examined the cases cited in support of these contentions and find nothing in them that helps the plaintiff. We are of opinion that the judge was right in directing a verdict for the defendant.

Exceptions overruled.

(207 Mass. 341)

**POSTAL TELEGRAPH CABLE CO. OF
MASSACHUSETTS v. CITY
OF CHICOPEE.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1911.)

**1. TELEGRAPHS AND TELEPHONES (§ 10*)—
ERECTION OF POLES IN STREETS—REASONABLE
REGULATIONS.**

Within Rev. Laws, c. 25, § 54, c. 26, § 6, providing that cities may, by ordinance, make reasonable regulations for erection and maintenance, in streets thereof, of telegraph lines

and lines for transmission of electricity, it is a reasonable regulation that a telegraph company, licensed to erect and maintain its lines there, shall permit the city to place its electric wires on such poles free of charge, and other corporations to place their wires there on payment of reasonable compensation; the expense to the company from the presence of the city's wires being slight, and probably not more than the expense to the city for inspection of the company's wires, and this, though presence of the city's wires requires those making repairs on the company's line to exercise greater care to avoid danger, and though the company has to increase its voltage because of inductive disturbances over its entire system.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

**2. COMMERCE (§ 59*)—ERECTION OF POLES IN
STREETS—REGULATIONS—INTERFERENCE
WITH INTERSTATE COMMERCE.**

Requirements of an ordinance, adopted under authority of Rev. Laws, c. 25, § 54, c. 26, § 6, to cities to make reasonable regulations for erection and maintenance of telegraph poles in streets, and in the exercise of the police power, for the purpose primarily of preventing the erection of unnecessary and objectionable poles, to the obstruction of travel, and secondarily to provide compensation to the city for expense of inspecting the telegraph line for the protection of the public, that a telegraph line licensed to erect poles in streets shall permit other companies, for reasonable compensation, to put their wires thereon, and the city to put its wires thereon without charge, being in reference to a local matter, about which Congress has taken no action, and being reasonable, are not an interference with interstate commerce, within the implied prohibition of the federal Constitution.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 87, 100; Dec. Dig. § 59.*]

**3. TELEGRAPHS AND TELEPHONES (§ 10*)—
RIGHT TO ERECT POLES IN STREET—USE BY
CITY.**

Where a city permitted a telegraph company to erect poles in streets, subject to an ordinance providing that other companies might, on due compensation, put their wires thereon, and that the city might put its wires thereon free of charge, and the city used the poles for 10 years for its wires, injunction against the continuance of the city's wires there should not be granted, but any relief should be by compensation in damages, even if the ordinance went too far by such requirements, and the existence of the city's wires on the company's poles be a technical invasion of its rights, as the erection of new poles by the city would not only require a great expenditure, but would involve a crowding of the streets.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 10.*]

Case Reserved from Supreme Judicial Court, Suffolk County.

Suit by the Postal Telegraph Cable Company of Massachusetts against the City of Chicopee. The case was reserved for the full court. Bill dismissed.

Carver, Wardner & Goodwin, G. Philip Wardner, and Clifford H. Walker, for complainant. Luther White, City Sol., for respondent.

KNOWLTON, C. J. This is a bill to enjoin the defendant from maintaining certain electric wires upon the plaintiff's telegraph poles.

In 1891 the Postal Telegraph Cable Company of New York erected a telegraph line in the city of Chicopee from the line of the city of Springfield on the south, by a somewhat circuitous route, through Chicopee Center to Chicopee Falls, and thence northwesterly to the line of the city of Holyoke, this being a part of a telegraphic system extending into and through other states, which was used in part in interstate commerce. By a series of conveyances through different corporations this line has passed into the ownership of the plaintiff, which holds it, with all the rights, and subject to all the liabilities, of the original owner. It runs through public highways which are post roads. The plaintiff's predecessor in title had a right to construct and maintain such a line, and the plaintiff has a right to maintain it along public highways, under Rev. St. U. S. § 5263 (U. S. Comp. St. 1901, p. 3579). This right also is reaffirmed and extended to other classes of corporations by Rev. Laws, c. 122, § 1. But it is subject to the right of cities and towns, by ordinance or by-law, to make any reasonable local regulations in regard to the exercise of it. Rev. Laws, c. 25, § 54; Id. c. 26, § 6. These regulations, under the Constitution of the United States, must be such as do not interfere with or regulate directly interstate commerce. These propositions are all well established by decisions of the Supreme Court of the United States.

On June 15, 1891, the plaintiff's predecessor in title, acting in accordance with Rev. Laws, c. 122, §§ 1, 2, applied to the mayor and aldermen for authority in writing, fixing the location of its line and establishing its rights. In July, 1891, the city of Chicopee passed an ordinance, which is chapter 17 of the Ordinances of that year, and which provided that the mayor and aldermen should have the exclusive power to license the erection and maintenance of telegraph and telephone and other lines of electric wires within the city, and that any license granted pursuant to the ordinance should be subject to the right of the city, free of charge, to place its fire alarm telegraph or other electric wires upon the poles or through the conduit, so licensed to be maintained, and to the right of the city to license the location of lines by any other person or corporation upon said poles and through said conduit, upon payment being made of a reasonable compensation, to be determined by the parties, or, if they fail to agree, to be determined by the mayor. There was also a requirement that all parties licensed to erect poles and fixtures and to maintain electric wires should give to the city an agreement in writing to save it harmless from all claims for damages, costs, expenses, charges or compensation, for or on account of the erection, maintenance or use of such poles, fixtures or wires. It also provided for the appointment and term of office of an inspector of wires, and for many other things, with a view to the proper regula-

tion of the business of maintaining and using electric wires within the city.

The committee on highways, to whom was referred the application of the Postal Telegraph Cable Company for a permit, reported on July 6, 1891, recommending the granting of the petition, with certain modifications, and that the company must agree to comply with the city ordinance entitled "Electric Wires." The ordinance was ordained at or about the same time. On the day when the report was filed it was accepted, and the clerk was instructed to notify the petitioner that the petition would be granted upon compliance with the restrictions and agreements therein enumerated. On September 7th, two months later, an order was passed by the mayor and aldermen that permission be given the petitioner to erect its lines in the specified streets, "upon the following express conditions, a violation of any of which shall, at the election of the board of aldermen, operate as a forfeiture of the permission and rights herein granted, to wit:

"First, that said company shall agree to comply with the requirements of chapter 22 of the Revised Ordinances of the city of Chicopee.

"Second, that said company shall use the poles now erected in said city on Broadway, from the house of Charles T. Hendrick to the Overman Wheel Company's factories.

* * *

"Fourth, that the officers and members of the fire department may, in the event of a fire, and whenever in connection therewith they deem it proper, cut the wires of said company, and that, if so cut, they shall be repaired at the expense of said company.

"Fifth, that said company shall, before any work or construction in said streets or highways is done, execute, under seal, a contract in the words following, all blanks being properly filled, and deliver the same to the city."

Then followed an agreement to indemnify the city from loss, cost or damage suffered by reason of the erection or maintenance of the poles or wires. This contract was signed by one of the officers of the company, but was never returned to the defendant. By a clerical error the chapter of the ordinance was referred to in this order as 22, instead of 17, the number intended. Chapter 22 is an ordinance relative to public parks, and it makes no reference to locations, poles or wires. Nearly all of the line was built shortly after this location was granted, although about half a mile of it was constructed before the license was granted.

This was the first location granted in the city of Chicopee for the erection and maintenance of electric wires. Since then the city has granted four locations to the Holyoke Street Railway Company, one location to the United Electric Light Company of Springfield, two locations to the J. Stevens Arms & Tool Company, thirty-one locations to the New England Telephone & Telegraph Compa-

ny, and one location to the Postal Telegraph Cable Company of New York. There are now 10 miles of trolley lines in Chicopee, not including span wires, and feed wires, about 6 miles of municipal fire alarm lines averaging 2 wires, and about 30 miles of poles of the New England Telephone & Telegraph Company, carrying, on the average, a large number of wires.

Beginning more than 10 years ago and ending prior to April, 1906, the city put municipal electric light wires upon 87 of the plaintiff's poles, making 223 hitches in all, and put 80 hitches in all of municipal fire alarm wires on the poles of the plaintiff. Up to the end of that time, all this was done without objection of the plaintiff or its predecessors in title, and without any requirement or tender of payment for the benefit. During this time the general officers of the plaintiff and its predecessors had no knowledge of this use of the poles, although the company's district foreman, whose duty it was to report anything going on along the lines, of interest to the company, knew it and reported it to the circuit manager at Boston. The master's report gives us the ordinance in full, together with an elaborate statement of conditions as to the different lines of wires in different places, and other important facts, much in detail.

It is obvious that in framing the ordinance the city council attempted to make careful provision for the protection of the public, in view of the probability of a great increase in the number of applications for authority to transmit electricity for various purposes through the streets. It is certain that careful regulation of the erection and maintenance of poles and wires in the streets of a city is necessary, in the public interest. As cities grow compact, and the need of using many wires for the transmission of electricity for many different purposes, on closely built streets, becomes more urgent, relief from inconvenience and danger can only be had by the removal of overhead wires from the streets and by placing them in conduits underground. Legislation for this purpose, applicable especially to great cities, has become common in different parts of the country. By the running of lines of wire upon different sets of poles in a crowded city, the difficulty of extinguishing fire and preventing a conflagration is often greatly increased, as well as the danger and inconvenience in using the streets in the ordinary way, and the unsightliness of numerous poles and wires. It was therefore reasonable and proper that the ordinance should forbid the unnecessary duplication of lines and of poles in public places. This was done in the requirement that licenses might be granted by the mayor and aldermen to other companies to use the same poles by making reasonable compensation therefor. This was nothing more than a regulation that, if two or more companies desired to run two lines of wires

through a street, they might be required, if it could be done reasonably, to put them on the same line of poles, the two companies sharing the expense equitably. This was entirely reasonable. To the same effect and for the same purpose was the provision in the order granting the permit to the plaintiff's predecessor, that the company should "use the poles now erected in said city on Broadway, from the house of Charles T. Hendrick to the Overman Wheel Company's factories." The plaintiff has made no objection to these regulations. The city's wires for a fire alarm telegraph and those for the municipal lighting which was undertaken several years later were also to be provided for, and if there had been a provision for pecuniary compensation by the city for the benefit that it might derive in this way, the reasons already referred to plainly would have been an ample justification for the requirement that the plaintiff's predecessor should allow the wires to be put upon its poles. The reason for this regulation in the ordinance plainly was to protect the interest of the public. That the defendant would be subjected to some slight burden and increased expense in the construction of its line, for the protection and convenience of the public in the use of the streets and in the preservation of their property, surely did not deprive the mayor and aldermen of the right to impose the requirement upon it as a regulation. The very idea of regulation involves, not only possible restriction in the exercise of rights and the use of the property, but also possible expenditure in the public interest, to make one's property available or one's rights enjoyable in the best way. The rights and interests of the public and the individual must be considered alike, in making police regulations for the common good. Unless this burden is excessive, and plainly unreasonable in reference to the benefits to be derived from the imposition of it, the ordinance is not invalid by reason of the requirement that it makes of the plaintiff.

Does the fact that the city derives a benefit from it, for which it makes no direct payment, change the character of the provision? In framing the ordinance the city might well take into account the probable expense to be incurred for the inspection of the lines from time to time to diminish the risk of accident, and the liability of the city for injuries suffered by travelers from an unsafe condition of the poles or wires. The mayor and aldermen properly could require a pecuniary payment by the telegraph company to meet this cost of inspection, and this risk of loss, to which the city would be subjected. This has been directly decided, even when the payment required was in the form of a tax, if the amount was such that it did not appear to be a tax for revenue, but merely a compensation for the reasonably anticipated cost of protecting the public. *Western Union Telegraph Company v. New Hope*, 187 U. S.

119, 23 Sup. Ct. 204, 47 L. Ed. 240; *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *Postal Telegraph Cable Co. v. Borough of Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342.

The burden of expense put upon the plaintiff and its predecessors is very small. The first company was obliged, for its own purposes, to erect poles for its wires. The plaintiff's line in the city of Chicopee consists of about 250 poles, and five wires upon one six-pin cross-arm, attached to the top gain of each of these poles. The poles, as they are described by the master, would readily carry many more wires besides those belonging to the city—probably many more than the plaintiff will ever have occasion to put upon them. The attachment of the city's wires has increased the expense to the plaintiff in only a trifling sum. Indeed, it is found that this increased expense did not attract the attention of the general officers of the company until more than 10 years after a considerable part of it had been incurred, and then only when a letter had been written by the defendant's inspector of wires, demanding that a cross-arm on some of the poles be lowered one gain, to make a place for the city's wires. The master has found that the cost to the city of the inspection of the plaintiff's poles and wires is small. Probably it is smaller than was expected when the ordinance was adopted; but it is a real and constant expense every year. Very likely, in a series of years covering the life of a line of poles, this expense would be much more than the additional cost to the plaintiff of a bar on the poles for such wires as the city would want to put there. We are of opinion that the ordinance, in the parts in question, was reasonable and proper, and so within the authority conferred by Rev. Laws, c. 25, § 54, and chapter 26, § 6.

The plaintiff complains that, while a part of the defendant's electric lighting is done by the direct system, carrying a very light current of electricity, another part of it is done with an alternating current of high tension, and that the proximity of wires carrying such a current increases the danger to persons making repairs upon its line, and is objectionable by reason of the effect of induction. The master had found that there is more danger and that more care is required in making repairs where wires of high tension are in close proximity than where there are none; but he also found that there had been no injury to the plaintiff's servants or to its property from this cause. It is obvious that this is a matter simply calling for proper care on the part of those who are engaged in the work, and that the care must be adapted to circumstances of greater danger. As bearing upon the questions involved, this does not seem to us a matter of much

importance. It relates simply to the method of doing work which is done in every city and large town, and in which there is no inherent difficulty, if proper precautions are taken.

The master considered the subject of induction, and has found, in substance, that the inductive effect of nearby high-tension wires interferes with the efficient operation of a telegraph system, but that the defendant's wires have had no appreciable effect upon the plaintiff's business in this particular. In the first place, for the most part, these wires are not charged with electricity in the daytime. In the next place, to produce any serious interference with the plaintiff's business would require a longer line of parallel high-tension wires than exists in that city. It was not shown that there had been any specific instances of trouble on the plaintiff's line in Chicopee, caused by the proximity of high-tension wires, or that the increase of voltage on its system was due in any degree to inductive difficulties caused by the proximity of the defendant's wires. He did find, however, that, by reason of inductive disturbances over its entire system, the plaintiff had been compelled to increase its voltage on its system over that which was formerly sufficient for the operation of its lines. Of course he found that inductive disturbance from other lines did not depend at all upon the wires being upon the same poles, except so far as they might be in closer proximity than if attached to an independent line of poles. The possibility of detriment to the plaintiff from induction, by reason of having these wires on its poles instead of upon independent poles, seems to be of little consequence, as against the importance of keeping the obstructions in the streets of the city as few as possible.

If these requirements of the ordinance were not unreasonable or invalid under the statutes of this commonwealth, it follows almost necessarily that they were not an interference with interstate commerce. They were adopted in the exercise of the police power, in reference to a local matter of public importance, about which Congress had taken no action. In *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347-359, 7 Sup. Ct. 1126, 1129, 30 L. Ed. 1187, it was said that, within the limitation that it does not encroach upon the free exercise of the powers vested in Congress by the Constitution, a state "may undoubtedly make all necessary provisions with respect to buildings, poles and wires of telegraph companies within its jurisdiction, which the comfort and convenience of the community require." A provision almost identical with that in the present case was upheld in *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380, and was assumed to be reasonable on the rehearing of the case, in 149 U. S. 435, 13 Sup. Ct. 990,

37 L. Ed. 810, and in the opinion in *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240. In the first of these cases an additional requirement of a money payment by the telegraph company to the city was upheld, on the ground that it was to be treated as rent for the "absolute, permanent and exclusive appropriation" of space in the streets. Assuming that the statutes of this commonwealth do not authorize a city to claim rent of a telegraph company for the use of the streets as property, the principles involved in other branches of this decision and in other decisions of the same court seem to cover the present case. It is well established that a police regulation of a state, affecting interstate commerce only indirectly, in a field which has not been occupied by congressional legislation, is not a regulation of such commerce within the implied prohibition of the Constitution of the United States. *Mississippi Railroad Commission v. Illinois Central R. R.*, 203 U. S. 335, 346, 27 Sup. Ct. 90, 51 L. Ed. 209; *Lake Shore & Michigan Southern Ry. v. Ohio*, 173 U. S. 285-298, 19 Sup. Ct. 465, 43 L. Ed. 702. All that has been done by the defendant, under this ordinance, seems to have but a slight and incidental effect upon interstate commerce, through the imposition of a local regulation of the use of the streets, for the purpose, primarily and principally, of preventing the erection of unnecessary and objectionable poles to the obstruction of travel; and, secondarily, to provide compensation for the expense to the city of inspecting the line of telegraph for the protection of the public.

If it were held that the ordinance goes too far in requiring the plaintiff to permit other companies, if licensed by the city, to use its poles, upon making compensation, and the city to use them for public purposes without compensation, it does not follow that the plaintiff should have an injunction. The vote of the city upon the report of the committee, which was communicated to the plaintiff's representatives, referred to the ordinance as entitled "Electric Wires." Then the formal order, which referred to the ordinance by a wrong number, put the plaintiff on inquiry as to the contents of the ordinance. It is hardly possible that the plaintiff's representatives did not understand, in general, the conditions under which they were permitted to erect their poles. The use of these poles by the city under these circumstances, for more than 10 years without objection or claim of compensation, will hardly permit the enforcement of the plaintiff's alleged equitable right against the defendant. There is much in the case to support the defendant's argument that there has been laches. If the highest officers of the company were ignorant of the facts, its agents,

who were in charge of business of this kind, knew all about them.

If the existence of the defendant's wires upon the plaintiff's poles were a technical invasion of the plaintiff's right, we are of opinion, upon the facts of this case, that the relief granted should not be an injunction against the continuance of the wires upon the poles, thus compelling the erection of new poles and the attachment of the wires to them. The master has found that this change could not be made without a large expenditure of money. Moreover, it would involve a crowding of the streets with poles, which the mayor and aldermen have rightly been attempting to prevent. It appears that, at present, in one or two places, there are four or five poles in front of one house. The master finds that, if the change were made as the plaintiff desires, there would be at least two places where there would be four or five poles within a distance of 75 feet. It would be more equitable, if the plaintiff's right were established, that its relief should be by compensation in damages.

But for reasons already stated, the entry will be:

Bill dismissed.

(200 N. Y. 316)

PEOPLE v. CHIARO.

(Court of Appeals of New York. Jan. 3, 1911.)

1. HOMICIDE (§ 269*) — PROSECUTION — JURY QUESTION — PREMEDITATION.

Evidence in a murder case *held* to make the question of premeditation by accused a question for the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 563; Dec. Dig. § 269.*]

2. HOMICIDE (§ 14*) — MURDER — PREMEDITATION.

A design which precedes the killing long enough to allow reflection on whether to kill or not, and for the formation of a definite purpose to kill, may be a deliberate and premeditated design to kill.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 19, 20; Dec. Dig. § 14.*]

3. HOMICIDE (§ 269*) — MURDER — PROSECUTION — JURY QUESTION.

Evidence in a murder case *held* to make the questions of motive and intent to kill questions for the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 563; Dec. Dig. § 269.*]

4. HOMICIDE (§ 9*) — INTENT — CONSEQUENCES OF ACT.

The rule that one intends the natural and necessary consequences of his act is applicable on the question of intent in cases of murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 14; Dec. Dig. § 9.*]

5. HOMICIDE (§ 22*) — MURDER — ELEMENTS OF OFFENSE — MOTIVE.

If a homicide was willful, it is not essential to prove motive in order to authorize a conviction for murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 35-38; Dec. Dig. § 22.*]

Appeal from Supreme Court, Trial Term, Onondaga County.

Rocco Chiaro was convicted of murder in the first degree, and he appeals. Affirmed.

Thomas Woods, for appellant. George H. Bond, for the People.

COLLIN, J. The defendant on Sunday, January 30, 1910, caused the death of William F. Keene by shooting him with a revolver. At about 6 o'clock in the afternoon of that day, the defendant, said Keene, and William F. Marsh were in the yard of the Warner-Quinlan Company at Syracuse, N. Y. Defendant was in the employ of that company as a laborer, Keene as a teamster and watchman at the yard, and Marsh as a foreman and watchman at the yard. The defendant asked Marsh, who as night watchman was about to take the place of Keene as day watchman, to let him watch that night, and Marsh replied that the company did not allow any Italian to watch. A friendly conversation consisting of several sentences then ensued between defendant and Marsh in the presence of Keene, at the close of which defendant for a reason not apparent said to Marsh that he was a liar, prefixing the appellation with an oath. Thereupon Marsh ordered the defendant to leave the yard, and, the defendant not complying or moving, took the defendant by the shoulder, and led him toward the gateway leading from the yard into the street. As they came near the gateway, the defendant protested against going out of the yard. Marsh then said to him, "I have a notion to smash your damned face for you," grasped him with both hands, shook him so that his cap fell off, told him to pick it up, which he did, and then said to him, "You get out of the yard, and stay out, and don't you come to work to-morrow." The defendant walked through and beyond the gateway into the street 10 or 15 feet. Marsh thereupon walked back into the yard, and after passing through the distance of about 30 feet heard some one behind him running. He turned about and saw the defendant about 15 feet from him pointing a revolver at his head, and heard him say, "Hands up, you son of a bitch. Do I go to work to-morrow?" Keene, who was standing 30 feet or thereabouts from defendant, said to him as he was pointing the revolver at Marsh, "Put up your gun," whereupon defendant pointed the revolver towards Keene and said, "You hands up," and Keene obeyed. Marsh looked at defendant, said to him, "What in hell is the matter with you?" walked to him, took him by the shoulder, defendant having put the pistol in his overcoat pocket, faced him toward the gateway, and ordered him to go out. They walked through the 15 feet to the gateway, the defendant dropping slightly behind Marsh, and, as they were in the gateway defendant said, "I kill you, son of a bitch," and twice shot Marsh in the back. Keene said, "For why you kill Willie

Marsh?" and defendant replying, "Yes, and you, too," fired into Keene the bullet which caused his death. The interval between the two shootings of Marsh was one second and between the last shooting of Marsh and the shooting of Keene was two seconds. The revolver used by defendant was through no disclosed reason or purpose placed by him in his pocket during the forenoon of that day. Until this occasion the relations between the parties had been uniformly and thoroughly friendly. The foregoing statement is based upon the evidence in behalf of the people. Inasmuch as the jury adopted with ample justification such evidence, rather than that in behalf of the defendant, widely differing therefrom, it is not necessary to state the facts the latter tended to establish.

The defendant's counsel earnestly and ably argues that the trial court erred in submitting to the jury the question whether the defendant was guilty of murder in the first degree, because the evidence did not tend to prove that the defendant shot Keene from a deliberate and premeditated design to effect his death. We cannot reach that conclusion. The fact that the defendant, when at the point of 10 or 15 feet without the gate, turned about and ran toward Marsh, taking the pistol from his pocket at some instant after Marsh at the gateway had turned his back upon him, is evidence that the defendant had formed and held the design to use the pistol. His exclamation and question to Marsh and command to Keene are additional evidence that the design existed when they were uttered. The conduct of Marsh and the direction of Keene may have stayed the execution of the design, but the subsequent words and acts of the defendant are evidence that it included within its scope the shooting of Keene. The trial court could not determine as a matter of law that the mind of the defendant as he shot Keene did not hold the design to do the act, or the precise instant of time when the design, if existing, was formed or its extent or quality. The law is that a design which precedes the killing by a space of time sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill, may be a deliberate and premeditated design to kill. *People v. Governale*, 193 N. Y. 581, 590, 86 N. E. 554. Defendant's counsel contends, further, that the judgment lacks support essential to its legality, in that the evidence does not tend to prove any motive or intent on the part of defendant to kill Keene. The facts constituting the transaction were evidence of both motive and intent. The rule that a person intends that which is the natural and necessary consequence of his act accords with sound reason, and is applicable to capital cases. The facts not only did not preclude, but were evidence of, the existence in the mind of defendant of the intent to kill. They were evidence also of the existence of a mo-

tive springing from the harsh and insulting treatment accorded him by Marsh and witnessed, without interference at least, if not with approval, by Keene, prompting his mind to shoot and kill Marsh and Keene. Moreover, the killing was plainly proven to be willful, and the finding of a motive therefor was not essential. Under the evidence, the trial court did not err in imposing upon the jury the duty of determining from the facts and circumstances connected with the shooting the character of the act and the degree of crime which should be attached to it. An examination of the record convinces us that the verdict was neither against the weight of evidence nor against law; nor do we find anything in the evidence or in the procedure which would justify us in holding that justice requires a new trial. A careful consideration of each exception taken by defendant reveals no error.

The judgment of conviction should be affirmed.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, and CHASE, JJ., concur. WIL-LARD BARTLETT, J., not voting.

Judgment affirmed.

(200 N. Y. 335)

PEOPLE v. BROMWICH.

(Court of Appeals of New York. Jan. 10, 1911.)

1. INDICTMENT AND INFORMATION (§ 160*)—AMENDMENT—VARIANCE.

An indictment charged that defendant entered a false registration in the Fifteenth election district of the Thirty-First assembly district of a stated county, he not being a qualified voter of such district nor a citizen of the United States or of the state of New York, nor an inhabitant of said election district for 30 days preceding the election. *Held*, that an amendment of the indictment at the trial by changing the number of the assembly district, though not improper when considered with the allegation that defendant was not a citizen of the United States, since in that event he would be guilty of the crime no matter in what election district he registered, and the statement of the election district would not be any element of the crime, but such amendment was not permissible under the allegation that defendant registered at a particular district where he was not entitled to vote, as the number of the district was an essential element of the crime, and, the grand jury not having found that the defendant was not an inhabitant of the district stated in the amendment, the amendment stated a new and distinct offense, and hence was not permissible under Code Cr. Proc. § 293, providing that upon trial of an indictment, where there is a variance between the allegation and proof in respect to time, place, person, or thing, the court may in its judgment, if not prejudicial to the defense, allow an amendment according to the proof.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 515; Dec. Dig. § 160.*]

2. CRIMINAL LAW (§ 362*)—EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES.

The certificate of clerks of court that after their examination of the records they failed to find that defendant was naturalized was not admissible in a prosecution for false registration under Code Cr. Proc. § 392, providing that rules of evidence in civil cases are applicable also to criminal cases except as otherwise provided, and section 921 of the Code of Civil Procedure, providing that, where the officer having custody of papers certifies that they cannot be found, the certificate is presumptive evidence, as under the first 10 amendments to the federal Constitution and our Bill of Rights, and section 8 of the Code of Criminal Procedure, in all criminal prosecutions the accused is entitled to be confronted by the witnesses against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1538-1548; Dec. Dig. § 662.*]

3. STATUTES (§ 142*)—AMENDMENT—IMPLICATION—BILL OF RIGHTS.

While the Bill of Rights is but a statute, it is a statute of great antiquity in this state, having been enacted first in 1787, and having remained on the statute books ever since, and appearing in article 2 of the civil rights law (Consol. Laws, c. 6), and it should be deemed amended only when the Legislature has expressed that opinion in clear terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 210; Dec. Dig. § 142.*]

Appeal from Supreme Court, Appellate Division, First Department.

Thomas E. Bromwich was convicted of false registration, and from an order of the Appellate Division (135 App. Div. 67, 119 N. Y. Supp. 833), reversing the judgment of conviction, the People appeal. Affirmed.

Edward R. O'Malley, Atty. Gen. (Jacob Frank, of counsel), for the People. William E. Morris, for respondent.

CULLEN, C. J. The defendant was indicted for the crime of false registration in appearing before the inspectors of election for the Fifteenth election district of the Thirty-First assembly district in the county of New York as a voter in said district, he not being a qualified voter in such district, nor a citizen of the United States or of the state of New York, nor an inhabitant of said election district for the last 30 days preceding the date of the election. On this indictment he was tried, convicted, and sentenced. The Appellate Division reversed the judgment on questions of law only, having examined the facts and found no error therein, and ordered a new trial. 135 App. Div. 67, 119 N. Y. Supp. 833. From that determination the people have appealed to this court.

The first error of which the defendant complains is that on the trial the prosecution was allowed, over his objection and exception, to amend the indictment by inserting the Thirty-Fifth assembly district in lieu of the Thirty-First assembly district wherever the words appeared therein. The learned judge who wrote for the majority of the

Appellate Division was of opinion that the amendment was authorized under section 293 of the Code of Criminal Procedure, which provides: "Upon the trial of an indictment, when a variance between the allegation therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms as to the postponement of the trial, to be had before the same or another jury, as the court may deem reasonable." We entertain a different view. While the indictment contains but a single count, the defendant is alleged to have violated the law and been guilty of a crime for two different reasons: (1) Because he was neither a citizen of the United States nor of the state of New York. (2) Because he was not an inhabitant of the election district thirty days previous to the date of election. Under the first allegation the defendant would be guilty of the crime, no matter in what election district he registered, and, had the indictment contained this single allegation, the amendment would have been justified clearly under the provisions of the Code quoted. The statement of the election district would not be any element of the crime, but a mere specification of the particular place in which the crime was committed. Not so, however, as to the second allegation of the indictment. There the crime charged is that the defendant registered at a particular election district where he was not entitled to vote because he was not an inhabitant of that district. The particular district in which the registry was obtained was an essential element of the crime. The grand jury have not found that the defendant was not an inhabitant of the Thirty-Fifth district, which was necessary to constitute a crime under the amendment of the indictment. In other words, the amendment is not merely in the description of the offense, but in the identity of the offense. An amendment of this character is not permissible. *People v. Geyer*, 196 N. Y. 364, 90 N. E. 48.

The majority of the court below placed their decision on the admission by the trial court of improper evidence to establish that the defendant was not a citizen of the country, and hence not entitled to vote anywhere. There was first placed in evidence his affidavit before the inspectors that he was born in England, and that he was naturalized at Bridgeport, Conn., in 1887. Then over the objection and exception of the defendant there was admitted in evidence certificates signed by the clerks of the various courts held in Bridgeport that after an examination of the records from 1875 to date they failed to find any record of the naturalization of the defendant. The certificates were signed by the clerks of the courts and their official

seals attached. Some of the certificates were exemplified by the presiding judge of the courts, others not. It is sought to sustain the admission of these certificates under section 392 of the Code of Criminal Procedure, which provides: "The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this Code." And section 921 of the Code of Civil Procedure, which provides: "Where the officer, to whom the legal custody of a paper belongs, certifies, under his hand and official seal, that he has made diligent examination, in his office, for the paper, and that it cannot be found, the certificate is presumptive evidence of the fact so certified, as if the officer personally testified to the same." The Appellate Division thought it doubtful if section 921 applied to other than officers within this state, because there is no provision made for the authentication of the signature of the clerk and the seal of the court, as required under the act of Congress for the exemplification of records of one state to be used in another. We think there is a good deal of force in that doubt. The court based its decision, however, on the ground that the defendant was entitled to be confronted with the witnesses against him, and for this reason the fact that there was no record of defendant's naturalization could be proved only by a witness personally produced in court. We think that in this view the court below was correct. It is doubtless true that the first 10 amendments to the federal Constitution are not restraints on the powers of the states, and also that our Bill of Rights which provides that, "In all criminal prosecutions the accused * * * is entitled * * * to be confronted with the witnesses against him," is but a statute and subject to legislative amendment, except so far as certain of its provisions appear in the first article of our Constitution. We think it entirely clear, however, that there is no legislation modifying or repealing the provisions quoted from the Bill of Rights. True, by section 392 of the Code of Criminal Procedure, above referred to, rules of evidence in criminal cases are the same as in civil cases, "except as otherwise provided in this Code," but section 8 of the same Code provides that a defendant is entitled "to be confronted with the witnesses against him in the presence of the court," with a single exception not applicable to the case before us. The right to be confronted with the adverse witnesses in court is plainly a case "otherwise provided for," and therefore comes within the express exception of section 392. It may be also said that, though the Bill of Rights is but a statute, it is a statute of great antiquity in this state, having been enacted first in 1787, and having remained on the statute books ever since, despite the perpetual revision and codification our laws undergo. It now appears in article 2 of the Civil Rights Law

(Consol. Laws, c. 6). Such a statute should be deemed amended by other provisions of law only when the Legislature has expressed that intention in clear terms.

The order of the Appellate Division should be affirmed.

GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Order affirmed.

(200 N. Y. 263)

SOHNS v. BEAVIS et al.

(Court of Appeals of New York. Jan. 3, 1911.)

1. AUCTIONS AND AUCTIONEERS (§ 7*)—CONTRACTS—CONSTRUCTION.

A sale of land at auction is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. §§ 20-24; Dec. Dig. § 7.*]

2. AUCTIONS AND AUCTIONEERS (§ 8*)—CONTRACTS—CONSTRUCTION—RESCISSION.

Where a purchaser of land at auction was informed at the time of the signing of the terms of sale that the land was subject to building restrictions, and was assured that the restrictions were all right, he could assume that the restrictions were of the ordinary kind, and that they were not so unreasonable as to make the title unmarketable, and he was entitled to a reasonable opportunity to ascertain what the restrictions were, and where the restrictions were not reasonable, mutual, and uniform, because the grantor could at any time alter and annul the restrictions as to any part of the premises without the consent of the owners of any other part of the premises, he could refuse to complete the purchase and sue for the payment made and reasonable expenses incurred in examining the title.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. § 32; Dec. Dig. § 8.*]

3. AUCTIONS AND AUCTIONEERS (§ 8*)—RESCISSION — "RESTRICTIONS AS TO BUILDINGS."

"Restrictions as to buildings," in the absence of any further description, means according to custom, restrictions of a general character against cheap buildings, offensive trades and irregular location of building lines with reference to the street line, and the term does not include restrictions which do not restrain except at the election of a remote grantor, and a purchaser of land at auction, with notice that the same is subject to building restrictions, may assume, in the absence of information to the contrary, that all purchasers are restrained in the same way and to the same extent, and that no one may vary the restrictions or release them without the consent of all, and, where such is not the case, he may avoid the sale.

[Ed. Note.—For other cases, see Auctions and Auctioneers, Cent. Dig. § 32; Dec. Dig. § 8.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by F. William Sohns against Frank S. Beavis and another. From a judgment of the Appellate Division (183 App. Div. 717,

118 N. Y. Supp. 189), reversing a judgment for plaintiff, and granting a new trial, defendants appeal. Affirmed.

The action was brought to recover earnest money paid down upon a sale of real estate at auction, as well as expenses incurred in examining the title. The plaintiff rejected the deed tendered on the adjourned law day on account of the following covenant appearing therein immediately after the description: "Subject nevertheless to the restrictive covenants contained in the deed from the Bankers Realty and Security Company to Frank S. Beavis, dated April 29, 1907, and recorded May 3, 1907, in Liber 67 of Conveyances relating to the Annexed District, at page 390, reference to which is had for a more particular description." The deed thus referred to contained the following covenants on the part of the grantee therein, the defendant Beavis, who is the present vendor:

"The party of the second part, by the acceptance thereof, for himself, his heirs and assigns, hereby covenants and agrees as follows:

"(1) That there shall not be erected upon any portion of said premises any house or dwelling less than two stories in height, or any house, not having a cellar, or costing less than \$2,500 or any house or dwelling commonly known as a tenement, or any house with a roof of the character by description known as a flat roof, or any store for the sale of merchandise.

"(2) That all buildings erected shall stand back at least twenty (20) feet from the line of the street or avenue on which said lots front, for the purpose of forming courtyards, in front of said premises. This covenant shall not, however, apply to stoops or open piazzas attached to residences. That there shall not be erected any stable or outbuilding on said premises within sixty (60) feet of the line of the street or avenue on which said lots front; that any such stable or outbuilding shall be used only for private family purposes, and not for business, and no stable or outbuilding shall be erected without the written consent of the party of the first part.

"(3) That there shall not be erected or permitted upon said premises any fence or hedge above four (4) feet in height nor any fence or hedge of a character and kind except as approved in writing by the party of the first part.

"(4) There shall not be erected upon any portion of said premises any carpenter shop, blacksmith shop, cow stable, slaughter house, pig sty, brass foundry, nail or other foundry or fertilizing manufactory, or any manufactory of gunpowder, dynamite, glue, varnish, vitriol, ink or turpentine, or the tanning, dressing or preparing of skins, hides or leather, or any bone-boiling establishment or manufactory of baking powder, cream of tartar, brewery, distillery, or other offensive, noxi-

ous or dangerous trade or business whatsoever.

"(5) That all these covenants shall run with the land until January 1, 1920, when they shall cease and terminate, except, however, that it is mutually understood and agreed that the above covenants and restrictions, or any of them, may be altered and annulled at any time prior to said January first, nineteen hundred and twenty (1920), by written agreement by and between the party of the first part hereto, its successors or assigns, and the owner or any of the owners of the premises hereby conveyed or any part thereof, and such agreement shall be effectual to alter or annul said covenants and restrictions as to any portion of said premises without the consent of any owner or owners of any other premises situate in Tremont Terrace."

Upon the trial it appeared that in the advertisement of the auction delivered to the plaintiff several days before the sale by the defendant Kennelly, the auctioneer, it was stated that the property was restricted as to nuisances, but there was no statement as to any other restriction. The terms of sale, however, contained the following: "The property is sold by a good title in fee simple, and will be conveyed by usual warranty deed free and clear of all incumbrances with restrictions as to buildings and against nuisances." Just before the sale these terms were read by a representative of the defendants to the crowd assembled, but the plaintiff testified that he did not hear it, as he was not present when the sale began. Right after the sale the plaintiff signed, without reading, a contract whereby he agreed to comply with "the terms and conditions as announced at the sale," and a few minutes later, when he paid his earnest money, he was required to sign a similar paper to which the formal terms of sale were annexed. The words relating to restrictions had been interlined in ink in the printed terms of sale. He had never purchased real estate at auction before, and he did not discover what the restrictions were until he employed a lawyer to look into the matter. Upon learning their real nature he refused to complete the purchase on account of the last clause in the list of restrictions. There were 73 lots in the Tremont terrace and all were sold at the auction in question.

The trial justice dismissed the complaint on the merits without stating any ground in his formal findings, but in his opinion he based his action on the ground that "if the purchaser is aware of the existence of an incumbrance he is chargeable with knowledge of its scope, and in the absence of fraud he cannot avoid the purchase because of his failure to apprise himself of the actual facts." The Appellate Division, one of the justices dissenting, reversed upon the ground, among others, that "one who purchases lands in an auction room is not bound by the general

rule governing cases of sale by contract which charges the purchaser of lands subject to incumbrances with knowledge of the nature of such incumbrances in the absence of deceit or fraud." The defendants, upon the usual stipulation, appealed to this court.

H. B. Bradbury, for appellants. Edward R. Koch, for respondent.

VANN, J. (after stating the facts as above). We agree with the learned Appellate Division that a sale of land in the haste and confusion of an auction room is not governed by the strict rules applicable to formal contracts made with deliberation after ample opportunity to investigate and inquire. When the plaintiff was required to sign the terms of sale or lose the benefit of his bid, he could not ascertain the extent of the restrictions relating to buildings which then came to his notice for the first time. While he then learned that there were building restrictions, he did not know their nature and he was told by the clerk to whom he paid the money that "these restrictions are all right. They are only for private houses, and you are all right." The description delivered to him by the auctioneer before the sale gave notice of restrictions against nuisances, but none as to restrictions upon the right to build. When he signed the terms of sale within a few minutes after the property had been struck off to him, he had no chance to investigate but had to act at once. The building restrictions were not fairly or sufficiently described, because the extraordinary feature, of which good faith required disclosure, was in no wise alluded to. Under the circumstances, he had the right to assume that the "restrictions as to buildings" therein contained were of the ordinary kind for "private houses" and that they were "all right," according to the assurance given, or at least that they were not so unprecedented and unreasonable as to make the title unmarketable. When compelled to sign so suddenly, although he then knew that the restrictions extended to buildings, as was said by Mr. Justice Scott, writing for the Appellate Division, "he was entitled to a reasonable opportunity to ascertain what the restrictions were." If they had turned out to be within the range of ordinary experience, even if strict and severe, the plaintiff would have been bound to complete his purchase, for the circumstances surrounding the sale would afford protection only against a situation so far beyond reason as to amount to imposition. The restrictions, however, were not within reason or precedent, and would not have been regarded as possible even by the most prudent and cautious. If the covenant in the original deed had been to build only out of Carrara marble or Russian malachite, or not to build at all, clearly the plaintiff would not have been bound to comply with the terms of sale, although he had signed them. Such a covenant would be

fraudulent upon its face, for it is a fraud for one person to take undue advantage of another to his pecuniary injury.

Building restrictions, if mutual and uniform throughout a large tract consisting of many lots, may be an advantage instead of a detriment to all concerned. Through the protection afforded against cheap buildings, offensive trades, and irregular location of building lines with reference to the street line, the value of every lot may be materially increased, for the restraint upon all the lot owners may give such character to the neighborhood as to make it desirable for residences of the best class. "Restrictions as to buildings," in the absence of any further description, according to common usage, means restrictions of the general character thus alluded to and would be so understood by the average purchaser. Those words do not mean restrictions which do not restrain except at the election of a remote grantor. A restriction "with a string to it" does not restrain if its creator sees fit to pull the string. As was said below: "The advantage to a purchaser of real estate from a covenant against nuisances is not that his own property is restricted, but that his neighbors' property is." The plaintiff had the right to assume from the printed terms of sale that all the purchasers were restrained in the same way and to the same extent that he was, himself, and that no one could vary or release without the consent of all. A club held by a former owner by retaining control of the right to build is not a building restriction in any proper sense.

The restrictions in question were not usual, mutual, uniform, or reasonable, because they restrained one party, and by express agreement opened the door wide to the other. During the period of 13 years, the original grantor of the entire tract, "its successors and assigns," even after it had sold every lot, could agree with "the owner or any of the owners" of any lot or any part of any lot, "to alter or annul said covenants and restrictions as to any portion of said premises, without the consent of any owner or owners of any other premises situate in Tremont Terrace," which comprised the seventy-three lots sold at the auction. This singular provision was not written in the deeds of the lots so sold, nor did it appear otherwise than by reference to the record of a deed given by a realty company conveying the tract to the defendant Beavis, for whom the sale at auction was held. A restrictive covenant of this kind would enable the original grantor to hold every one of its grantees and their grantees at its mercy. They would be bound and helpless, while it would be in a position to exact and extort. After the tract had been well built up with beautiful homes, unless the exactions of the company were complied with, it could open any part of it

to any kind of business from a livery stable to a saloon. In the absence of local regulations, it could bring virtual destruction to any dwelling house, however valuable for residential purposes, by selling the right to tan hides or make dynamite upon either side thereof. It could permit every alternate lot owner to build up to the street line and prevent the others from building within twenty feet of the line. It could place at defiance all the lot owners but one by releasing the latter from the covenants by which all the others were bound. The question is not what will be done, but what may be done.

We think that the restrictions so imperfectly described in the terms of sale, did not give fair notice of the restrictions afterward put in the deed tendered to the plaintiff; that under the circumstances surrounding the sale and the assurance given right after the sale he had a reasonable time to investigate; that upon discovery of the actual facts he had the right to rescind the transaction and sue for the recovery of the amount paid down together with the reasonable expenses incurred in examining the title.

The order of the Appellate Division should be affirmed and judgment absolute rendered against the defendants upon their stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Order affirmed, etc.

(300 N. Y. 379.)

BOGART v. CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 10, 1911.)

1. MUNICIPAL CORPORATIONS (§§ 680, 681*)—USE OF STREETS—AUTOMOBILE RACES.

A city council has no power to authorize the use of public streets by an automobile club for automobile races to be held within certain hours on a particular day, and such use of the street is illegal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1459; Dec. Dig. §§ 680, 681.*]

2. MUNICIPAL CORPORATIONS (§ 748*)—USE OF STREETS—AUTOMOBILE RACES—INJURY TO SPECTATORS—CITY'S LIABILITY.

Where a spectator was voluntarily present to witness automobile races on a public highway, illegally authorized by the city council, his administrator could not recover against the city for his death, resulting from being struck by an automobile swerving in its course and leaving the highway, on the theory that the contest was illegal in the absence of proof of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 748.*]

3. MUNICIPAL CORPORATIONS (§ 706*)—USE OF STREETS—AUTOMOBILE RACES—DEATH OF PEDESTRIAN—EVIDENCE.

In an action against a city for the death of plaintiff's intestate by being struck by an auto-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r. Indexes

mobile during such races illegally permitted to be held on a boulevard by defendant city, evidence held insufficient to warrant a finding that decedent was a traveler on the highway when injured, or was anything more than a voluntary spectator at the races.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

4. EVIDENCE (§ 471*)—INTENT OF PERSON SINCE DECEASED—CONCLUSION OF WITNESS.

On an issue as to whether intestate, killed in an automobile accident, was a traveler when struck and killed, or a voluntary spectator at certain automobile races being illegally held on the street, the widow was not entitled to testify that he expected to go to the races and go to a beach afterward; she being at most entitled to testify to the facts and circumstances from which decedent's intention was deduced.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2157; Dec. Dig. § 471.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mary C. Bogart as administratrix of the goods, chattels, and credits of John Bogart, deceased, against the City of New York. From a judgment for plaintiff affirmed by the Appellate Division, 138 App. Div. 888, 122 N. Y. Supp. 1122, defendant appeals. Reversed.

Archibald R. Watson, Corporation Counsel (Theodore Connolly, of counsel), for appellant. Frank J. Dupignac, for respondent.

CHASE, J. On May 31, 1902, certain automobile races or speed trials were run under the direction and auspices of the Automobile Club of America. The track on which the races were run was a public highway known as the Southside boulevard, in the borough of Richmond, city of New York. The races were authorized by a resolution of the board of aldermen of the city of New York, of which resolution the following is a part, viz.: "That upon the recommendation of the local board, First district, borough of Richmond, permission be and the same is hereby given to the Automobile Club of America to conduct speed trials for automobiles on the Southside boulevard in the Fourth ward of the borough of Richmond on Saturday, May 31, 1902, between the hours of 11 o'clock a. m. and 4 o'clock p. m. * * *". Elaborate preparations were made to care for the visitors that might attend the races, and more than 100 policemen were specially detailed to patrol the boulevard and its locality during the hours in which the races were to be run. A street surface railroad corporation engaged in operating a line of trolley road over Lincoln avenue extending from some point west of the boulevard to Midland Beach, a point east of the boulevard, allowed its tracks crossing the boulevard to be taken up, and the schedule of cars to be run on such road for the day to be so changed that cars from the west ran to the boulevard and returned and cars from Mid-

land Beach ran to the boulevard and returned to such point. Persons desiring to travel beyond the boulevard in either direction were given transfer tickets for use on the cars after crossing the boulevard. People crossed the boulevard at Lincoln avenue, however, whether they had trolley transfers or not, providing a certain signal bell of gong was not ringing.

An accident occurred to one of the automobiles while running in a speed contest, which caused it to swerve from the track and dash among the spectators near Lincoln avenue. It resulted in several persons being killed and the serious injury of others. One of the persons injured was Louisa Johnson. She brought an action against the city of New York, the Automobile Club of America, and others, and recovered a judgment which was affirmed on appeal to the Appellate Division. An appeal was taken therefrom to this court, and it was held that the use of a public highway for such races is illegal, but that the judgment in favor of the plaintiff must be reversed for reasons stated in the opinion. *Johnson v. City of New York*, 180 N. Y. 139, 148, 78 N. E. 715, 717 (116 Am. St. Rep. 545). In the opinion this court say: "But granting that the action of the defendants in the use of the highway was illegal, the question remains, Was it illegal against the plaintiff so as to render the parties participating therein liable to her solely by reason of the illegality of their acts and regardless of any element of negligence or other misconduct? If the plaintiff had been a traveler on the highway when she met with injury, a very different question would be presented. Highways are constructed for public travel, and, as already said, the acts of the defendants were doubtless an illegal interference with the rights of the traveler. It may well be that for an injury to the traveler or to the occupants of the lands adjacent to the highway, or even to a person who visited the scene of the race for the purpose of getting evidence against the defendants and prosecuting them for their unlawful acts, the defendants would have been absolutely liable regardless of the skill or care exercised. But the plaintiff was in no such situation. She was not even a casual spectator whose attention was drawn to the race while she was traveling in the vicinity. She went from her home, a distance of five miles from the scene of the race, expressly to witness it and to enjoy the pleasure that the contest offered. As to the elements which made the contest illegal she was aware of their existence. She knew it was to take place on a highway, and she knew it was to be a contest for speed, and that therefore the automobiles would be driven at the greatest speed of which they were capable."

The plaintiff's intestate, in this case, was

killed at the same time and by reason of the same accident and circumstances that resulted in the injury to Louisa Johnson. It is not claimed by the plaintiff that the defendant was negligent in the conduct of the races. It may be assumed that the defendant is liable to the plaintiff for any injuries to her arising from the illegal use of the highway, if her intestate was injured while using the highway as a traveler. If, however, the intestate was injured while a spectator in attendance at the races to witness them and enjoy the pleasure that the contest afforded, the plaintiff is not entitled to recover, and the judgment should be reversed.

The intestate was a carpenter. He had lived on Staten Island for many years, and at the time of his death he was 68 years of age. His home was at Castleton Corner, about seven or eight miles from the place where the accident occurred. On the morning of the races he was engaged in building a fence near his home. Between 10 and 11 o'clock he left his work and went to his home and changed his working clothes for other clothes and left the house. Before leaving the house, he asked his daughter if she would like to go with him, but she made some excuse, and did not go. He left home shortly after 10 o'clock or between 10 and 11 o'clock. It was about 30 minutes' ride by the trolley car on Lincoln avenue from the intestate's home to the boulevard. He was seen at the boulevard to get off a Lincoln avenue trolley car that arrived from the direction of Castleton Corner between 11 and 12 o'clock on the day of the accident. The person who was employed as a trolley car starter on the west side of the boulevard saw him get off the car, but did not see where he went therefrom, and it does not appear that he asked for or obtained a transfer ticket. About 15 or 20 minutes before the accident, he was seen crossing the boulevard. A neighbor of his came down on a trolley car with a friend to go to Midland Beach. At the boulevard they obtained transfers and crossed to the east side, and, while standing there waiting for a car, they saw the intestate again cross the boulevard, and, as he approached them with his back to the boulevard, he said "Good morning," and before they could say anything more the accident occurred, and he suffered the injury from which he died shortly thereafter.

Without any other evidence to show that the intestate was a traveler on the public highway the court charged the jury as follows: "Was he present as a spectator of the display, a participant in what took place? If he was, I charge you that she may recover. If he went there as an express inspector to take part in this exhibition, to satisfy his pleasure, or his curiosity, she may not recover in this case. Upon that point, gentlemen, you will consider all the evidence. Consider the evidence of the witnesses as to

what time he was seen there, how long he loitered there, when he left his home, the distance of the home from the point of the accident, the time within which the distance could be traversed, the space of time between his arrival at the place, if you find evidence of that time and the happening of the accident, the testimony of the witness who testified that he bid her the time of day going on his way in the direction of Midland Beach."

The jury found in favor of the plaintiff, and the judgment entered thereupon was affirmed by the Appellate Division by a divided court.

We are unable to find in the record any evidence whatever to sustain the conclusion of the jury that the plaintiff at the time of the accident was a traveler upon a highway. There is no evidence that he was on his way to Midland Beach, or that he was stopping at the boulevard casually waiting for a car on which to continue his journey. The accident occurred at about 1 o'clock. The intestate arrived at the boulevard at some time between 11 and 12 o'clock, and there is nothing from which to infer that he went to the boulevard or remained there one or more hours other than as a spectator. The record being wholly without evidence to sustain the verdict of the jury, the judgment must be reversed.

The defendant has urged that the judgment should also be reversed by reason of an alleged error of the court in striking out certain evidence of the plaintiff during her cross-examination. We think the evidence should not have been received by the court, and we give expression to our views in regard to its competency because of the possibility of the question again arising in case of a new trial. On the cross-examination of the plaintiff questions were asked and answered as follows: "Q. You knew, did you not, when he went out that he was going to see the automobile races? A. Well, he expected to go there and to go to the beach at the same time. Q. You knew he expected to go to see the races? A. Yes." Subsequently the answers were stricken out upon motion of the plaintiff. It is interesting to note that the only suggestion in the record that the intestate expected to go to the beach or to any point other than the races appears in this testimony so stricken out on motion of the plaintiff.

The declaration by a person of his intention made without premeditation in connection with starting to do a thing or of proceeding upon a journey, and simultaneously therewith, is sometimes received in evidence when all of the circumstances and surroundings verify the disinterestedness of the declaration. The evidence stricken out by the court was not even the alleged declaration of the intestate, but the witness was cross-examined upon the subject upon which she had not been interrogated by her coun-

sel and she was asked directly as to the intestate's expectation when he left his work and proceeded easterly in the direction of the races. When a witness is interrogated for the purpose of ascertaining the intention or expectation of another, it should be as to the acts or statements (when admissible) of the other person from which his intention or expectation can be ascertained.

When a person declares the intention or expectation of another apart from the acts or statements from which the conclusion is derived, it is manifest that his declaration is a mere conjecture or a conclusion derived from other facts. The conjecture or conclusion of a witness is generally improper and incompetent, and should not be allowed as testimony in a case. The facts and circumstances should be given from which the intention or expectation of the person under consideration can be determined as a fact.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, O. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 346.)

FIRST NAT. BANK OF WATERLOO v. STORY.

(Court of Appeals of New York. Jan. 10, 1911.)

1. GUARANTY (§ 37*)—ANNUAL BOND—INSTRUCTIONS—LIABILITY.

Where stockholders of a corporation jointly and severally guaranteed to a bank prompt payment of all notes, checks, drafts, or other obligations in writing made or accepted by the corporation which the bank then had or might thereafter have or purchase within the year in a sum not exceeding \$15,000 and interest thereon, such contract, in the absence of evidence that such was the intention, was not terminated by the execution of a similar contract for the succeeding year.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 46; Dec. Dig. § 37.*]

2. GUARANTY (§ 77*)—ACTION—NECESSITY OF DEMAND.

Where stockholders guaranteed prompt payment at maturity of all obligations in writing of the corporation which a bank had or might secure during the year within a specified limit of liability on demand, the bank was bound notwithstanding the corporation's insolvency to demand payment of the guarantors before instituting a suit against them.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 77.*]

3. ACTION (§ 11*)—CAUSE OF ACTION—DEBT PAYABLE ON DEMAND—NECESSITY OF DEMAND.

Where a promise is to pay one's own debt for a specified sum on demand, no demand need be alleged or proved.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 64-75; Dec. Dig. § 11.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the First National Bank of Waterloo against Leonard Story. From a judgment for plaintiff (53 Misc. Rep. 429, 103 N. Y. Supp. 233), affirmed by the Appellate Division' (131 App. Div. 472, 115 N. Y. Supp. 421), defendant appeals. Reversed, and new trial granted.

This action was brought upon a written instrument, dated January 31, 1901, signed and sealed by the defendant and five others, and running to the First National Bank of Waterloo. After appropriate recitals showing its consideration and purpose, and the relation of the signers as stockholders "or otherwise" to the Waterloo Organ Company, it proceeds as follows: "We, the undersigned, do hereby jointly and severally for ourselves, and our, and each of our heirs, executors and administrators, guarantee and warrant unto the said bank, its successors and assigns, the prompt payment at maturity of each and all the notes, checks, drafts, bills of exchange and other obligations in writing of every name and kind, made, signed, drawn, accepted or endorsed by the said Waterloo Organ Company, which the said bank now has, or which it may hereafter have, hold, purchase or obtain within one year from date hereof, but our liabilities hereunder shall not at any time exceed the sum of \$15,000 and interest thereon. And in case default is made in the payment at maturity of any of the above-mentioned obligations, or in the payment of any lawful claim or demand held by said bank against said company, we do hereby jointly and severally covenant, promise and agree to pay the same to the said bank, its successors or assigns upon demand. This instrument is intended to be a full, complete and perfect security and indemnity to the said bank to the extent and for the time above stated, for any indebtedness or liability of any kind owing by the said company to it from time to time and to be valid and continuous without other or further notice to us or to any of us."

The complaint set forth said instrument, and alleged that in July, 1901, the plaintiff became the owner of 15 bonds for \$500 each, duly issued on the 1st of December, 1894, by the Waterloo Organ Company and all payable to bearer on the 1st of December, 1904. It was further alleged that, although said bonds had become due, no part of the principal thereof had been paid, and no part of the interest since December 1, 1901. No demand of payment was alleged or proved. The answer, after a general denial in part, pleaded payment, and that said instrument was extinguished by another of like tenor and effect given in renewal thereof in January, 1902, and by the recovery of a judgment thereon for the full limit of \$15,000 and interest, and the payment of said judg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment by the defendant. The trial court, after finding the facts substantially as alleged in the complaint, held that the 15 corporate bonds were obligations of the organ company referred to, and that they were covered by the instrument in question. Judgment was directed in favor of the plaintiff for the sum of \$7,500 and interest thereon from December 1, 1901. The defendant appealed to the Appellate Division, where the judgment was affirmed, the presiding justice dissenting, and thereupon a further appeal was taken to this court.

George E. Zartman, for appellant. J. N. Hammond, for respondent.

VANN, J. (after stating the facts as above). The appellant insists that the plaintiff, by accepting a similar contract of guaranty for the succeeding year, extinguished its right to recover on the instrument in question. Thus far it has been held that in the absence of evidence, either internal or external, to show that the new contract was designed to destroy the one outstanding, it cannot be deemed to have been given in renewal thereof, or as a substitute therefor; but must be regarded as an independent and distinct agreement. That subject has been sufficiently discussed by well-considered opinions in both of the courts below, where the claim of the defendant was overruled, mainly upon the authority of *Barnes v. Cushing*, 168 N. Y. 542, 81 N. E. 902. We regard that case as conclusive, and pass this point without further discussion.

The appellant further claims; but without argument or the citation of authority, that the judgment should be reversed on account of the failure to allege and prove a demand by the plaintiff upon the defendant before the commencement of the action. The learned Appellate Division held that no demand was necessary, "as it would be useless to ask payment of the bankrupt organ company." The question now raised by the appellant, however, in reference to a demand is not that it was necessary to make one upon the Waterloo Organ Company, but upon the defendant. The first promise by the obligors is to guarantee "the prompt payment at maturity of each and all" the written obligations of the organ company purchased or obtained within one year from the date of the bond, with a limitation of liability at any time to the sum of \$15,000 and interest. The second promise is that, "in case default is made in the payment at maturity of any" of the obligations named, the obligors "agree to pay the same to the said bank, its successors or assigns upon demand." The next and last paragraph of the instrument contains the declaration that it "is intended to be a full, complete, and perfect security and indemnity to the said bank to the extent and for the time above stated. * * * and to be valid and continuous without other or further notice to us or to any of us."

In *Locklin v. Moore*, 57 N. Y. 300, 362, Judge Earl declared that "a contract could, doubtless, be so drawn that the demand and place of payment would become part of it, so that an action could not be maintained without a demand at the place." He further said, however, that "it is the settled law of this state, announced in many decisions, that when a specific sum of money is made payable by the agreement of the parties, upon demand, or at a specified time, at a particular place, as against the original debtor, no demand at the time or place, prior to the commencement of the suit, is necessary. The commencement of the suit is itself a sufficient demand. * * * The argument that in such cases the demand and place of payment are part of the contract has frequently been made, and in this state uniformly overruled. * * * The only benefit the defendant could get from the specification of payment at a particular place is that if he was ready there to pay, and kept ready, he could set that fact up in his answer and then pay the money into court and allege such payment in his answer, and thus shield himself from all liability for interest and costs." This was said in an action against the original debtor to recover for goods sold payable at a certain place on a day specified, and also to recover the proceeds of goods sold by him on commission.

In *Nelson v. Bostwick*, 5 Hill, 37, 39, 40 Am. Dec. 310, the action was against Shumway as principal and Nelson as surety upon a bond, "conditioned to be void if Shumway should pay on demand all costs that might be awarded to the defendants" in a certain action. Judge Bronson, speaking for the court, said: "When a party agrees to pay his own debt on request, it is regarded as an undertaking to pay generally, and no special request need be alleged. But it is otherwise when he undertakes for a collateral matter, or as a surety for a third person. There, if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alleged and proved. *Devenly v. Welbore*, Cro. Eliz. 85; *Hill v. Wade*, Cro. Jac. 523; *Waters v. Bridge*, Id. 639; *Birks v. Trippet*, 1 Saund. 82, and note (2); *Harwood v. Turberville*, 6 Mod. 200; Com. Dig. Pleader (c. 69); *Sicklemore v. Thistleton*, 6 M. & S. 9; *Carter v. Ring*, 3 Camp. 459; *Douglass v. Reynolds*, 7 Pet. 113 [8 L. Ed. 626]; 2 Saund. 106, note (3); *Lawes' Pl.* 232, 251; 1 Chit. Pl. 363 (Ed. of 1837)."

The judgment rendered in favor of the plaintiff in that action was reversed because there was neither allegation nor proof of a demand and a majority of the court refused to award a *venire de novo*, because there was "a fatal error which lies back of the trial." Chief Justice Nelson concurred generally. Judge Cowen concurred in an elaborate opinion, and, while he thought that a *venire de novo* should be issued, he agreed

with Judge Bronson as to the principal question. He said: "There are several errors for which this judgment must be reversed. A prominent one is the failure to prove a demand of Shumway. The condition of the bond means an actual, not a mere constructive demand, such as the bringing of a suit, or the issuing of an execution. Without saying that the want of demand would be a defense for Shumway, it is clearly so as to Nelson, the surety, the only person who appeared and pleaded. There was no precedent duty upon him independently of the words of the condition, and he might prescribe such preliminaries to his liability as he pleased. A bond to pay a precedent debt, on demand, is satisfied by the commencement of the suit itself, which is considered a sufficient demand; but in case of any engagement to pay a sum on demand, or on request, not itself due independently of the contract, the terms of the contract must be pursued. A demand, with time and place, must then be averred, and the averment cannot be satisfied without proof of an actual demand." Page 42 of 5 Hill, 40 Am. Dec. 310. The learned justice cited the following authorities in addition to those cited by Judge Bronson: *Selman v. King*, Cro. Jac. 183; *The Case of an Hostler*, Yelv. 68. He then continued: "A promise to save harmless on request is an instance. *Harrison v. Mitford*, 2 Bulstr. 229. This and various other cases to the same effect are cited in 1 Saund. 33, note (2). 'For,' adds the editor, 'a request is parcel of the contract, and must be proved; and no action arises until a request be made.' Vid. *Douglass v. Howland*, 24 Wend. 51, and several books there cited to the same point. In *Harwood v. Turberville*, 6 Mod. 200, the defendant became surety by bond to pay a previous debt of his mother, on demand; and a special request was held necessary to charge him." Page 42 of 5 Hill, 40 Am. Dec. 310.

The cases cited by the learned judges faithfully support the conclusions announced, and in their discussion no notice is taken of the fact that the bond was an undertaking required by statute, which apparently was regarded as immaterial. In *Devenly v. Welbore*, 1 Cro. Eliz. 85, the surety promised that, if one Percy "did not pay the plaintiff yearly upon request ten pounds and ten loads of faggots, he would pay them." It was held that the request was material and ought to be expressly alleged. In *The Case of an Hostler*, Yelv. 68, the court said: "Where the ground of the action is for a debt, in which case the law implies the promise, there the request is not issuable, nor parcel of the consideration. Otherwise where the action is founded on a mere collateral promise, and not upon a duty, for there the request is issuable and ought to be expressly alleged." In *Birks v. Trippet*, 1 Saund. 31, counsel argued that: "Where a mere duty is promised to be paid upon request, there need be no actual request, but, where a collateral sum

is promised to be paid upon request, there must be an actual request." One of the justices interrupted and said, "The court is of your opinion and the matter clear," and judgment was thereupon rendered on the theory that a demand was necessary. In *Harwood v. Turberville*, 6 Mod. 200, case 293, the court said: "If a man be bound to pay money on default of payment by another, but is not the original debtor, there he is not chargeable until special request made of him who was to pay it." In *Carter v. Ring*, 3 Campbell, 459, the covenant of a surety was to pay on demand if the principal debtor failed to pay, and Lord Ellenborough held that "the plaintiff was bound to prove a demand before action brought." In *Sicklemore v. Thistleton*, 6 Maul. & S. 9, the defendant's covenant was to pay to the plaintiff on demand certain rent reserved if the lessee should neglect to pay it for 40 days. It was held that the defendant was not chargeable until after 40 days, nor until demand made. The case received elaborate consideration, every justice, including Lord Ellenborough, writing an opinion. *Nelson v. Bostwick*, supra, has been frequently cited, but never criticised or overruled so far as the point in question is concerned. Thus, in *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226, 235, Chief Judge Folger said: "The appellant is a surety, and demand of the principal is part of the contract. *Nelson v. Bostwick*, 5 Hill, 87 [40 Am. Dec. 310]. It is one of the conditions precedent to her obligation to pay." In *McMullen v. Rafferty*, 89 N. Y. 456, 459, Judge Earl said: "If the defendant had made it a part of his collateral contract of guarantee that the maker should pay the notes upon demand, then his obligation would not have matured until an actual demand of payment had been made upon the maker. *Nelson v. Bostwick*, 5 Hill, 87 [40 Am. Dec. 310]." See, also, *Beers v. Shannon*, 78 N. Y. 292, 302; *Wangler v. Swift*, 90 N. Y. 38; *Cass v. Shewman*, 61 Hun, 472, 478, 16 N. Y. Supp. 236; *Bunn v. Lett*, 65 Hun, 43, 19 N. Y. Supp. 728; *Miller v. City of Buffalo*, 1 Sheld. 490, 492.

The promise in the case before us was neither to pay nor to guarantee the payment of a specific sum of money, for no amount was mentioned except to limit the liability. The obligations upon which the recovery was based did not belong to the plaintiff at the date of the bond. While then in existence as valid obligations of the organ company, they did not become the property of the bank until about five months after the bond was given and did not become due until several years later. Without a demand, therefore, the defendant could not know what, or how much he was to pay, unless he learned by inquiry or accident. Nor could he know, except as aforesaid, when he was to pay, for the promise was to "guarantee the prompt payment at maturity of" all checks, notes, etc., and "other obligations in writing" of the

principal debtor, as well as any "lawful claim" against him. While there was an absolute promise to guarantee prompt payment at maturity, still the guarantor had the right to contract that his liability should not mature until a demand had been made upon him, which would make the demand a condition precedent to the right to recover. A surety may desire to have notice of the amount of his principal's default and a chance to pay without suit, and he may so stipulate. The promise to guarantee prompt payment at maturity should be read with the promise in case of default by the principal to pay "upon demand," and, while there is an absolute promise to guarantee payment at maturity, there is no promise to pay "in case of default," except "on demand." Both of said promises should also be read in connection with the final declaration and the waiver of "other or further notice to us or to any of us." The words "other or further" must have a function to perform, and they imply that a notice of some kind was to be given to the obligors. The notice excluded may have been notice of each debt as it was acquired by the plaintiff, as some authorities hold necessary (*Douglass v. Howland*, 24 Wend. 35, 49), but, unless the notice included relates to a demand, the words "other and further" impress me as meaningless.

The intention of the parties should govern, and, if the terms had been to pay "on demand and not otherwise," there would have been no doubt as to that intention; yet it seems to me that logically the meaning of the instrument in its present form is the same as if the form supposed had been used. How would the obligor express his intention? He might promise to pay only on demand, or after due demand, or provided a demand is first made, but, unless this was meant, what was meant by the promise as made? Why was the word "demand" used? What function has it to perform? Can it be disregarded and yet effect given to the intention of the parties? Can it be held that the meaning would be the same without it as with it? Can it be logically said that a promise to pay on demand differs in no legal aspect from a promise to pay without a demand?

I think that, when a promise is to pay one's own debt on demand, none is required, because the law implies a promise to pay and the express promise forms no part of the consideration and adds nothing to the obligation. When, however, the promise is not to pay one's own debt but the debt of another yet to come into existence, on demand, there is no precedent duty, and the obligation to pay rests wholly on the promise in the form made, and the promise is binding only in the form made. As according to the promise nothing was payable except on demand, there could be no breach until demand made.

"When there is a duty which the law makes payable on demand, there need be none alleged, but otherwise where there is no duty until a demand." To the contention that the obligor is not harmed in the one case more than in the other because he can avoid liability for costs in one the same as in the other, the obvious answer is that he was not bound to pay at all except by his collateral promise and he had the right to limit that promise by annexing any condition that he saw fit.

I think that upon principle as well as authority the following propositions should be announced as the law:

(1) When the promise is to pay one's own debt for a specified amount on demand, no demand need be alleged or proved.

(2) When the promise to pay on demand is not to pay one's own debt, but is a collateral promise to pay the debt of another, a demand is necessary, for it is part of the cause of action.

When a promise to pay on demand is a material part of the only contract made and enters into the consideration therefor, whether a demand is necessary even if the debt contracted is one's own is a question not now before us, and we do not pass upon it.

The judgment should be reversed and a new trial granted, with costs to abide event.

CULLEN, C. J., and GRAY, HAIGHT, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 356)

PEOPLE v. CONROW.

(Court of Appeals of New York. Jan. 10, 1911.)

1. CRIMINAL LAW (§ 381*)—GOOD CHARACTER OF ACCUSED—EFFECT.

That accused has previously borne a good character must be considered by the jury in every case in determining his guilt, and his good character may be sufficient to raise a reasonable doubt of guilt, and, when it does, accused must be acquitted, though, without such evidence, no doubt as to his guilt would exist.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 846; Dec. Dig. § 381.*]

2. CRIMINAL LAW (§ 776*)—GOOD CHARACTER OF ACCUSED—INSTRUCTIONS.

Where several witnesses testified to previous good character of accused, and they were not contradicted, an instruction that the jury were limited in the consideration of previous good character to cases where the questions of fact were closely balanced, and that good character should not create a reasonable doubt as to guilt unless otherwise the evidence was nearly balanced, and in refusing to charge that, in the exercise of sound judgment, the jury might give accused the benefit of the presumption of innocence arising from good character, no matter how conclusive the other testimony appeared to be, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.*]

3. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS.

Declarations in the presence of accused are only competent when accused hears and fully comprehends the effect of the words spoken and when he is at full liberty to make answer thereto, and then only under such circumstances as will justify the inference of assent to the truth of the statement by his silence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

4. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS—SILENCE.

After the arrest of accused for a murder charged against him and a confederate, the confederate, who had confessed, was brought before accused, and asked accused if certain statements, which he then made, detailing the plans for and commission of the crime by both, were not true. Accused, under advice of counsel, refused to reply, stating his reason. *Held*, that it was error to permit the district attorney to cross-examine accused as to the transaction, by questions detailing at length the statements made by the confederate, accused being entitled to refuse to reply, so that his failure to deny the accusation was not an admission.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 407.*]

5. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error was not made harmless by striking out the evidence at the close of the testimony and instructing the jury that accused was not bound to answer, so that his silence was not an admission; it being impossible to say that the evidence may not have affected the result.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

Appeal from Supreme Court, Trial Term, Dutchess County.

George Conrow was convicted of murder in the first degree, and he appeals. Reversed, and new trial ordered.

James G. Meyer, for appellant. John E. Mack, Dist. Atty., for the People.

CHASE, J. John Kliff and his wife for several years maintained a restaurant principally for railroad employes at Hopewell Junction, in the county of Dutchess. They accumulated several hundred dollars in cash which they retained in their personal possession at the restaurant. Early Sunday morning, January 24, 1907, Mr. Kliff was struck upon his head with some instrument which crushed his skull, from the effects of which he died that day. Mrs. Kliff was also struck by the same or a similar instrument, and her skull was crushed, but she survived, although she was physically unable to be present at the trial. The money, amounting to about \$525, was stolen. One Napoleon Monat and the defendant were subsequently indicted for the homicide, and charged with murder in the first degree. The theory of the prosecution is that Monat and the defendant, having ascertained that Kliff and his wife had in their possession several hundred dollars in cash, entered into an agreement to rob them, and that pursuant to such agreement and carrying out the details there-

of Monat took an iron bolt and entered the restaurant about 4 o'clock in the morning while the defendant watched outside, and that Monat struck the blows which we have mentioned and took the money, which he divided with the defendant in accordance with said agreement. The defendant denies all participation or knowledge of the crime, but admits that several days thereafter he received a part of the money obtained by Monat from the Kliffs, and that after he had spent part of the money so received he was told by Monat about the robbery and the homicide. They were separately tried upon the indictment, and each has been convicted of murder in the first degree.

It is unnecessary to repeat the details of the crime and the evidence connecting the defendant therewith. We have carefully examined the record and are of the opinion that the verdict of the jury should not be set aside as against the evidence.

The defendant's counsel urges many objections to the judgment being affirmed. One of the reasons why he claims that the judgment should be reversed is for alleged errors of the court in charging the jury upon the subject of good character, and the consideration to be given to it by the jury in determining the guilt or innocence of the defendant.

The defendant produced several witnesses who testified to his good character, and no witnesses were produced on behalf of the prosecution to contradict them. The court in the charge to the jury said: "Witnesses have testified on the part of the defendant to his former good character, witnesses who knew him six or seven or eight years ago, and other witnesses who have known him more recently. And evidence of previous good character is always proper, and is always to be considered by the jury along with the other evidence in a criminal case, and where the questions of fact are sharply contested, and the case is close, evidence of good character may of itself create a reasonable doubt as to the defendant's guilt, so the courts have held. But where the evidence satisfactorily establishes the guilt of the defendant beyond a reasonable doubt, where you are satisfied beyond a reasonable doubt that the crime has been made out, then the evidence of previous good character is of no avail to save a man from the consequences of his act. In other words, a man cannot commit his first crime and then come into court and ask to be excused because up to that time he has always lived an exemplary life. Evidence of good character is only to be considered as it may bear upon the question of his credibility and as it may tend to create a reasonable doubt in your minds on the question of his guilt." At the close of the charge counsel for the defendant said: "I except to that part of your honor's charge which says that where

the evidence is close good character may be considered." The court replied to the counsel for the defendant as follows: "I did not say that. I said that it should be considered in any case, and that where the case was close it might of itself create a reasonable doubt." Alternate statements by counsel for the defendant and the court followed, of which the following is a copy: "Mr. Meyer: I ask your honor to charge further that there is testimony in this case, and if the jury believes the testimony of these witnesses upon the subject of the defendant's character that that is proof conclusive of the defendant's good character. The Court: I will leave it to the jury to say what effect the testimony of those witnesses as to good character is to have. I said to you, gentlemen, and I say again, that evidence of good character is always to be considered in a criminal case along with the other evidence; but, if the other evidence convinces you beyond a reasonable doubt of the guilt of the defendant, then the evidence of good character is of no avail. But, if the case is close upon the evidence, evidence of previous good character may of itself create a reasonable doubt as to his guilt. Mr. Meyer: I except to your honor's refusal to charge as requested and also to the charge as made. * * * Mr. Meyer: I ask the court to charge the jury that the jury may in the exercise of sound judgment give the defendant the benefit of good character no matter how conclusive the other testimony may appear to be. The Court: You are to consider the evidence given by the witnesses as to his previous good character, giving to each such effect as you think under the circumstances it deserves or ought to have. (Exception to Mr. Meyer.)"

When a person who is charged with crime has previously borne a good character, that fact should in every case be considered by the jury with the other evidence in determining whether he is guilty or innocent. The improbability of a person of such character being guilty may of itself be sufficient in any case to raise a reasonable doubt of guilt. When evidence of good character raises a reasonable doubt as to the guilt of a person accused of crime, he is entitled to an acquittal, although without such evidence no doubt as to his guilt would exist. If, however, after considering the evidence of good character with all of the other evidence in the case, the jury believe the defendant guilty, they must so find notwithstanding his good character.

This court has had occasion many times to state the rules applicable to the consideration by a jury of the good character of an accused in a criminal case, and a reference to some of the statements of this court in its reported opinions will be made in place of a general discussion of the subject.

In *People v. Gilbert*, 199 N. Y. 10, 26, 92

N. E. 85, 90, the court with its approval of the statements made a summary from the charge of the court at the Trial Term as follows: "The jury were instructed to consider the evidence of good character with all the other evidence in arriving at a conclusion; to weigh the probabilities as to whether a person of such character would be guilty of such an offense, that good character alone might create a reasonable doubt, and that if they had a reasonable doubt the defendant was entitled to an acquittal. They were told in effect that good character was not a specific defense, such as justification or excuse might be; but, as it might create a reasonable doubt, even if the evidence were otherwise conclusive, the jury should consider it with all the other evidence in order to decide whether the defendant was guilty beyond a reasonable doubt."

In *People v. Bonier*, 179 N. Y. 315, 821, 72 N. E. 226, 228 (103 Am. St. Rep. 880), this court quoted from the opinions in three important prior cases in this court involving the subject of the previous good character of a person accused of crime, namely, *Cancemi v. People*, 16 N. Y. 501, 506, *Remsen v. People*, 43 N. Y. 6, *People v. Elliott*, 163 N. Y. 11, 57 N. E. 103, and then said: "It is therefore the law that evidence of good character may of itself create a reasonable doubt, when without it none would exist, and that upon the request of the accused the jury should be told that such evidence, in the exercise of their sound judgment, may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive." In this case the trial court in substance charged the jury that they were limited in the consideration of the previous good character of an accused to a case where the questions of fact affecting his guilt or innocence were closely or nearly evenly balanced, and that good character should not create a reasonable doubt as to the defendant's guilt unless otherwise the evidence was nearly balanced.

The defendant was entitled to have the jury charged, substantially as requested by his counsel, that in the exercise of sound judgment they might give the defendant the benefit of the presumption of innocence that arises from good character, no matter how conclusive the other testimony appeared to be.

The defendant's counsel also claims that the judgment should be reversed because of alleged errors committed by the trial court in allowing the district attorney to detail, in questions put to the defendant, certain statements made by Monat in the defendant's presence while they were both in the county jail. The statements in part will appear more fully hereafter.

The defendant was a witness in his own behalf. When he was being cross-examined he was asked in regard to an interview at the jail, at which Monat, the district at-

torney, a stenographer, and one or more others were present with the defendant. The following is taken from the record of such cross-examination: "Q. Do you remember having a talk with Monat in the county jail in the presence of Mr. Young and myself and stenographer? A. I didn't have a talk with him. I didn't say anything. Q. Do you remember Monat talking with you? A. I remember him talking to you people, yes. Q. Do you remember him talking to you? A. I was there when he was talking." The defendant's counsel objected to what Monat said as incompetent, irrelevant, and illegal. The objection was overruled, and an exception was taken by the defendant's counsel, and the court said: "It depends on what answers the defendant made, if any; and if he made none it will be for the jury to say whether his silence under the circumstances amounted to an acquiescence." The defendant's counsel then said: "That is what I object to." The objection was again overruled, and an exception was taken by the defendant's counsel. The district attorney then proceeded: "Q. Did Monat say this to you: 'Well, George, I understand here this morning that you turned state's evidence against me, so I thought I would request Mr. Mack to call you in, and you and I have a little talk about this murder. Of course you know the position I'm in, and you know the details as well as I do. Of course things is brought in now between you and I, and these in the room here, for you and I, to talk together. Now, of course, if you want to talk to me, as I told Mr. Mack and Mr. Young and these people, why I would like to have you tell me who made the certain remarks, or one or two things, and one of them was that you didn't know anything about the job until you got to New Haven and I gave you \$250 to keep your mouth shut. Now you know me, George, and I know you, and you know the position I'm in. I know what's going to become of me, but all I want is that you must take a little of this blame and not put it all on me, because there is nothing can save me; I did the deed, and you was just as deep in it as I was, and you know everything that was done, from the beginning to the end. You know where you and I went, and everything, and you can just as well go on and tell your share of what you done, and everything. No matter what you tell any one else, it ain't going to save me. I committed the murder from our planning, you and I, and that settled it. Of course, when I heard you made the remark when I met you at New Haven I gave you \$250 at New Haven to keep your mouth shut you know that ain't right, don't you?' To which you answered: 'I've got nothing to say; I don't answer no questions. Where's my attorney?' Is that right? A. No, sir; it is not. Q. What is wrong? A. When I come in there, didn't I say to you I would answer no questions whatever under

instructions of my attorney? Q. Did you answer Monat's question, 'I have nothing to say?' A. I said I wouldn't answer no questions. Q. Didn't you say, 'I have nothing to say?' A. No, sir. Q. Did he ask you this question, 'Now, George, to bring on one thing and the other, when we first started, the first thing was about the expressman; that is how we first started in about the money racket?' Mr. Meyer: I object to bringing in a collateral matter. The Court: Repeat it. Q. Did Monat ask this question and did you make the following answer to it, 'Now, George, to bring on one thing and the other, when we first started the first thing was about the expressman; that is how we first started in about the money racket; we tried it on the expressman three nights running and never succeeded, by your not being where you were requested to be, and then Bock's came; of course we got Baker's money without any fear of anything in Baker's place, and you got \$6 of it and I got \$8.10; it was \$12.10 altogether. Am I right or am I wrong? And the ladder was taken away that night, and you was with me, and you know where I put the ladder, and we took it down and put it back, and then we went to the caboose. I think we made one or two trips before the Kliff affair came up. You and I made the plan and planned it well, and you and I called it, and we had McGough call us, you remember, that night I told them I would go out on the pusher at 8 o'clock, and if I didn't go out we told McGough to wake us anyway and we would take the roustabout, and McGough came down and waked us up, and we went down all together and he went up in the new yard, and you and I went up about our business, and we went up and had the little talk about what you and I was going to do; you was to stay on the crossing and I was to go in and buy whatever I was to buy and hit Mr. Kliff, and no matter who came there you was to back me up, and you didn't back me up, George, and after I went in you went over to the dispatcher's office, and when I got through in there I whistled for you, and you came out after I whistled three times, and I asked you who was knocking at the door, and you said there was no one; you said you were there all the time, which you wasn't. You know as well as I do, George, that that night, that you stood on the crossing just about long enough for me to get inside and you to get out where you was. There is one man there who said you talked to him, a few words maybe, and you went in the inside and stayed there, and the fireman came and knocked at the door, and when I whistled you came out, and you asked me if I had the money, and I told you, "Yes," and I asked you if you had stayed there, and you said "Yes," until just when I come out, and we went down in the caboose and divided the money, and in the morning Stearns went out

and looked it over, and you and I went up and you got your bills at 11:15, and we went to Summit and I left you at Waterbury; and you had the money when I left you at Waterbury, didn't you? I went to New Haven and got a room at a hotel and waited for you to come down there, and you didn't show up until Tuesday night, and we spent the money there. Of course I don't know what you did with all of yours, and finally you bought some medicine and filled three or four prescriptions for me, if I am right and we drank and we had quite a good time down there with it, and, when I left you to go home, I told you just what I was going to do; I was going to write you, and I did, and just as soon as I got home I wrote to you, but I don't know whether you have the letter or not, and the next thing I knew the officers come down to the house and got me. About Kliff, the first way it started, we started with the expressman, and going up to Baker's. If I go wrong on the details I want you to stop me, George. When you sprung that about Kliff and the money that night, I don't remember whether it was a night or two before, and I asked you how you knew that Kliff had money, and you told me. Am I right or wrong? To which you answered: 'I won't say.'

The defendant's counsel moved that the question be stricken from the record on the ground that the defendant was acting on the advice of his counsel and had a right to refuse to answer, and on the further ground that the question is asked for the purpose of getting before the jury statements which cannot be gotten before them in any other way. The motion was denied, and the defendant's counsel excepted. The district attorney then proceeded as follows: "Q. Was that question asked you by Monat, and did you make that answer? A. No, sir; I made no answer. By the Court: Q. Was that statement made by Monat in your presence and did you say in reply and in answer to him, 'I won't say'? A. No, sir; I told them when I went in I wouldn't answer no questions under the instruction of my counsel. Q. Did you make this statement that Mr. Mack has just read? A. Yes, sir. By Mr. Mack: Q. Did Monat ask you this further question: 'You said you had seen her counting it out, and I told you I didn't believe it, and we went up there at night and I watched and seen it. Yes, I saw her count the money, and he asked me if I saw her, and I said yes, and that night I came ahead of you on 17-4 out of Waterbury, and I met you there in Hopewell, and that morning we came right up after he woke us up, and I got the bolt out of the barrel, and I was supposed to put them unconscious, which I didn't. I had to strike him the second blow to put him down, and that killed him, and also I had to hit Mrs. Kliff, and I went in and got the money, and I also

got the money in the little drawer. You said in the statement to me that there was two drawers, one on top and one near it, about half and half drawers as you would call them, and after we had got back to the caboose we counted it and divided it and everything. You made the plans, George. You know as well as I do, if you wanted to talk you could talk. * * *'" The district attorney added to the last question from which we have quoted further statements of the same general character as those quoted, which added statements equal in number and extent all of the alleged statements of Monat quoted above; but they are omitted to avoid unreasonably extending this opinion. After the question to the defendant from which we have quoted in part had been completed, the record is as follows: "By the Court: Q. Did he make that statement? A. Yes. Q. Did you refuse to make any reply? A. Yes, sir." A motion was then made to strike from the record all of such questions and answers relating to Monat's statements, and the court said: "I will reserve my decision upon your motion until some time later during the trial. He certainly had a right to refuse to answer, and whether his silence under the circumstances could be used against him or construed as consent or acquiescence I am not certain about; I will consider it and rule later." At the close of the testimony upon motion the court struck out the testimony, and said to the jury that the defendant's silence "cannot be regarded as an admission on his part, because he was strictly within his legal rights when he said I won't say anything by advice of counsel. Of course, if he had been in a position where he ought to have admitted or denied, then his silence would have acted against him; but, inasmuch as he was acting on the advice of counsel and refused to answer or speak, for that reason I do not think his silence can be used against him."

The district attorney did not at any time show that the defendant was placed in a position where by reason of his silence he should be charged with assent to or acquiescence in the truth of the statements and charges made in his presence by Monat. There are circumstances in which the declarations of persons made in the presence of an accused are competent; but they are regarded as dangerous and should always be received with caution and should not be admitted unless the evidence clearly brings them within the rule. Declarations or statements made in the presence of a party are not received as evidence in themselves, but for the purpose of ascertaining the reply the party to be affected makes to them. They are only competent when the person affected hears and fully comprehends the effect of the words spoken, and when he is at full liberty to make answer thereto,

and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent. *People v. Kennedy*, 164 N. Y. 456, 58 N. E. 652; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814; *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287.

The rulings of the court in allowing the district attorney to make such statements and charges against the defendant in the form of questions were clearly erroneous and tended to injure the defendant seriously. The final ruling of the court was right, and such reversal of the former rulings was made as clear and comprehensive as it was possible to make it. As a matter of law the statements and charges were no longer a part of the record. The previous erroneous rulings were theoretically cured, and the statements and charges eliminated from the minds of the jury. Whether in practical result it is possible to remove from the minds of jurymen the effect of such detailed statements and charges when so deliberately received and repeated in their hearing may well be doubted. Where the judgment is death, the jurisdiction of this court is not limited to the review of questions of law. Const. art. 6, § 9. If the dramatic recounting of the alleged acts and sayings of the defendant was calculated to affect the jury in determining the guilt or innocence of the defendant notwithstanding that they were at least in form removed from its consideration, we have the power and it is our duty to give the defendant a new trial for that reason.

In the trial of cases it frequently occurs that incompetent or immaterial facts or statements get before the jury inadvertently or without having been given that careful thought which they should have had. In such case, even where the evidence is received subject to objection and exception, if it is subsequently stricken from the record, and the jury is directed by the court not to consider it, the error may in most cases be deemed unimportant, or cured, and it is generally disregarded upon appeal.

In this case it appeared before any of the statements and charges were repeated by the district attorney that the defendant had intentionally and deliberately refused to make any reply to them when they were made by Monat, and before any considerable part of the statements and charges had been detailed on the trial it further appeared that the defendant had been advised by his counsel not to reply to statements made to him, and that at the time they were made by Monat he did not reply because he was obeying such advice of his counsel; and yet the district attorney persisted in asking the questions, and the court deliberately allowed him to proceed with great detail to recount before the jury Monat's statements

and charges, not only as they related to the robbery and homicide of Kliff, but as to other alleged distinct and independent crimes. It is difficult to conceive of anything more damaging to the defendant. At the time these questions were asked of the defendant, Monat had already been a witness for the prosecution, and he had so far as appears narrated every material and competent fact within his knowledge relating to the crime and connecting the defendant therewith.

The statements and charges of Monat must have been repeated to the jury for the express purpose of influencing it in its deliberations upon the question of the defendant's guilt. It is not always an easy thing for a jurymen to eliminate from his memory the effect of damaging statements made in his presence. *Brooks v. Rochester Ry. Co.*, 156 N. Y. 244, 50 N. E. 945; *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024; *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 48 L. R. A. 641, 70 Am. St. Rep. 495. In this case where the defendant's life is involved, we are unwilling to take the responsibility of saying that the statements and charges of Monat erroneously received, although stricken out, did not affect the result.

It is unfortunate that incompetent testimony, even when peculiarly calculated to materially influence a jury, is so frequently urged upon its attention in criminal cases when slight care given to its consideration would not only reveal its incompetency but the danger and wrong of persisting in its consideration.

For the reasons stated, the judgment of conviction should be reversed, and a new trial ordered.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

Judgment of conviction reversed, etc.

(200 N. Y. 320)

WHITESIDE v. NORTH AMERICAN ACCIDENT INS. CO. OF CHICAGO.

(Court of Appeals of New York. Jan. 3, 1911.)

1. TRIAL (§ 368*)—BY COURT—SUBMISSION ON AGREED STATEMENT.

Where the answer was withdrawn and by stipulation the case was submitted on the facts stated in the complaint as upon application for judgment, the question before the court is whether the complaint sets forth a cause of action in view of the facts appearing therein.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. § 868.*]

2. INSURANCE (§ 539*)—NOTICE OF LOSS—EXCUSE FOR FAILURE TO GIVE.

An insured was not excused from performing a condition in an accident policy that insurer must be notified of any sickness of insured for which he expects to claim benefits, by the fact that he was delirious and unable to remem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ber the policy, especially where the notice might have been given by some one for him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1334; Dec. Dig. § 539.*]

3. NOTICE (§ 7*)—STATUTES—CONTRACT—STATUTE LAW OR CONTRACT.

There is a distinction between obligations imposed by statute against a person in regard to serving notices, and those voluntarily assumed by him as part of his contract. In the former case inability to serve notice may excuse; in the latter it will not.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 13, 14; Dec. Dig. § 7.*]

4. INSURANCE (§ 539*)—NOTICE OF LOSS—EXCUSE FOR FAILURE TO GIVE.

The power of equity to relieve against forfeitures for breach of a condition caused by subsequent unavoidable accident, fraud, surprise, or ignorance has never been extended so as to excuse a breach of a contract for serving notice of loss upon a life insurance company arising from the disability of the policy holder because of sickness or insanity.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1334; Dec. Dig. § 539.*]

5. INSURANCE (§ 138*)—LIFE INSURANCE—CONDITIONS OF POLICIES.

A contract of life insurance being a voluntary one, the insurers have the right to designate the terms upon which they will become liable for a loss, and, in the absence of legislative interference, they may insert such conditions and agreements as they choose, so long as they are reasonable and not contrary to law or public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 246-249; Dec. Dig. § 138.*]

Haight and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William J. Whiteside against the North American Accident Insurance Company of Chicago. From a judgment of the Appellate Division (119 App. Div. 915, 104 N. Y. Supp. 1150) reversing a judgment dismissing plaintiff's complaint and directing a judgment for him in the amount demanded in his complaint under a stipulation made by the parties, defendant appeals. Reversed.

Safford E. North, for appellant. Francis T. Moynihan, for respondent.

HISCOCK, J. This action was brought on a policy of insurance issued by the appellant, whereby, amongst other things, it agreed to pay to the insured a certain sum each week during sickness. The policy is not set forth in full; but the complaint alleges that it contained "a provision that written notice from the insured or his representative stating the time, place, and nature of injury, or death, or commencement of sickness, must be mailed to the secretary of the company at its home office . . . within 10 days after the date of such injury, death, or commencement of such sickness, as conditions precedent to recovery." Said complaint, after further alleging that the respondent, on November 13, 1904, and thereafter, was sick for the period of a month to a degree and in

a manner which brought him within the terms of the policy, contains this important allegation: "And the plaintiff further alleges that during the early part of said sickness he was delirious and unable to remember that he had said policy of insurance, and had wholly forgotten that fact until about the 10th day of December, 1904, when he caused notice to be sent to the defendant of such sickness," and the defendant repudiated liability because of failure to serve notice of sickness in accordance with the terms of said policy.

The question which has been argued is whether or not the insured was relieved from compliance with the terms of his policy requiring service of notice as above stated by reason of mental and physical inability to prepare and serve the same within the time specified. This question is presented to us by means of a procedure somewhat out of the ordinary course. Originally appellant seems to have answered in the case; but it appears by stipulation subsequently made that this answer was withdrawn and the case "submitted on the facts stated in the complaint as upon application for judgment." Therefore the query practically is whether the complaint sets forth a cause of action in view of the facts appearing therein concerning the failure of respondent to serve or cause to be served the notice which has been mentioned.

There is no dispute that the insurer might and did make it a substantial provision of its contract of insurance and a condition precedent to recovery that it should within a specified time be notified of any sickness of the insured for which he expected to make a claim under his policy. This was a condition which was not only lawful, but which we can readily see was only a reasonable and suitable protection to the company against fraudulent claims. It is, however, urged that an insured might be, and in this case was, relieved from compliance with this provision by a physical and mental condition which precluded such compliance by him. Some question is made and fairly arises on the allegations of the complaint whether the insured was delirious, and therefore unable to remember the terms of his policy of insurance down to the date when he finally did cause notice to be served; but I shall assume for the purpose of this discussion that the complaint does allege such condition, and therefore such excuse for nonaction on his part.

In most cases of possible municipal liability for negligence, statutory provisions require as a condition precedent to recovery that notice of claim shall be served and action commenced within a certain time after the injuries are alleged to have been received, and in actions brought to enforce such liabilities it has been held that physical and mental disability may operate as an excuse for fail-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ure on the part of the injured person to act within the time specified by the statute, provided he does act with promptness after the disability has ceased. Sometimes a notice otherwise late has been said under these circumstances to be a substantial compliance with the statute, and at other times it has been written in substance that the statute should not be construed as requiring impossibilities, and therefore inability to serve notice should until removed be a sufficient excuse for not serving it. *Walden v. City of Jamestown*, 178 N. Y. 213, 216, 70 N. E. 466; *Green v. Village of Port Jervis*, 55 App. Div. 58, 66 N. Y. Supp. 1042; *Forsyth v. City of Oswego*, 191 N. Y. 441, 84 N. E. 392, 123 Am. St. Rep. 605.

It is to be observed, however, that in these cases the court was dealing with an exaction and burden placed on a claimant without his consent by statute. That is not this case. Here the parties by their free and voluntary action have entered into a contract by which each has assumed certain obligations. The insurance company has agreed to make certain payments on account of sickness, and the assured as a condition precedent to the enforcement of such obligation has agreed to the payment of certain premiums and to the service of the notice in question, which might have been prepared and served by some one else in his behalf if he was incapacitated from personally doing it. All of these provisions and engagements enter into the substance of the contract which respondent is seeking to enforce, and under such circumstances the courts will not relieve either party under the conditions here presented from fulfillment of the engagement which he has voluntarily undertaken. This distinction between obligations imposed on a party by statute and against his will, and those voluntarily assumed by him as a part of a contract, is clearly recognized by the decisions.

In *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y. 543, 550-552, 37 Am. Rep. 594, an application was made to a court of equity to prevent the defendant from enforcing a clause in its policy forfeiting the same for nonpayment of premiums when such nonpayment resulted from the insanity of the insured. The court, having stated that equity would relieve against a forfeiture in many cases, then referred to the fact that the condition in the policy did not require the insured himself to pay the premiums, and that such payment could have been made quite as well by some one else in his behalf, and then laid down the following principle: "While, as a general rule, where the performance of a duty created by law is prevented by inevitable accident, without the fault of a party, the default will be excused, yet, when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his

contract. * * * The principle thus established has been especially applied in reference to policies of insurance, where the payment of the premium is held to be a condition precedent which must be kept or the policy falls. * * * While a court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent caused by unavoidable accident, by fraud, surprise or ignorance, in many cases, that power has never been extended so as to excuse a breach of a contract of this description arising from the disability of a party caused by sickness or insanity."

In *Klein v. Insurance Co.*, 104 U. S. 88, 92, 26 L. Ed. 662, a defense was interposed under a clause in a policy forfeiting the same in case premiums were not paid on or before the several days therein mentioned for the payment thereof. The plaintiff, a beneficiary under the policy in question, alleged that the policy was taken out by the insured without her knowledge, and that she had received no information of its terms or conditions until after his death, and that for some time before the latter event he had been sick and deranged, and for that reason had failed to pay the premium when it was due. The court refused to excuse the nonperformance and resulting forfeiture for the reasons urged, and amongst other things said: "In a contract of life insurance the insurer and assured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium. The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. He also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due. The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the assured has from loss consequent on the risk assumed by him. Neither has any such right."

Kerr on Insurance lays down the rule: "The contract of insurance being a voluntary one, the insurers have a right to designate the terms upon which they will become liable for a loss. The insurer and insured can, in the absence of legislative interference, make a contract to their mutual liking, and can insert in it such conditions and agreements as they choose regulating the rights, duties, and obligations of each, both before and after loss; providing always that they are not unreasonable or contrary to public policy or the law of the land. And when parties have made their own contract, have agreed upon their own terms, and assented to certain conditions, the courts cannot change them and must not permit them to be violated or disregarded. The conditions may seem harsh and useless; but they are the result of the meeting of the minds of parties capable in

law of contracting, and if they have not been waived, or if one party has not been prevented by the act of the other, all conditions must be respected and enforced." See, also, *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160, 164; *Heywood v. Maine Mut. Accident Ass'n*, 85 Me. 289, 27 Atl. 154.

Under the principles asserted in these authorities, and which are not contradicted or overthrown by any of the cases cited in behalf of the respondent, I think that the latter must be held to the terms of the contract which he had voluntarily made, and that, having assented to a provision requiring notice of sickness within a certain time as a condition to recovery, he cannot be excused from fulfillment for the reasons alleged, and especially that this is true in view of the fact already mentioned that the notice called for by his contract might have been served by another person if he was disabled from personally so doing.

I recommend that the judgment of the Appellate Division be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

HAIGHT, J. (dissenting). On the 13th day of November, 1904, the plaintiff became sick, and subsequently, and on or about the 15th of the month, he was confined to his house by reason of such sickness and was visited by a legally qualified physician for one month, and was thereafter, during convalescence, disabled from performing business for a period of more than eight months. On the 10th day of December, 1904, he caused notice to be sent to the defendant of such sickness, whose policy of insurance he held for injury, death, or sickness. The policy contained a provision to the effect that a written notice from the insured or his representative, stating the time, place, and nature of injury or death or commencement of sickness, must be mailed to the secretary of the company at his office in Chicago, Ill., within 10 days after the date of such injury, death, or commencement of such sickness, as conditions precedent to recovery.

I think that the strict rule which obtains with reference to notice of injury or death does not and should not apply to that of sickness. An injury or death are events which do not admit of any doubt with reference to time or place at which they occur. But it is often quite different with reference to disease and sickness, which may approach gradually and under circumstances which the patient may not be aware of their existence, or that he is seriously afflicted therefrom to an extent necessary for his application for relief under the provisions of his policy. The commencement of sickness, therefore, in many cases, is an indefinite term as to time and place. The purpose of the notice is to give the company an opportunity to investigate and ascertain the facts with reference

to the sickness, and it is therefore fully protected by holding that its liability for contribution during the period of the sickness only commences to run from the time that the notice is given, or the 10 days specified in the notice preceding that time. Such I believe should be the construction of the provision of the policy.

The plaintiff should therefore be permitted to recover the amount stipulated in the policy for sickness after the 1st day of December, 1904.

CULLEN, C. J., and **GRAY, WILLARD BARTLETT**, and **COLLIN, JJ.**, concur with **HISCOCK, J.** **VANN, J.**, concurs with **HAIGHT, J.**

Judgment reversed, etc.

(200 N. Y. 370)

HOGAN v. BOARD OF EDUCATION OF CITY OF NEW YORK.

(Court of Appeals of New York. Jan. 10, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 63*)—OFFICERS—COMPENSATION—BOARD OF EDUCATION—CHARTER.

Under Greater New York Charter (Laws 1901, c. 406) § 1091, empowering the board of education to fix the salaries of all members of the supervising and teaching staff, a statistician cannot have his salary increased by a resolution of the board; the power to fix his salary under section 56 being in the board of aldermen upon recommendation of the board of estimate and apportionment.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 63.*]

2. COURTS (§ 107*)—OPINIONS—STARE DECISIS.

The opinion of a court must be interpreted as a whole, and whatever was said must be tested by reference to the actual question then before the court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 360; Dec. Dig. § 107.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Lawrence F. Hogan against the Board of Education of the City of New York. The Appellate Division affirmed (137 App. Div. 255, 121 N. Y. Supp. 924) a determination of the Appellate Term reversing (65 Misc. Rep. 194, 119 N. Y. Supp. 734) a judgment of the Municipal Court in the City of New York which overruled a demurrer to the complaint, and plaintiff appeals by permission. Affirmed.

See, also, 137 App. Div. 944, 122 N. Y. Supp. 1131.

John E. O'Brien, for appellant. **Archibald R. Watson**, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

HISCOCK, J. Appellant has brought this action to recover compensation claimed to be due to him as a statistician in the employment of the department of education in the city of New York. As the complaint alleges,

the claim for compensation is based on a resolution of the board of education increasing appellant's salary, and the question raised by the demurrer and involved on the appeal is whether said board had the power to raise and thus fix the appellant's compensation, or whether this power rested exclusively with the board of aldermen of said city. The latter is manifestly the case, and this seems to be made so clear by the provisions of the charter and by the opinion of Judge Miller at the Appellate Division that it would be regarded as unnecessary to say anything further except for the fact that there has been more or less controversy on various branches of this subject, and therefore it is deemed wise that this court should briefly express its opinion.

Section 1091 of the present charter of New York City (Laws 1901, c. 486), and which is found amongst the sections relating to the powers and duties of the board of education, provides that "the board of education shall have power to adopt by-laws fixing the salaries of all members of the supervising and the teaching staff," and then follow many and explicit provisions limiting and regulating the exercise of this power. While the nature of the duties performed by the appellant are not set forth with any fullness in the complaint, it is conceded that he is not a member of the supervising or teaching staff. This section thus provided a limited class of people in the department of education whose salaries may be fixed by the board of education. Section 56 of said charter then in a perfectly logical and systematic manner supplements this provision so far as this department is concerned by providing that: "It shall be the duty of the board of aldermen, upon the recommendation of the board of estimate and apportionment, to fix the salary of every officer or person whose compensation is paid out of the city treasury other than day laborers, and teachers, examiners, and members of the supervising staff of the department of education." It is argued by the appellant that this section has application only to "officers and employes of the city of New York," and does not relate to employes of the board of education; but this argument is obviously unsound from the fact that it does expressly mention and take cognizance of teachers who would be in the employ of that department.

If anything were needed to make this perfectly plain language of the present sections plainer, such additional help would be found in a comparison of the sections of the preceding charter of the city of New York (chapter 378 of the Laws of 1897) with the present ones. In the former act sections 56, 1069, and 1091 fill the place of the provisions of the present charter which have been referred to and of section 1067 as governing this sub-

ject of salaries. Such being the case, section 1069 of the former charter provided that: "The said board (of education) shall fix and regulate within the proper appropriation the salaries or compensation of the secretary of said board; * * * of members of the board of examiners, and of any other officers, clerks or subordinates, and it may fill any vacancies in such offices or positions." And section 56 contained no exception of "teachers, examiners, and members of the supervising staff of the department of education" from those whose salaries were to be fixed by the municipal assembly, thus leaving an apparent conflict between the two sections. It seems clear that, by the changes made in the present provisions, the Legislature intended to remove any possible uncertainty on this subject, and, while securing to the department of education the unquestioned right to fix the compensation of certain of its employes, to confer with equal clearness upon the board of aldermen the general power to fix the compensation of those not included in the specified exceptions.

The appellant attempts to build up an argument in favor of his views on the case of *Gunnison v. Board of Education of N. Y.*, 176 N. Y. 11, 68 N. E. 106; but this case will not bear any such burden as he desires to place upon it. Doubtless there are isolated quotations from the charter as it was then assumed to be and expressions of opinion by the learned judge writing the opinion which construed by themselves might inferentially support the position of the present appellant; but, as is well understood, this is not the proper method by which to determine the scope of a decision. The opinion must be interpreted as a whole, and whatever was said must be tested by reference to the actual question then before the court. When we do this, we see that the question presented to the court in that case was whether a suit by a teacher for his salary should be brought against the board of education as a defendant or against the city under the provisions of the charter. By means of a general discussion of the provisions of the charter constituting the board of education and prescribing its powers and duties, the conclusion was reached that such a suit should be brought against it and not against the city. This was the only question involved and decided in the case, and by no permissible process of reasoning can that decision be made to decide the question now before us as appellant desires to have it decided.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

Judgment affirmed.

(200 N. Y. 275.)

PEOPLE ex rel. PERRY v. GILLETTE,
Sheriff.

(Court of Appeals of New York. Jan. 3, 1911.)

1. THREATS (§ 1*)—ATTEMPTS—ACTS CONSTITUTING.

Where an intended victim of extortion paid money in apparent pursuance of threats but really to entrap accused, the offense is an attempt to commit, and not consummated, extortion.

[Ed. Note.—For other cases, see Threats, Dec. Dig. § 1.*]

2. THREATS (§ 1*)—ATTEMPT—NATURE OF OFFENSE.

Penal Law (Consol. Laws, c. 40) §§ 850-852, define extortion and make it punishable as a felony. Section 856 makes blackmail a felony. Section 551 makes sending threatening letters a misdemeanor. Section 857 makes it a misdemeanor to attempt to extort by verbal threats which would be criminal under any of the foregoing sections if made in writing. *Held*, that an unsuccessful attempt to extort money through verbal threats is a misdemeanor; section 857 not relating merely to such threats as if in writing would constitute blackmail under section 856.

[Ed. Note.—For other cases, see Threats, Dec. Dig. § 1.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Habeas corpus proceeding by the People, on the relation of Charles Perry, against Willis K. Gillette, Sheriff. From an order of the Fourth Appellate Division (140 App. Div. 27, 124 N. Y. Supp. 470) reversing an order discharging relator, he appeals. Reversed, and relator discharged.

Louis E. Fuller, for appellant. Charles B. Bechtold, for respondent.

HISCOCK, J. This appeal involves the question whether an unsuccessful attempt to extort money by means of verbal threats is a misdemeanor or a felony, and it arises upon the following facts undisputed here: The appellant and another attempted to extort money from one Stillson by means of verbal threats to accuse him of a crime and to inform others thereof. While the intended victim paid money in apparent pursuance of these threats, he did this really acting in concert with the police authorities for the purpose of entrapping the accused and his companion, and therefore the crime of extortion was not consummated, but the acts charged amounted to an attempt to commit such offense. *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741. The appellant was arrested and taken before the police justice of the city of Rochester and held awaiting examination. Pending this he was indicted by the grand jury and arrested by the respondent on a bench warrant. If his offense was a misdemeanor, he should have been tried in police court; if it was a felony, he was properly indicted and taken into custody by respondent, and this writ should be dismissed.

ed. The decision of the question involves the examination of several sections of the Penal Law.

Section 850, article 80, of the Penal Law (Consol. Laws, c. 40), defines "extortion" as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear," etc. Section 851 provides that "Fear, such as will constitute extortion, may be induced by a threat: * * *

(2) To accuse him (the individual threatened) or any relative of his or any member of his family, of any crime." Section 852 provides the punishment for extortion, and it is undisputed that the punishment therein prescribed is of such a character as makes the offense a felony. It is also beyond controversy that under the general provisions of the Penal Law, if unmodified by special provision, an attempt to commit the crime of extortion would also be a felony. Section 856 of the same article relates to blackmail, and provides that: "A person who, knowing the contents thereof, and with intent, by means thereof, to extort or gain any money or other property, or to do, abet, or procure any illegal or wrongful act, sends, delivers, or in any manner causes to be forwarded or received, or makes and parts with for the purpose that there may be sent or delivered, any letter or writing, threatening: (1) To accuse any person of a crime * * * is punishable by imprisonment for not more than fifteen years." Section 551, found in another article of said Penal Law, relates to sending threatening letters, and in substance makes the sending of such a letter by a person knowing its contents, threatening to do any unlawful injury to the person or property of another, etc., a misdemeanor. Section 857, found in the same article as the preceding sections except section 551, and entitled "Attempts to extort money or property by verbal threats," provides: "A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, verbally makes such a threat as would be criminal under any of the foregoing sections of this article or of section five hundred and fifty-one, if made or communicated in writing, is guilty of a misdemeanor."

It is contended by appellant that under the section last quoted the general rule relating to attempts to commit crimes is modified, and that an attempt to commit extortion by mere verbal threats such as occurred in this case is made a misdemeanor. On the other hand, the respondent insists that said section simply relates to such threats to obtain property as if in writing would come under section 856 and constitute blackmail. I am unable to adopt the latter construction.

Said section 857 by its language specifically relates to an attempt to extort or gain

money by such verbal threats as would be criminal if in writing under any of the preceding sections of the article of which it is a part. If the appellant and his companion had made in writing the threats which are said to have been made verbally with the intent of obtaining money, they would have been criminal under section 850 of said article as extended by the general provisions defining attempts to commit a crime, for, concededly, extortion may be accomplished or attempted by written threats. Instead of making their threats in writing, they made them verbally, and therefore their attempt came within the express provisions of section 857 and was a misdemeanor.

The argument that section 857 is intended to apply only to such verbal threats as if in writing would constitute blackmail under section 856 is largely founded on the arrangement of provisions as it existed in the former Penal Code. There section 558 related to blackmail, and section 559 to the sending of threatening letters, and then followed section 560, which provided that "A person who, under circumstances not amounting to robbery, or an attempt at robbery, with intent to extort or gain any money or other property, verbally makes such a threat as would be criminal under either of the foregoing sections of this chapter, if made or communicated in writing, is guilty of a misdemeanor." On the assumption that the word "either limited the application of section 560 to the two preceding sections relating to blackmail and to threatening letters, it is argued that section 857 of the Penal Law ought to be likewise restricted in its application and not extended to the crime of attempting to commit extortion. As already indicated, I do not see how section 857 could be so construed, even if we should assume that the Legislature did have the intent to restrict its application to the same cases which were covered by section 560 of the Penal Code. The language which is used is so explicit and plain that its obvious meaning cannot be avoided by any process of justifiable construction. When a section in a given article of a statute says, as in this case, that it applies to all of the preceding sections of that article, I do not see how the court can decide that it only applies to a part of them. Moreover, I am not prepared to assume that the Legislature had any such purpose, but believe, rather, that it intended to equalize, so to speak, the crimes of attempted extortion and attempted blackmail by verbal threats. If we should adopt the construction contended for by the respondent, we should have this anomalous result: If a person by verbal threats attempted to extort property from another, and section 857, as contended, is not applicable to extortion, such attempt under the sections relating to extortion would constitute a fel-

ony. On the other hand, precisely the same attempt under section 856, relating to blackmail, as concededly affected by section 857, would only amount to a misdemeanor. That is, at the option of a district attorney or grand jury the same offense might be treated either as a felony or a misdemeanor. The Legislature evidently saw the incongruity possible under the Penal Code of thus making the same act when prosecuted as an attempt at extortion a felony, and when prosecuted as an attempt to commit blackmail by verbal threats, so to speak, a misdemeanor, and therefore, in enacting section 857 of the Penal Law, broadened its terms so as to make the act of equal seriousness whether prosecuted under one section or another.

It is to be noted in answer to some things which have been said in favor of the respondent's view that the construction which we have adopted only applies to a mere attempt to commit extortion by verbal threats. The consummated offense of extortion remains a felony as before, whether accomplished by verbal or written threats.

There is nothing in *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741, which controls us on this question which was not raised or discussed in that case.

These views lead us to the conclusion that the order of the Appellate Division should be reversed, and that of the special county judge should be affirmed, and the relator discharged from custody.

CULLEN, C. J., and GRAY, VANN, WILLARD BARTLETT, and COLLIN, JJ., concur. HAIGHT, J., not voting.

Order reversed, etc.

(300 N. Y. 572)

PAYNE v. WITHERBEE, SHERMAN & CO. (Court of Appeals of New York. Jan. 10, 1911.)

1. ELECTRICITY (§ 11*)—SUPPLY OF ELECTRICAL POWER—CONTRACTS—CONSTRUCTION.

A contract bound a party to furnish the adverse party electric power amounting to at least 350 horse power for at least 12 hours per day during every day of the year, and bound the adverse party to accept the minimum amount, and to pay at the rate of \$20 per horse power for a year of 365 days of 12 hours each, and at the same rate for every hour over 12. The adverse party received at least the minimum amount 12 hours or more in every day of the year, but the power had been intermittent. As a matter of fact, the power was furnished for much more than 12 hours daily. *Held*, that computing compensation at the rate of \$20 per horse power per year of 340 days of 10 hours each, instead of 365 days of 12 hours each, was erroneous, resulting in overpayment.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 11.*]

2. PAYMENT (§ 84*)—RECOVERY—MISTAKE.

Where a corporation contracts for a supply of electrical power at a rate fixed by the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract, and its electrician erroneously computes payments at a higher rate, which the corporation voluntarily pays, the overpayments are made upon a mistake of law as to the construction of the contract, and not upon any mistake of fact, and cannot be recovered.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 267-271; Dec. Dig. § 84.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Daniel F. Payne against Witherbee, Sherman & Co. From a judgment of the Appellate Division (132 App. Div. 579, 117 N. Y. Supp. 15), affirming a judgment dismissing the complaint and awarding damages and costs to the defendant on its counterclaim, plaintiff appeals. Modified and affirmed.

Francis A. Smith, for appellant. Edward T. Stokes, for respondent.

COLLIN, J. The action is to recover the sum of \$1,461.84 as a balance due for electrical power furnished the defendant, a domestic corporation, by plaintiff between January and June, 1907, and for the construction of the contract upon which the action is brought. The defendant denied its liability, and alleged as a counterclaim an overpayment by it to plaintiff during the year 1906, through a mistake of fact, of the sum of \$3,646.23. The rights and liabilities of the parties spring from a contract dated March 22, 1905, which obligated the plaintiff to deliver to defendant, through the succeeding ten years, electrical power of a designated voltage and power, and the defendant to receive and pay therefor, as provided in the contract. The findings of the trial court, which under the unanimous affirmance of the Appellate Division are the sole source of our knowledge of the facts, are, in so far as a present statement of them is required: The said contract, after reciting the execution of a prior contract of March 23, 1904, provided that the power was to be delivered by plaintiff in a minimum quantity of 350 horse power, and a maximum quantity of 750 horse power, at least 12 hours per day, and for 24 hours per day if required by defendant, during each and every of the 365 days in the year, except that during at least one day in each week, which day should be Sunday, plaintiff should be required to deliver such power only for the minimum time of 12 hours. In case the defendant should not require power during the entire 24 hours per day, the plaintiff should furnish the power during the 12 hours thereof designated by defendant, the defendant to pay the plaintiff \$20 per horse power per year of 365 days of 12 hours each, and at the same rate for each and every hour per day in excess of said 12 hours. The contract of March 23, 1904, contained identical agreements, except as to the quantity of power

to be furnished. From October 22, 1904, to January 1, 1907, one Lamborn was defendant's electrician, empowered by defendant to measure the amount of electric power furnished under the contract and compute the amount of the payments to be made the plaintiff therefor. Lamborn made such measurements, and from month to month made the computations which the defendant paid, and which were fixed upon the basis of \$20 per horse power per year of 340 days of 10 hours each. Prior to January 1, 1907, the defendant did not accept the minimum amount of power mentioned in the contracts during twelve consecutive hours per day, but only during five out of six consecutive hours per day. There is no dispute as to the quantity of power furnished and received, and defendant has accepted at least the minimum power prescribed by the contract. The defendant has fully paid the plaintiff for all power furnished and received. Conclusions of law are that the contract was not ambiguous, and had the certain meaning that the plaintiff "will furnish electrical power at the rate of twenty dollars per horse power per year of 365 days of 12 hours each," and the complaint should be dismissed upon the merits. The contention of the plaintiff, urged under his exceptions, is based upon his construction of the provisions of the contract. He seeks a construction which enables him to recover, and obligates the defendant to pay \$20 for each horse power of power delivered through a period of 340 days of 10 hours each. He bases his demand upon a ground having two phases, the one that inasmuch as the contract provided that during one-half day of 12 hours in each week the plaintiff should not be required to furnish power—that is to say, 52½ days of 12 hours each or 26 days of 12 hours each—there should be deducted from the 365 days of 12 hours each 26 days of 12 hours each, leaving 339 days or 340 days, as plaintiff's counsel states it, of 12 hours each as the year contemplated by the contract; or, in other words, defendant agreed to pay \$20 per horse power of power delivered through 340 days of 12 hours each; the second, that the defendant was bound to receive at least the minimum quantity of power through 12 consecutive hours of each day, and plaintiff was entitled to be paid for 12 hours, although the defendant took the power for only 10 hours. His ultimate contention, therefore, is that defendant agreed to pay \$20 per horse power of power delivered through 340 days of 10 hours each. The defendant, under the computations of Lamborn, paid upon this basis for the power delivered by the plaintiff prior to January 1, 1907. Defendant contends that the 12 hours per day during which at least defendant must accept so much as the minimum quantity of power, might be interrupted and incontinuous hours;

and defendant agreed to pay \$20 per horse power per year of 365 days of 12 hours each. Upon this basis the defendant paid, without prejudice to the rights of plaintiff, for the power delivered between January and June, 1907.

The language of the contract refutes the arguments of plaintiff's counsel. Its meaning is so clear and certain that it would be difficult to make it by other phraseology more intelligible or unequivocal. The meaning given it by the trial court is too plainly right to permit useful discussion. Without expressing an opinion as to the effect, if any, of the acts of defendant's agent, Lam-born, upon the rights and liabilities of the parties prior to January, 1907, it may be said that he was not empowered to change the agreement or make a new agreement, or by an erroneous construction bind the defendant after it had discovered the error. The trial court, therefore, did not err in dismissing the complaint upon the merits. There was error, however, in awarding, under the facts found, the defendant judgment upon its counterclaim. Further findings of fact are: "That during the year 1906 the power furnished by the plaintiff, and received by the defendant, at the agreed price under the contract, amounted to the sum of \$12,650.88, and that the defendant paid the plaintiff for the said power the sum of \$18,297.11, an overpayment of \$3,646.23. (10) That said overpayment was made by mistake." No other finding amplifies or supplements the tenth finding. A conclusion of law is that the defendant is entitled to an affirmative judgment against the plaintiff for the sum of \$3,646.23, together with interest. The facts found are insufficient to sustain this conclusion of law and the judgment entered in accordance therewith. The overpayment was voluntary, and cannot be recovered by defendant unless made under a misapprehension or mistake of fact. The courts do not undertake to relieve parties of the results of their acts fairly done on a full knowledge of the facts, though under a mistake of the law. The doctrine is well settled, in this country, that a voluntary payment where there is no mistake of fact although made under a mistake, cannot be revoked. *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508; *Newburgh Sav. Bank v. Town of Woodbury*, 173 N. Y. 55, 65 N. E. 858; *Redmond v. Mayor, etc.*, of N. Y., 125 N. Y. 632, 26 N. E. 727; *Belloff v. Dime Savings Bank*, 118 App. Div. 20, 103 N. Y. Supp. 273; *Flynn v. Hurd*, 118 N. Y. 19, 22 N. E. 1109; *Hathaway v. County of Delaware*, 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. The rule is applicable to corporations. *N. Y. & H. R. R. Co. v. Marsh*, 12 N. Y. 308; *Railway Co. v. Iron Co.*, 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412. The fact that de-

fendant paid the excess by mistake did not entitle it to a recovery.

The judgment appealed from, in so far as it affirmed the judgment that the complaint of the plaintiff be dismissed upon the merits, should be affirmed, and in so far as it affirms the judgment that the defendant recover of the plaintiff the sum of \$3,958.59 should be reversed and the judgment of the trial court, in so far as it adjudges that the defendant recover of the plaintiff the said sum, should be reversed and a new trial granted, without costs in this court to either party.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Judgment accordingly.

(200 N. Y. 340)

In re FEARING'S WILL.

(Court of Appeals of New York. Jan. 10, 1911.)

1. TAXATION (§ 868*)—TRANSFER TAX—SUBJECT—NONRESIDENT'S PROPERTY.

Tax Law (Laws 1896, c. 908) § 220, subd. 5, as added by Laws 1897, c. 284, § 2, provides that whenever any person shall exercise a power of appointment created either before or after the passage of the act, such appointment shall be deemed a transfer taxable the same as if the property belonged to the donee and had been willed by him. *Held* that, where testator, a resident of New York, devised property in trust for the life of his daughter, a resident of Rhode Island, to whom was granted a power of appointment over the remainder of the trust estate on her death, if she died without issue, the exercise of such power by the daughter dying without issue while a resident of Rhode Island, transferring the trust res situated there, did not render them subject to a transfer tax in New York, though the debts constituting the bulk of the trust estate were secured by mortgages on lands in New York.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1685-1687; Dec. Dig. § 868.*]

2. TAXATION (§ 868*)—TRANSFER TAX—INVESTMENT—"PROPERTY WITHIN THE STATE."

Transfer Tax Law (Laws 1892, c. 399) § 1, provides that a tax shall be imposed on the transfer by will, or intestate law, of property within the state, where the decedent was a nonresident at the time of his death. *Held*, that bonds passing under the will of a nonresident pursuant to a power of appointment were not property within the state within such act, and subject to taxation because the bonds were secured by mortgages on lands located in New York.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1685-1687; Dec. Dig. § 868.*]

For other definitions, see Words and Phrases, vol. 6, p. 5730.]

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the transfer tax on the estate of Daniel B. Fearing, deceased. From an order of the surrogate vacating an order assessing a tax on certain property original-

ly belonging to decedent and passing under a power of appointment contained in the will of a nonresident, and remitting a report of the appraiser, the Comptroller and others appealed to the Appellate Division, where the surrogate's order was confirmed (138 App. Div. 881, 123 N. Y. Supp. 396), from which the Comptroller appeals. Affirmed.

Thomas B. Casey and John S. Jenkins, for appellant. John L. Cadwalader, for respondent.

GRAY, J. The Appellate Division has affirmed a determination of the surrogate of New York county that "bonds and other property, located outside of this state" at the date of the death of Mrs. Sheldon, a nonresident of this state, and transferred by her will, in the exercise of a power of appointment contained in the will of Daniel B. Fearing, were not subject to a transfer tax. Upon this appeal by the Comptroller of the state, it is argued, in the first place that the trust property, which was appointed by Mrs. Sheldon's will, "was property of a resident decedent, * * * and, consequently, taxable here, wheresoever situated." In the second place, it is argued that bonds, secured by mortgages of real estate situated in this state, of which the trust estate was principally composed, "although the instruments evidencing them are outside of the state, constitute taxable property."

Daniel B. Fearing died in 1870, a resident of this state, leaving a will; by which a trust was created for the life of his daughter, Amey R. Sheldon, for her benefit. She was given the power to appoint by will the persons, to whom the trustees were to set over the remainder of the trust estate upon her death, in the event of her dying without issue. At the time of her death Mrs. Sheldon was, and had been for many years, a resident of the state of Rhode Island, and her will was there admitted to probate. She left no issue, and her exercise of the power of appointment conferred by her father's will was in accord with its provisions. The surviving trustee of Fearing's will was, also, a resident of the same state. The trust estate, which was disposed of by the provisions of Mrs. Sheldon's will, wholly consisted of bonds, secured by mortgages of real estate. The mortgages were, mainly, of real estate within this state, but none of them, or of the bonds, was, or had been, kept here.

Mr. Fearing died many years before the enactment of any statute charging the succession to estates of deceased persons with a tax. After such an enactment was placed upon the statute books, it was not until 1897 that property, passing through the execution of a power of appointment created by will, was subjected to taxation when the will had become operative before the passage of the tax law. Laws 1896, c. 908. Chapter 284 of the Laws of 1897 added to the

transfer tax law the following provision: "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment, when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." Section 220, subd. 5. No language could more clearly disclose the legislative intent that property thereafter to pass by the exercise of a power of appointment should be taxed, irrespective of the time when the instrument creating the power was executed. Such an appointment to others was, for the purposes of taxation, to be deemed the equivalent of a bequest, or devise, by the donee of the power of property belonging to the donee. Prior to this amendment of the transfer tax law, there was no provision for the taxation of transfers under powers of appointment; but, with the passage of the amendment the privilege of exercising the power by will was subjected to the charge of a tax upon the right of the appointees to take. Whereas, previously, the source of the appointee's right of succession was deemed to be in the will creating the power of appointment; thereafter, it was to be deemed to be in the execution of the power itself. The actual transfer effected by the exercise of the power was to be taxed. The Legislature, in the exercise of its control over testamentary dispositions of property, could validly burden such transfers with a tax, regardless of the technical source of the title of the appointee under the rules of the common law. See *Matter of Dows*, 167 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508; *Matter of Delano*, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279. As Mrs. Sheldon, in making a will, exercised a privilege granted by the laws of her own state, and not by those of this state, the transfers of property effected thereby were beyond the reach of our tax laws. The state had no dominion over the property transferred.

The second proposition urged by the Comptroller presents no new question. It is covered by our decision in *Matter of Bronson*.

150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632. The contention that, as the mortgages, which were given to secure the payment of the bonds transferred by Mrs. Sheldon's will, were of real estate in this state, the bonds represented investments taxable here, was disposed of by that case. The provision of the transfer tax law, which was then under consideration, was that "a tax shall be and is hereby imposed upon the transfer of any property * * * when the transfer is by will, or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." Laws 1892, c. 899, § 1. This provision of the law has not been changed since its enactment in 1892. In the Bronson Case, the testator was a resident of the state of Connecticut, and a part of the residuary estate disposed of by his will consisted in shares of the capital stock, and in the bonds, of corporations incorporated under the laws of this state; all of which were in the testator's possession at his domicile. We held the shares of stock to be taxable, as representing distinct interests of the holder in the corporate property; but the bonds were held not to be subject to any tax. It was considered that they did not represent "property within the state," and therefore were not property over which this state had any jurisdiction for the purposes of taxation. The reasoning, upon which this conclusion was reached, is as effective in the present case. Whether the bonds are secured, as in the Bronson Case, by mortgages of corporate property, or, as in the present case, by mortgages of the property of individuals, they represent, equally, debts of their makers, which, as choses in action, under the general rule of law, are inseparable from the personality of the owner. Under that rule, as it was said in the Foreign Held Bonds Case, 15 Wall. 300, 320, 21 L. Ed. 179, of the bonds there, they "can have no locality separate from the parties to whom they are due," and the legal situs of the indebtedness, which they represent, is fixed by the domicile of the creditor. The legal title to these bonds in question was transferred by force of the laws of Rhode Island. As their legal and actual situs was in a foreign state, upon no theory were they within the operation of our transfer tax law. I am unable to perceive the force of any argument, which seeks to find in the feature of the mortgage a reason for limiting the rule of law applied by us in the Bronson Case. If bonds issued by domestic corporations upon the security of mortgages of the corporate property are not subject to taxation when in the hands and physical possession of a nonresident decedent, as we have decided in that case, then the bonds passing under Mrs. Sheldon's will cannot be reached for taxation. In the Whiting Case,

150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640, decided at the same time as was the Bronson Case, it was expressly stated that the bonds there in question were subject to taxation "on account of their physical presence in this state." There is no sound distinction between this case and the Bronson Case, which, as I view them, commends itself to the judgment.

I therefore advise that we should affirm the order appealed from.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., dissents. HAIGHT, J., not voting.

Order affirmed, with costs.

(300 N. Y. 230.)

BARKER v. WASHBURN et al.

(Court of Appeals of New York. Jan. 3, 1911.)

1. WITNESSES (§ 41*)—MENTAL COMPETENCY—EFFECT OF ADJUDICATION.

That one was adjudged to be an idiot and incapable of managing his own affairs several years previously did not disqualify him as a witness; he being interrogated to determine his competency as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 99; Dec. Dig. § 41.*]

2. FALSE IMPRISONMENT (§ 7*)—SUBJECTS—INCOMPETENT WARD.

An incompetent's committee can maintain an action for false imprisonment for an unlawful taking of the ward from his custody, or the custody of those with whom he has temporarily placed him.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 14; Dec. Dig. § 7.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Franklin H. Barker, Ansel W. Sutliff's committee, against James H. Washburn and others. From a judgment of the Appellate Division of the Supreme Court, Third Department (128 App. Div. 931, 113 N. Y. Supp. 1124), affirming a judgment for plaintiff, defendants appeal. Affirmed.

Fred Linus Carroll, for appellants. Frank Talbot, for respondent.

HISCOCK, J. We are led to the consideration of rather unusual facts in this action which was brought for alleged false imprisonment. It was instituted by the respondent as committee of one Sutliff, an incompetent person, to recover for the alleged unlawful removal and restraint of his ward by the appellants. This conduct on the part of the latter is claimed to have been in violation of the will and wishes both of the incompetent himself and of the respondent as his committee, and apparently the real motive involved in this controversy over the possession of the idiot's body is the purpose to reap a profit on his services as a farm laborer.

Several years before the occurrences in question, the respondent was duly appointed committee of said Sutliff on a finding duly made in lunacy proceedings that the latter was "an idiot and incapable of managing or caring for his own affairs or business." For several years the incompetent person was allowed by his committee to live with the appellants, and then he was taken away by the former and hired out to a third party. Thereafter as the evidence unquestionably permitted the jury to find, the appellants on two occasions took the incompetent person away under such circumstances as permitted the jury to find that such removal was against the will of the incompetent person, if he had one, and amounted to a false imprisonment. The evidence likewise permitted the jury to find that, not only was the removal and retention on these occasions against the will of the committee, although consideration of one of them so far as the committee was concerned was withdrawn from the jury, but that at other times the appellants without physical force against the will and wishes of said committee enticed the incompetent away and on one occasion aided in concealing his whereabouts from the committee for several weeks. In addition to damages compensatory for the loss of wages which might have been earned by the incompetent, the jury were allowed to award punitive damages, which they apparently did in a small amount.

Many of the questions argued by the counsel for the appellants on this appeal involve mere questions of evidence or familiar and well-settled principles applicable to such an action as this, and I deem it unnecessary to discuss these, contenting myself with saying that we have considered them and approve of the disposition thereof as made by the courts below. There are two questions of a less familiar character which may be briefly considered.

The respondent's case was sustained in part by the evidence of the incompetent himself. Basing his claim on the inquisition and on some of the evidence presented in the lunacy proceeding, it is argued by counsel for appellants that that proceeding and the order appointing his committee adjudicated that the incompetent was so completely and permanently devoid of intelligence that he could not be assumed to understand the object and nature of testimony, and that, therefore, he should not have been sworn and received as a witness. In my judgment this contention is not well founded. The inquisition was found several years before the trial of this action, and the committee was appointed on the ground that Sutliff was an idiot and incompetent to manage his own affairs. It did not by any means follow from this as a matter of law that he was, and for years would continue to be, so utterly lacking in intelligence that he could not appreciate at all the relationship and significance of

facts, and would not be able to understand the obligation of an oath and describe accurately what those facts were. We know both as a matter of definition and of observation that a person who would be judicially declared incompetent and unable to manage his affairs might nevertheless possess sufficient intelligence to be truthful and to describe simple occurrences as they were. When this person was offered as a witness, he was interrogated both by the court and counsel for the purpose of determining his competency as a witness, and thereafter the court decided that he should be sworn. This determination was undoubtedly within the power of the trial court and the testimony which was subsequently given and the accuracy of which was tested by long and exacting cross-examination in my judgment bears on its face such marks of intelligence and comprehension as fully justify the disposition which the trial judge made of the question presented to him. If the appellants desired any special instructions to the jury concerning the weight to be given to this evidence they should have asked for them.

The other question to which reference has been made is the more interesting and novel one.

Apparently this case was tried on the theory that the appellants might be found guilty of false imprisonment either because they took possession of and restrained the incompetent person against his will, if he was found to have one, or because they seized and removed him from the custody of the committee.

The court, amongst other things in its charge, said: "I say that this case is somewhat peculiar. I say, further, that because of this peculiarity in this case (the appointment of a committee over the incompetent) the question is not so much whether Ansel Sutliff was seized and detained by these defendants against his own will, but whether he was seized and detained by physical force by these defendants against the will of his committee. If, therefore, there is proof in this case that these defendants have jointly used force to take Ansel Sutliff physically away from his committee and against the will of his committee and detained him against the will of his committee, then there might be jurisdiction for a finding on your part that there has been false imprisonment in this action." He further charged at the request of the appellants themselves: "Plaintiff must prove both an unlawful arrest or seizing and unlawful detention against the will of Ansel W. Sutliff by a preponderance of evidence." Assume that this last charge must be construed as subject to the provision that the jury should take the view that the incompetent was capable of exercising volition. Exception was taken to that portion of the charge first quoted, and thereby the inquiry is presented whether an action of

false imprisonment may be maintained by a committee of an incompetent person because his ward has been unlawfully taken and removed from his custody or from the custody of those with whom he has temporarily placed him. While this specific question does not seem to have been adjudicated in this state, I think that such principles have been established in other analogous cases as lead to an affirmative answer to the question suggested.

Robalina v. Armstrong, 15 Barb. 247, was an action for assault and battery and false imprisonment. The plaintiff was an infant about four years of age and the illegitimate child of one Eliza Gilbert, with whom she had lived since birth. The defendant was the putative father of the child, and had obtained possession of her without the consent of her mother, and refused to restore her to the latter. The court held that the mother and not the father was entitled to the custody of the child, and that, inasmuch as the latter against the will of the mother had wrongfully detained and maintained possession of the infant, an action for false imprisonment would lie in the name of the infant whose rights were violated. In thus ruling in the case of an infant too young to have any volition in the matter the principle was necessarily involved that the unlawful removal of a person having no will by reason of infancy from the custody and possession of the person entitled thereto furnished the basis for an action of false imprisonment.

People ex rel. Wilcox v. Wilcox, 22 Barb. 178, was a habeas corpus proceeding instituted to obtain the possession and custody of an infant of such tender years as to be incapable of exercising volition as to its custody, and therein was approved the principle cited from *The King v. Greenhill*, 4 Adol. & E. 642, "where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the custody is, no restraint exists."

In *People ex rel. Tappan v. Porter*, 1 Duer, 709, it is said: "An infant of such tender years as to be incapable of rationally expressing its wishes, which is all I can understand to be meant by 'incapable of making a choice,' is of necessity under restraint, and, in order to determine whether the restraint is illegal, the court must determine to whom the custody belongs." Page 719.

Commonwealth v. Nickerson, 5 Allen (Mass.) 518, was a criminal action for assault and battery, and was predicated on the acts of the defendant in taking an infant of the age of nine years from school where he had been placed by his father who had his legal custody, in order to deliver him into the custody of the mother who was not entitled thereto.

The court sustained the action and amongst other things said: "Being in the actual custody of his father, whose will alone was to govern as to the place of residence and the selection of a teacher and custodian, this child of nine years was incapable of assenting to a forcible removal from the custody of his teacher and a transfer to other persons forbidden by law to take such custody. He was under legal restraint when taken from the lawful custody and against the will of his rightful custodian; and such taking is in law deemed to be forcible and against the will of the child. Without limiting the precise age in which a child would be held not to have the legal capacity to assent to such forcible abduction from the custody of the parent to whom such custody has been assigned * * * the forcible taking away of a child of nine years of age against the will of his father, or those to whom the father had committed him for nurture or education, will authorize a jury to find that the child was illegally restrained of his liberty, whatever may have been his apparent wishes or satisfaction in being withdrawn by force from his place of legal custody * * * and placed under the care of those whose custody was illegal restraint." See, also, *Merceln v. People ex rel. Barry*, 25 Wend. 64, 35 Am. Dec. 653; *People ex rel. Pruyne v. Walts*, 122 N. Y. 238, 25 N. E. 268.

So far as the principles thus announced are concerned, I see no reason for distinguishing those cases from the present one. There was no objection by the appellants to the theory on which the jury were permitted to find them guilty of false imprisonment because they had violated the wishes and will of the incompetent, if he was possessed of them, but they have expressly and repeatedly argued that the incompetent had no mind or will whose violation could be made the basis of such an action as this. If the jury took that view and concluded that the incompetent like a child of tender years had no such will as would enable him to exercise intelligent and legal volition as to his custody, then the case was brought exactly within the principles of the cases to which reference has been made, and on this theory I think the trial judge committed no error in giving the instructions which have been quoted, but that here as elsewhere with much clearness and fairness he amply protected all the rights of the appellants.

The judgment should be affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

Judgment affirmed.

(175 Ind. 181)

DITTON et al. v. HART et al. (No. 21,464.)

(Supreme Court of Indiana. Feb. 2, 1911.)

1. PARTIES (§ 71*)—COMPLAINT—CONSTRUCTION—PARTIES.

The character in which one is made a party to a suit must be determined from the allegations of the complaint, and not from its title alone.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 113; Dec. Dig. § 71.*]

2. APPEAL AND ERROR (§ 171*)—THEORY OF PLEADINGS—CHARACTER OF PARTIES—EFFECT ON APPEAL.

Where, though the title of a complaint in a will contest made a trust company a defendant only in its individual capacity, the allegations showed that it was made a party as executor, and instructions requested by plaintiff and other documents in the record showed that the case was tried on that theory below, such theory must be adhered to on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1054-1057; Dec. Dig. § 171.*]

3. APPEAL AND ERROR (§ 757*)—BRIEFS—COMPLIANCE WITH COURT RULES.

A substantial compliance with Supreme Court rules (Rule 22, cl. 5), requiring appellant's briefs to contain a concise statement of so much of the record as fully presents the errors relied on, referring to the pages and lines of the transcript, is sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

4. NEW TRIAL (§ 112*)—JOINT MOTIONS.

While a joint motion for a new trial must be based upon a ruling which is erroneous as to all who join therein, a joint motion for a new trial on the ground of error in giving and refusing instructions was sufficient where the court ruled against all of appellants at the same time and all of them took the same exceptions to the giving and refusal of the same instructions, and were affected by the ruling in the same way, though their exceptions to the rulings were several.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 233; Dec. Dig. § 112.*]

5. WILLS (§ 50*)—TESTAMENTARY CAPACITY—COMPREHENDING WILL—NECESSITY.

Testatrix need not comprehend the legal effect of the provisions of her will in order to have the requisite testamentary capacity, nor understand all of its provisions, standing alone or with respect to each other, it being only necessary that she understand the property she intends to dispose of, the objects of her bounty, and the manner she intends to distribute it between them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. § 50.*]

6. WILLS (§ 159*)—UNDUE INFLUENCE—NATURE.

Undue influence must be directly connected with the execution of the will and operate at that time in order to avoid it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 387; Dec. Dig. § 159.*]

7. WILLS (§ 165*)—WILL CONTEST—ADMISSION OF EVIDENCE—UNDUE INFLUENCE—TESTATOR'S DECLARATIONS.

Oral and written declarations, such as other wills, though admissible in evidence on the question of mental capacity, are not admissible on the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

8. WILLS (§ 297*)—WILL CONTESTS—ADMISSION OF EVIDENCE.

Declarations by testator not made when the will was executed, are admissible in evidence in a will contest to sustain the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 690-696; Dec. Dig. § 297.*]

9. WILLS (§ 330*)—WILL CONTESTS—INSTRUCTIONS—CONSTRUCTION OF WILL.

Where it is proper to submit the provisions of the will to the jury in a will contest as bearing on the question of testator's mental capacity when the will was executed, the court should instruct as to the correct legal meaning of such provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 779-781; Dec. Dig. § 330.*]

10. PARTITION (§ 6*)—PARTITION BY PARTIES—ARBITRATION.

Where a will provided that for the purpose of obtaining a fair and equitable distribution of the land devised, testator directed that each of the devisees should, with the executor, divide the land on a fair and equitable basis as to value, the executor to act as arbiter, and that the allotment so made when approved by a majority of the devisees or their representatives, should be a conclusive division of the land and binding upon them, an unfair and unjust partition made by collusion of some of the parties would not be conclusive, but should be set aside in a proceeding by an interested party, and a fair and equitable partition had.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 4; Dec. Dig. § 6.*]

11. WILLS (§ 614*)—CONSTRUCTION—ESTATE DEVISED—LIFE ESTATE.

Item 7 of a will devised the residue of the estate equally to testator's four daughters during life, but provided that, should any of them die without children, the share of such daughter should go to her sisters equally for life, but if any daughter should die before testator, leaving children, the share willed to such daughter for life should go in fee to the trustees for said children, thereafter named. Item 9 provided that to provide a safe source of income for the children of such daughters, after the daughters' death, testator appointed persons named as joint trustees for the children of the several daughters, and devised to such trustees the fee of the land, which was willed to the daughters for life by item 7, but, should any daughter die without children, the share willed to the trustees for her children should go in fee to the trustees for the children of her sisters, share and share alike, to each set of joint trustees, it being testator's intention that the share of any daughter dying childless should go to children of her sisters, and equal shares to the children of each sister, per stirpes, and further provided that as each of the grandchildren became 21 years of age the joint trustees of such child should convey the fee of the property held in trust for it to such grandchild, whereupon the trust should terminate as to it. Held that, under item 7, each of the four daughters took a life estate, share and share alike.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.*]

12. WILLS (§ 681*)—CONSTRUCTION—ESTATE DEVISED.

The joint trustees took a fee-simple estate in the realty, subject to the life estates given to daughters, upon the trust named for the children of such daughters.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1612, 1613; Dec. Dig. § 681.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

13. WILLS (§ 523*)—CONSTRUCTION—ESTATE DEVISED—DEVISES TO CLASS.

The children of testator's daughters take the real estate devised to them as a class, so that it is subject to change by increase or diminution of the number of such children by future birth or death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

14. EVIDENCE (§ 547*)—OPINION EVIDENCE—EXPERT TESTIMONY.

An expert witness must base his opinion upon his testimony or upon facts assumed in the question, and not upon his own recollection and construction of the evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. § 547.*]

15. EVIDENCE (§ 547*)—OPINION EVIDENCE—EXPERT TESTIMONY.

It was error to permit an expert witness to testify upon testator's insanity, by basing his conclusion upon the provisions of the will and a letter, which were read to him, where the meaning of such provisions was disputed, thereby permitting him to base his opinion upon his own construction of the will and letter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2364; Dec. Dig. § 547.*]

Morris, J., dissenting.

Appeal from Circuit Court, Warren County; J. T. Saunderson, Judge.

Action by Abigail H. Hart and others against Minerva H. Ditton and others. From a judgment for plaintiffs, defendants appeal. Reversed, with directions to sustain defendants' motion for a new trial, and for further proceedings.

Items 7 and 9 of the will were as follows:

"Item 7. All the rest of my real estate * * * is hereby willed, devised and bequeathed to my four daughters, Minnie Ditton, Abigail Hart, Elizabeth Bond and Martha Jewell, share and share alike, during their natural lives; but should any of my daughters die leaving no children, then the share hereby willed to such daughter shall go to the sisters of said deceased daughter, share and share alike, during their natural lives, but if any of my said daughters should die before I depart this life leaving children, then the share hereby willed to said daughter during her natural life shall go in fee simple to the joint trustees for said children, hereinafter named by me, and be subject to the terms of the trust created for the benefit of the children of my daughters."

"Item 9. Believing that the life estate in the lands willed by me to my four daughters in Item No. 7 of this my will, will furnish income of such an amount as will amply provide for the support, maintenance, care and comfort of my said daughters during their natural lives, and also for the support and education of their children, and being desirous of providing the children of my daughters with what I regard as a safe and sure source of revenue after the death of the mothers, I hereby appoint William C. Ditton, husband of my daughter Minnie Ditton and the LaFayette Loan & Trust Company joint

trustees for the children of said daughter Minnie Ditton; and George Hart, husband of my daughter Abigail Hart, and the LaFayette Loan & Trust Company joint trustees for the children of my daughter Abigail Hart; and Charles J. Jewell, husband of my daughter Martha Jewell, and the LaFayette Loan & Trust Company joint Trustees for the children of my daughter Martha Jewell; and John L. Bond, husband of my daughter Elizabeth Bond, and the LaFayette Loan & Trust Company joint Trustees for the children of my daughter Elizabeth Bond; and I hereby will, devise and bequeath to the said joint Trustees of the children of each of said daughters respectively the fee simple of the land which was willed by me to my four daughters during their natural lives in Item No. 7, and to be set off to them in severalty under the provisions set out in Item No. 8. But should any of my said daughters die leaving no children, the share willed to the joint Trustees for her children shall go in fee simple to the joint Trustees for the children of her sisters, share and share alike to each set of joint Trustees, it being my will and intention that the share of any of my daughters who may die childless shall go to the children of her sisters, an equal share to the children of each sister per stirpes. Said joint Trustees shall receive the property herein devised to them under the following trust, viz: They shall, respectively, manage the property conveyed to them in a good, business-like manner, for the benefit of my daughters' children, and in such manner that it shall yield a good income; and after paying taxes, repairs, and the expenses of this trust, shall use the net income for the benefit of said grand children.

"As each of said grand children shall reach the age of twenty-one (21) years, the joint Trustees of such grand child shall convey the fee simple of such grand child's equal share of the property held in trust, and increment arising therefrom, to such grand child, and as to such grand child this trust shall then terminate.

"If any child of any of my daughters shall have reached the age of twenty-one (21) years before the mother's death, the share of such child shall immediately vest in him or her in fee simple, and be exempted from the provisions of this trust.

"In case of the death of either of the joint Trustees herein named, the surviving associate in the trust shall have all the powers, and be charged with all the duties, herein imposed upon such trustees jointly."

Instructions 31, 32, and 34, requested, were as follows:

"No. 31. I instruct you that under the terms of the will the four daughters of Jane Hawkins took an estate in the real estate devised under clause 7 for and during the

term of their natural lives, share and share alike, and that the joint trustees mentioned in said will took a fee simple in said real estate subject to the life estate in said daughters upon the trust mentioned therein for the children of said daughters. (Refused.)

"No. 32. I instruct you that under the terms of the will the children of the daughters take the real estate devised to them as a class, and that the estate which by the terms of the will is to vest in them at the age of 21 years is subject to change by an increase or diminution of its number in consequence of future births or deaths in said class. (Refused.)"

"No. 34. The court instructs the jury that the partition of the lands provided for in the will between the life tenants, the daughters of the testatrix, is required to be made on a fair and equitable basis as to value, and that in case a division is attempted, and any party to it deems it unfair and inequitable as to values, they have the right to appeal to the circuit court of the county in which the trust is pending, for it is a general rule of the law that the persons for whose benefit a trust is created may always proceed to the proper court to compel the fulfillment of the terms of the trust in accordance with its spirit and meaning, and in this case I instruct you that the Benton circuit court of Benton county, Ind., has full supervisory power and control of the trust created in the will of Jane Hawkins, and in case of any violation of the trustee of any of its duties under the will, said court has full power on a showing thereof to remove the trustee and appoint another, and generally to see to it that the trustee administers the trust without hostility to any party in interest and in a fair and equitable manner. (Refused.)"

Kumler & Gaylord, McCabe & McCabe, and Charles M. Snyder, for appellants. Stuart, Hammond & Simms, Fraser & Isham, Meade S. Hays, and W. B. Durborow, for appellees.

MONKS, J. This action was brought by appellees against appellants to contest the will of Jane Hawkins, deceased, after probate, on alleged grounds that the testatrix was of unsound mind when the will was executed, that the will was procured by undue influence, and that the same was unduly executed. A trial of said cause resulted in a general verdict in favor of appellees, and over a motion for a new trial final judgment was rendered setting aside said will. The only errors assigned and not waived call in question the action of the court in overruling appellant's joint motion for a new trial.

It is insisted, however, by appellees that this appeal must be dismissed because the La Fayette Loan & Trust Company was made a defendant in the court below in its individual capacity, and is not named in that capacity as one of the appellants in this

court, but is named as a party appellant in the assignment of errors as the "executor of the last will and testament of Jane Hawkins, deceased, when it was not a party defendant in that capacity in the court below." It is true that said Loan & Trust Company was not named in the title of the complaint in this case as executor of said will, but the character in which any one is made a party must be determined from the allegations in the complaint, and not by its title. *Marion Bond Co. v. Mexican, etc., Co.*, 160 Ind. 558, 563, 85 N. E. 748; *Williams v. Dougherty*, 37 Ind. App. 449, 77 N. E. 805; *Funk v. Davis*, 103 Ind. 281, 285, 286, 2 N. E. 739; *Beers v. Shannon*, 73 N. Y. 292, 297; *Tate v. Shackelford*, 24 Ala. 510, 60 Am. Dec. 488. It clearly appears from the allegations in the body of the complaint that said Loan & Trust Company was made a party as the executor of said will, and it appears from an instruction given at the request of appellees and from other papers in the case that the case was tried in the court below upon that theory; said theory must therefore be adhered to in this court on appeal. *Oblitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246, and cases cited; *Conrad v. Hansen*, 171 Ind. 43, 49, 85 N. E. 710; *Studabaker v. Faylor*, 170 Ind. 498, 507, 83 N. E. 747, 127 Am. St. Rep. 397. It is insisted by appellants that the court erred in giving each of instructions Nos. 8, 9, 11, and 14, requested by appellees, and in refusing to give each of instructions Nos. 31, 32, 34, and 35, requested by appellants.

Appellees insist that "no question is presented upon the evidence or instructions for the reason that appellants in their brief have not complied with clause 5 of rule 22 (55 N. E. v.) of this court." While appellants' brief may not be a model in complying with the requirements of said rule, it is clear from their first brief and reply brief that they have made a good-faith effort to comply with the same, and that they have substantially complied therewith, as to the questions we shall determine. This is sufficient. *Howard v. Adkins*, 167 Ind. 184, 186, 78 N. E. 665, and cases cited; *Stamets v. Mitchenor*, 165 Ind. 672, 675, 75 N. E. 579; *Teeple v. State*, 171 Ind. 268, 271, 86 N. E. 49; *Pomeroy v. Wilmer*, 167 Ind. 440, 450, 78 N. E. 233, 79 N. E. 446; *Ellison v. Branstatter* (Ind. App.) 89 N. E. 513; *Indiana Union Trac. Co. v. Heller*, 44 Ind. App. 385, 89 N. E. 419; *Simplex, etc., Co. v. Western, etc., Co.*, 173 Ind. 1, 88 N. E. 682.

Appellees further insist that "no question is presented as to instructions given or refused because appellants' exceptions to the giving and the refusal to give instructions were separate and several as to each appellant, and could not therefore be properly assigned as causes for a new trial in appellants' joint motion for a new trial to the overruling of which the exceptions were joint and not several." It is true that the

motion for a new trial was the joint motion of all the appellants and that they jointly excepted to the overruling of the same and that appellants each severally excepted to the giving and refusing to give the instructions complained of, but it does not follow that no question is presented thereby.

It is well settled that a joint assignment of errors, or a joint motion for a new trial, to be sufficient, must be founded upon a ruling which is erroneous as to all who join therein. The motion for a new trial in this case was the joint motion of appellants, and called in question the action of the trial court in giving and refusing to give certain instructions. Although appellants took their exceptions to the giving and refusal to give instructions severally, they were all entitled to join in a motion for a new trial because the court by a single action ruled against all the appellants, and all appellants took the same exception to the giving and refusal to give the same instructions, and they were all affected in the same way by the ruling of the court on said instructions and had a common interest in the result sought by the motion for a new trial. They had the same right to question, by a joint motion for a new trial, the correctness of the action of the trial court in giving and refusing to give said instructions, as if the exceptions had been joint instead of several as to each appellant. *Stamets v. Mitchenor*, 165 Ind. 672, 75 N. E. 579. See, also, *Whitesell v. Stickler*, 167 Ind. 602, 609, 78 N. E. 845, 119 Am. St. Rep. 524.

In instruction No. 8, four mental requisites are stated in the disjunctive by the use of the word "or," and informed the jury that lack of either requirement named at the time of the execution of the will, if shown by the evidence, would render the testatrix "at that time a person of unsound mind, not having sufficient mental capacity to execute a will; and if the jury so found their verdict should be for the plaintiff." One of the requisites the lack of which said instruction informed the jury would render the testatrix of unsound mind was "sufficient mental capacity to understand the nature and legal effect of her will."

Said instruction 9 informed the jury that if the testatrix "did not have sufficient mental capacity to understand all the provisions of said will standing alone, and each with respect to the other, and if the evidence so shows, then Jane Hawkins should be regarded as a person of unsound mind at the time of the execution of the will, and not possessing sufficient mental capacity to execute the same, and if the jury so find their verdict should be for the plaintiff." It was not necessary that the testatrix should have comprehended the provisions of her will in their legal form. *Barricklow v. Stewart*, 163 Ind. 438, 440, 72 N. E. 128; *Harrison v. Rowan*, 3 Wash. C. C. 580, 585, 11 Fed. Cas. p. 658, No. 6,141; *Irish v. Newell*, 62 Ill. 196,

14 Am. Rep. 79, 84, 85; *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202, 212; *Kischman v. Scott*, 166 Mo. 214, 228, 65 S. W. 1031; *Couch v. Gentry*, 113 Mo. 248, 256, 20 S. W. 890; *Young v. Redinbaugh*, 67 Mo. 574; *Havens v. Mason*, 78 Conn. 410, 62 Atl. 615, 3 L. R. A. (N. S.) 172, 27 L. R. A. (N. S.) 20, 21, note.

As was said in the case of *Harrison v. Rowan*, supra, "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient, if he has such a mind and memory as will enable him to understand the elements of which it is composed—the disposition of his property in its simple forms. It is the business of the testator to dictate the purpose of his mind, and, of the scrivener, to express them in legal form."

It is said in *Couch v. Gentry*, supra, on page 256, of 113 Mo., on page 892 of 20 S. W.: "Again, it is doubtless true that the testator should have a reasonable understanding as to how he desires his will to take effect; but to say he must understand the scope and bearing of the provisions of the will as prepared by his adviser, and this instruction is subject to such a construction, is another thing—a thing to which legal advisers and eminent men are sometimes mistaken."

In *Kischman v. Scott*, supra, the court said, on page 228, of 166 Mo., on page 1034 of 65 S. W.: "And while it is true that the testator should have reasonably understood as to how he desired his will to take effect, it was not necessary that he should have understood the scope and bearing of the provisions of the will as prepared by his legal adviser."

It is evident that each of said instructions 8 and 9 were erroneous for the reason that they required too high a standard of mental capacity.

Said instruction No. 11, given upon the question of the mental capacity of the testatrix to make a will, informed the jury that they might "consider whether she had sufficient mental capacity to comprehend the provisions" of items 7, 8, and 9 of her will, setting out what appellees claim to be the legal effects of said items.

What we have already said, and the authorities cited, in regard to instructions 8 and 9, that it is not necessary that the testatrix comprehend the provisions of her will as prepared by the scrivener, apply with equal force to said instruction 11.

This court said in *Barricklow v. Stewart*, 163 Ind. 438, 440, 72 N. E. 128, 129: "Erroneous views of the law of decedents or of wills entertained by a testator generally constitute very slight grounds, if any, for an inference of unsoundness of mind. Even gentlemen learned in the law of these subjects, and possessing unquestionable ability to comprehend and apply it, often differ in opinion or fall in error. It is not strange, therefore, that persons destitute of professional learning should have mistaken notions in regard to the effect of certain words in the creation of estates, and the legal consequences of inconsistent devises or bequests of property." This is well shown in the case before us where counsel for appellants and counsel for appellees differ widely as to the meaning of the provisions of the will in controversy, especially as to items 7, 8, and 9 mentioned in said instruction 11.

Said instruction 14 given at the request of appellees was upon the question of undue influence. A number of facts were stated therein, which if proved, the jury were informed, might be considered by them, "together with all the other facts and circumstances, if any, shown in evidence bearing upon the question as to the execution of the will, * * * and if from all such evidence, if any, the jury believe that the execution of said will was procured by undue influence, then the jury should find for the plaintiff in this case, and that said will is invalid." In said instruction the jury were informed, among many other things, that upon the question of undue influence they might consider whether some 10 or 15 years before her death the testatrix had executed, at intervals of several months apart, three wills, the contents of which are stated in said instruction. The disposition made by the testatrix of her property in each of said wills was different from that made by the will in controversy in this case. Undue influence, in order to make void a will, must be directly connected with its execution, and operate at the time it is made. *Floto v. Floto*, 233 Ill. 605, 613, 84 N. E. 712; *Wickes v. Walden*, 228 Ill. 56, 71, 81 N. E. 798, and cases cited; *Guild v. Hull*, 127 Ill. 523, 532, 20 N. E. 665, and cases cited.

Declarations of the testator not made at the time of the execution of the will in controversy were admissible in evidence as tending to show the mental capacity of the testator at the time the will was executed, but were not admissible as evidence of undue influence. *Hayes v. West*, 37 Ind. 21; *Todd v. Fenton*, 66 Ind. 25, 32; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, 438; *Conway v. Vizzard*, 122 Ind. 266, 268, 23 N. E. 771; *Westfall v. Wait*, 165 Ind. 353, 360, 361, 73 N. E. 1069; *Throckmorton v. Holt*, 180 U. S. 552, 570, 581, 21 Sup. Ct. 474, 45 L. Ed. 663; *Hobson v. Moorman*, 115 Tenn. 73, 90 S. W. 152, 3 L. R. A. (N. S.) 749, and cases cited; *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 684, 22 L. R. A. (N. S.) 1024; *Waterman*

v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71, 74; and note; *In re Kennedy's Estate*, 159 Mich. 548, 124 N. W. 516, 28 L. R. A. (N. S.) 417, 134 Am. St. Rep. 743; *Floto v. Floto*, 233 Ill. 605, 611, 613, 84 N. E. 712; *Wickes v. Walden*, 228 Ill. 56, 71, 81 N. E. 798; *Cheney v. Goldy*, 225 Ill. 394, 401, 80 N. E. 289, 116 Am. St. Rep. 145; *Compher v. Browning*, 219 Ill. 429, 440, 441, 76 N. E. 678, 109 Am. St. Rep. 346, and cases cited; *Waters v. Waters*, 222 Ill. 26, 35, 36, 73 N. E. 1, 113 Am. St. Rep. 359, and cases cited. This rule also applies to written declarations of the testator as letters written by him and other wills executed by him. *Floto v. Floto*, supra, pages 611, 612, 233 Ill., 84 N. E. 712, and cases cited; *Hobson v. Moorman*, 115 Tenn. 73, 90 S. W. 152, 3 L. R. A. (N. S.) 749, 752, et seq.; *Marx v. McGlynn*, 88 N. Y. 357, 374, 375; *Matter of Lawlor*, 86 App. Div. 527, 83 N. Y. Supp. 726.

It is held, however, that declarations of the testator in harmony with the provisions of the will in controversy are admissible, to sustain it. *Compher v. Browning*, supra, page 441, 219 Ill., 76 N. E. 678, 109 Am. St. Rep. 346, and cases cited; *Waters v. Waters*, supra, pages 35, 36, 222 Ill., 73 N. E. 1, 113 Am. St. Rep. 359, and cases cited; *Cheney v. Goldy*, supra, page 401, 225 Ill., 80 N. E. 289, 116 Am. St. Rep. 145; *Harp v. Parr*, 168 Ill. 459, 470, 48 N. E. 113, 107 Am. St. Rep. 467, 468, note "c."

Other objections are urged against said instructions, but as the court erred in giving them for the reasons stated they are not considered.

Instructions 31, 32, 34, and 35, requested by appellants and refused by the court, were concerning the proper construction of the will in controversy. Appellees insist that these instructions were properly refused because "in an action to contest a will no question as to its construction is presented unless all of its provisions are invalid." It is true that in an action to contest a will the proper construction of the will is not necessarily involved. In this case, however, by instructions Nos. 11 and 14 given by the court at the request of appellees, the court instructed the jury that upon the question of testamentary capacity and undue influence they might consider "the nature of the will and its provisions," and in the hypothetical questions put by appellees to their medical experts, the construction of items 7, 8, and 9 of said will was involved, and in the hypothetical question put to one of their medical experts they assume that item 8 of said will "required two of the heirs to join with this arbiter, the La Fayette Loan & Trust Company, to enforce a partition, and if any of the two heirs agreed with the La Fayette Loan & Trust Company, then the partition or division shall be made in accordance with that agreement, whatsoever it shall be; * * * that is to say, that in the division of this land, if Mrs. Hart and Mrs. Bond should join with the La Fayette Loan &

Trust Company, or it should join with them, and divide the land to the detriment and injury of Mrs. Jewell and Mrs. Ditton, it would have to stand, and contrariwise, if Mrs. Ditton and Mrs. Jewell entered into collusion with the La Fayette Loan & Trust Company, and set off property of much less value to Mrs. Hart and Mrs. Bond, that the La Fayette Loan & Trust Company agree to it, it would be final and conclusive, and forever after that would stand."

Counsel for appellees in their brief say that, "in a will contest, contradictions and ambiguities, and also the injustice of its provisions with respect to the heirs, may be considered as bearing upon the question of testamentary capacity and undue influence" and that incongruities and inconsistencies between the 7 and 9 items of the will were under the authorities proper matters for the consideration of the jury."

If in such action the provisions of the will can be considered by the jury for the purposes named, as claimed by counsel for appellees, how can they determine as to the matters named unless they know the meaning and legal effect of the provisions of the will, which were claimed to be unjust, ambiguous, contradictory, etc.? It is clear that it was material and important that the jury should have been informed as to the correct meaning of items 7, 8, and 9 of said will; about which there was such a wide difference of opinion between opposing counsel. The construction of the will is a legal question, and the court must inform the jury, on request properly made, as to the correct meaning of any provision of the will when it comes in question and is material to the issues to be determined by them. 11 Encyc. Plead. & Prac. 81, 82; *State v. Patterson*, 68 Me. 473-476; *Magee v. McNeill*, 41 Miss. 17, 90 Am. Dec. 354, 357, 358; *Sartor v. Sartor*, 39 Miss. 760, 770; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150, 157; *Bruck v. Tucker*, 42 Cal. 346, 355, 356; *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573, 576; *Watford v. Forester*, 66 Ga. 738; *Wilson v. Whitfield*, 38 Ga. 269, 283; *Green v. Collins*, 28 N. C. 139, 143; *Underhill v. Vandervoort*, 56 N. Y. 242, 247. No such question as this was presented in *Clearspring Tp. v. Blough*, 88 N. E. 511, cited by appellees, and that case is not in point here.

By item 7 of said will the testatrix devised to her four daughters about 4,500 acres of real estate during their natural lives. Item 8, which provides for the partition thereof, is as follows: "For the purpose of bringing about a quick, fair and equitable distribution of said real estate amongst my daughters or their children I direct that each of my said daughters, either in person or through representatives chosen by them, or the legal representatives of their children, shall meet with my executor herein named and make division of said real estate on a fair and equitable basis as to value, said executor to act as arbiter,

and the allotments so made, when approved by a majority of said children or their representatives, including my said executor, shall stand and be binding on each of said daughters and their children as a final and conclusive division of said real estate." The La Fayette Loan & Trust Company was by said will made the executor thereof. It will be observed that said item does not make any partition made thereunder final and conclusive, except one that "is made on a fair and equitable basis as to the value." A partition, therefore, that is unfair and unjust made by collusion to the detriment and injury of any one or more of said devisees, would not be final and conclusive as assumed in said hypothetical question, but could in a proceeding brought by a party interested, in a court having jurisdiction, be set aside, and a partition compelled that would be fair and equitable as required by said item. *Pray v. Belt*, 26 U. S. 670, 7 L. Ed. 309; *Moore v. Harper*, 27 W. Va. 362; *American Board, etc., Missions v. Ferry* (C. C.) 15 Fed. 696. It has been held by this court that parties cannot, even by contract, in advance of any dispute oust the jurisdiction of the courts by providing that the decision of any person named shall be final and conclusive. *Supreme Council v. Forsinger*, 125 Ind. 52, 55, 56, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196, and cases cited.

Instruction 34 stated the proper construction of the eighth item of the will and the rights of the parties to compel a partition according to the provisions thereof.

Instructions 31 and 32, as to the proper construction of items 7 and 9 of the will were correct, and should have been given. Conceding, without deciding, that the legal propositions stated in instruction 35 as to the construction of the will are correct, we are unable to say, from the parts of the record set out in appellants' brief, that appellants were prejudiced in any of their substantial rights by the refusal of the court to give the same.

It is next claimed that the court erred in permitting two of appellees' medical witnesses to testify in answer to hypothetical questions propounded to them, that the testatrix was of unsound mind at the time she executed the will in controversy. The seventh and ninth items of the will in controversy were read as a part of the hypothetical question propounded by appellees to their medical expert, Dr. Sterne, and a letter written by Mr. Ball, the person who wrote the will, to the testatrix, was also read as a part of the hypothetical question. The objection of appellants to the question was, in effect, that an expert witness is not allowed to give his opinion upon the construction he may give the portions of the will read to him or upon the letter written by Mr. Ball. It is settled that an expert witness will not be allowed to give his opinion upon his recollection and construction of the evidence in the case. He must base his opinion

upon his own testimony or upon facts assumed to have been proven, which facts must be given to him as the foundation upon which to base his opinion. *Rush v. Magee*, 36 Ind. 69, 73, 75-77, and cases cited; *Bishop v. Spining*, 38 Ind. 143; *Gueltig v. State*, 66 Ind. 94, 104, 32 Am. Rep. 99, and cases cited; *Burns v. Barenfeld*, 84 Ind. 43, 47-49; *Elliott v. Russell*, 92 Ind. 526, 530, 531; *Craig v. Noblesville, etc., Co.*, 98 Ind. 109; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 418-422, 3 N. E. 389, 4 N. E. 908, and authorities cited. When an expert is asked to give his opinion upon a hypothetical question, the question to him must be so framed as to give no occasion to mentally draw his own conclusion from the whole evidence or any part thereof. *McMechen v. McMechen*, 17 W. Va. 683, 692, 698, 41 Am. Rep. 682; *Russ v. Wabash, etc., R. Co.*, 112 Mo. 45, 20 S. W. 472, 18 L. R. A. 823, 825, 826; *Com. Title, etc., Co. v. Gray*, 150 Pa. 255, 260, 24 Atl. 640.

It was said in *Com. Title, etc., Co. v. Gray*, supra, page 260, of 150 Pa., page 641 of 24 Atl., "a belief respecting the sanity of the testator founded on a provision of the will is neither satisfactory nor competent evidence. It is not the province of an expert witness to draw inferences of fact from evidence, but simply to declare his opinion upon a known or hypothetical state of facts." *Rush v. Magee*, 36 Ind. 69, 76, and cases cited.

This court said in *Louisville, etc., R. Co. v. Falvey*, supra, pages 421, 422, of 104 Ind., page 396 of 3 N. E.: "To this question there is at least one valid objection. This objection is that it assumes, as one of the facts, the opinion of another physician that Miss Falvey, the appellee, was not suffering from a lesion of the spine. It is not proper in asking hypothetical questions to incorporate in them the opinion of other expert witnesses. An opinion of an expert witness cannot be based upon opinions expressed by other experts. Facts, and not opinions, must be assumed in the questions. If it were otherwise, opinions might be built upon opinions of experts, and the substantial facts driven out of the case. An opinion cannot rest, in whole or in part, upon other opinions, but must rest upon fact."

The proper construction of the seventh and ninth items of the will in controversy, read to said expert witnesses, involved a legal question, one which was in dispute, and about which opposing counsel differ. The will and letter were read in evidence, but it was the facts proven by the letter and the parts of the will included in said question that should have been assumed as facts in stating the hypothetical question to the expert witness and not the evidence of such facts, as was done in this case. In answer to said question the expert witness drew his own inferences and conclusions from said

items of the will and said letter. His opinion in answer to the question, so far as said terms of the will and letter were concerned, was based upon his construction of the same. It is evident under the rule applicable to such questions and the authorities cited that the court erred in permitting the medical expert to answer said question.

The hypothetical question propounded to Dr. Wetherill, appellee's medical expert, was objectionable for like reasons.

Other objections are urged against said hypothetical questions, but, as they were objectionable for the reasons given, it is not necessary to consider them.

There is nothing in the answers of the jury to the interrogatories showing that the errors of the court in giving and refusing to give said instructions or the errors of the court on overruling the objections of appellants to the hypothetical questions were harmless.

Other questions are argued in the briefs, but as they may not arise upon another trial they are not considered.

It follows from what we have said that the court erred in overruling appellants' motion for a new trial. Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

MORRIS, J., dissents.

(33 Oh. St. 241)

STATE v. PIERSON.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

EMBEZZLEMENT (§ 6*)—COUNTY RECORDERS—EMBEZZLEMENT OF PUBLIC MONEY—NATURE OF FUND.

A county recorder cannot be indicted, under section 6841, Revised Statutes, for embezzlement in converting to his own use interest received by him on deposits of public money.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 4; Dec. Dig. § 6.*]

Exceptions from Court of Common Pleas, Franklin County.

One Pierson was indicted for embezzlement of public money. From an order sustaining a demurrer to the indictment, the state brings exceptions. Exceptions overruled.

Webber, McCoy, King & Game, for the State. Huggins, Huggins, Johnson & Hoover, for defendant in error.

SUMMERS, C. J. The defendant was recorder of Franklin county in the year 1909, and was indicted for the embezzlement of \$66 received by him as interest, and converted to his own use, on public money that he had deposited in bank. The court of common pleas sustained a demurrer to the indictment, and the county prosecutor by bill

of exceptions questions the correctness of the ruling.

Section 6841, Rev. St., is as follows: "Whoever being charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money or bequest, or any part thereof, belonging to the state, or to any county, township, municipal corporation, board of education, cemetery association or company in this state, converts to his own use, or to the use of any other person, body corporate, association or party whatever, in any way whatever, or uses by way of investment in any kind of security, stock, loan, property, land or merchandise, or in any other manner or form whatever, or loans with or without interest to any company, corporation, association or individual, or, except as hereinafter provided, deposits with any company, corporation or individual any portion of the public money or any other funds, property, bonds, securities, assets or effects of any kind received, controlled or held by him for safe-keeping or in trust for a specific purpose, transfer or disbursement, or in any other way or manner, or for any other purpose, shall be deemed guilty of embezzlement of so much of the money or other property thus converted, used, invested, loaned, deposited or paid out, and shall be imprisoned in the penitentiary not more than twenty-one years nor less than one year, and fined in double the amount of money or other property embezzled, which fine shall operate as a judgment at law on all of the estate of the party sentenced, and be enforced to collection by execution or other process for the use only of the owner of the property or effects so embezzled, and such fine shall only be released or entered as satisfied by the party in interest as aforesaid. Provided, however, nothing in this act shall be so construed as to make it unlawful for the treasurer of any township, municipal corporation, board of education or cemetery association, to deposit any portion of such public money with any person, firm, company or corporation organized and doing a banking business under the banking laws of the state of Ohio, or the banking laws of the United States. Provided, further, the deposit of any such funds in any such bank shall in no wise release any such treasurer from liability for any loss which may occur thereby."

It is conceded that by section 1296-11, Rev. St., the money deposited was public money, and the court of common pleas ruled, under the statutory provision in that section as to what fees, costs, etc., shall be held as public moneys belonging to the county, that interest on such funds is not public money within the meaning of section 6841.

In *Eshelby v. Cincinnati Board of Education*, 66 Ohio St. 71, 63 N. E. 586, it is held that, "The treasurer of a school district who, under favor of the proviso of section 6841, Rev. St., deposits its funds in a bank which allows interest on the average balance of the deposit is required to account to the school district for such interest," and hence it is contended that interest is embraced within the words "public money" as used in section 6841. That was a civil action to recover the interest, and it was held that the interest might be recovered on the ground that the treasurer did not own the money on deposit; that it belonged to the public; that he was merely the custodian of the money, and that the increment follows the principal. It does not necessarily follow, however, from the fact that interest may be recovered in a civil action, that it is public money within the meaning of those words as used in a statute making it a crime to embezzle public money.

The indictment seems to have been drawn upon the assumption that it was the duty of the officer to deposit the public money at interest in bank, and to pay the principal and interest into the county treasury quarterly, for it is expressly so charged in the indictment. But attention to the statute discloses that it is made embezzlement for the officer to loan the public money with or without interest, or to deposit it. However, it is contended that this charge in the indictment may be disregarded for the indictment still charges that the defendant received the interest and converted it to his own use. It is true that it is so charged, and it may be that the charge in the indictment that it was the duty of the officer to make the deposit may be disregarded, and it is perhaps immaterial whether that was the reason that the officer was indicted for converting the interest and not for depositing the money in bank.

We do not think that interest is within the purview of the statute, for in the contemplation of the law-makers there never would be any interest. There could be none unless an officer was guilty of an act made embezzlement by the statute, and so there could be no necessity for making the conversion of interest embezzlement. The purpose of the original legislation is set out in *State of Ohio v. Newton*, 26 Ohio St. 265. Briefly, it was to safeguard the public money by keeping it in the custody of the public officer and not to secure for the public any profit or interest he might receive from the use of it.

Exceptions overruled.

CREW, SPEAR, DAVIS, SHAUCK, and PRICE, JJ., concur.

(88 Ohio St. 146)

SCHEU v. STATE.

(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION—ILLEGAL SALE—CONSTRUCTION OF STATUTE.

From and after 30 days from the time a majority of the electors of a county have legally voted in favor of prohibiting the sale of intoxicating liquors as a beverage within the limits of such county, as is authorized by the provisions of "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties," passed March 5, 1908 (99 O. L., 35), it is unlawful for any person, personally, or by agent, in said county, to sell, furnish, or give away intoxicating liquors to be used as a beverage, except as permitted by section 8 of said act; and the prohibition under said act extends to and includes the sale, furnishing or giving away of intoxicating liquors in the county at the manufactory by the manufacturer, or by his agent, to be used as a beverage, although the sale be "in quantities of one gallon or more at any one time."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.*]

2. INTOXICATING LIQUORS (§ 40*)—ILLEGAL SALE—CONSTRUCTION OF STATUTE.

In construing the provisions of said act, the court is not authorized to interpolate, as a part thereof to affect the meaning and application of said act, the exceptions contained in section 4384—16, Revised Statutes (Bates'), known otherwise as section 8 of the Dow-Aikin tax law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 40.*]

Error to Circuit Court, Tuscarawas County.

Walter H. Scheu was convicted of unlawfully furnishing and giving away intoxicants, and he brings error. Affirmed.

At the January term of the court of common pleas of Tuscarawas county, for the year 1909, the grand of the county presented to the court an indictment against plaintiff in error, charging him with having sold to George Kuemerly intoxicating liquors, to wit, beer, to be used as a beverage. The sale is alleged to have been made in said Tuscarawas county on the 24th day of December, A. D. 1908, which sale was then and there prohibited and unlawful. In a second count the same person was charged with having unlawfully furnished and given to said Kuemerly intoxicating liquors, to wit, beer, on said 24th day of December, 1908, in the said county; the said furnishing and giving not being done and made in the private dwelling of the said Walter Scheu. The court overruled a demurrer to the indictment, and a plea of not guilty was made and entered, and in due time the issue was tried to a jury. After the introduction of the evidence was completed, the accused asked the court to instruct the jury as follows: "The court instructs and charges the jury that if you find from the evidence that the Tuscarawas Valley Brewing Company is a

corporation incorporated under the laws of Ohio, that said company is the manufacturer of intoxicating liquor, to wit, beer, that said company manufactures said beer at its brewery located in Canal Dover in said county of Tuscarawas, that said county had adopted local option under the Rose law, that said defendant, Walter H. Scheu, was the manager of said company, and the agent of said company at the time and place of said sale as testified to by said Kuemerly, and that said manufacturer, said company, by said Walter H. Scheu, its agent, sold intoxicating liquors, to wit, beer, to said George Kuemerly at the said manufactory, the brewery of said company, and in quantity of a gallon or more, then I say to you that the said defendant, Walter H. Scheu, would not be guilty of either of the counts in said indictment, and your verdict should be not guilty, as he stands charged in said indictment." Also: "Under the laws of Ohio, the manufacturer of beer would have the legal right to sell beer to the said George Kuemerly in quantities of not less than one gallon at the manufactory, and if you find from the evidence that the beer alleged to have been sold to the said George Kuemerly was beer owned and manufactured by the Tuscarawas Valley Brewing Company, and was sold to him by the said brewing company through the said defendant as its agent, in quantities of not less than one gallon, at the manufactory, then your verdict should be not guilty, as the defendant Walter H. Scheu, stands charged in said indictment." The court refused to give either of the said charges, to which Scheu expected. He also asked the court to charge that the county local option law, known as the Rose law, is unconstitutional and void. This was also refused. The defendant was found guilty by the jury. A motion for new trial was overruled, and the accused was sentenced to pay a fine of \$200 and costs of prosecution. On leave granted for that purpose, a petition in error was filed in the circuit court to review the judgment of the common pleas. The circuit court affirmed the judgment, and error is prosecuted here to reverse both courts. Other facts are stated in the opinion.

J. F. Greene, J. D. T. Bold, and A. D. Metz, for plaintiff in error. D. R. Wilkin, Pros. Atty., for the State.

PRICE, J. (after stating the facts as above). We are not troubled in this case with any controversy or doubt about the facts. They are few and very clear; the defendant himself having taken the witness stand apparently to remove all question as to his attitude in reference to the sale of the beer at the time and place mentioned in the indictment. He was the manager of the Tuscarawas Valley Brewing Company,

located in Canal Dover, and, while he did not personally make the sale to Kuemerly, it was made by one Murphy, on the premises and under defendant's authority, who by his own testimony assumed all responsibility for making the sale as it was made. The transaction occurred several months after the electors of the county, at an election held under the county local option law, by a considerable majority had voted in favor of prohibiting the sale of intoxicating liquors within the county. The purchaser at the sale referred to says that he bought at the brewery a case, consisting of two dozen pint bottles of beer—bought it to drink and took it home and drank it. He paid for it, and this beer was made at this brewery. The contents of the bottles aggregated more than one gallon. The defendant, now plaintiff in error, testified that sales were made at the brewery after the said election just the same as before, and he and his superiors claimed then, and insist now, that they had a legal right to continue to make such sales regardless of the results of the vote of the people. If they were violating the law, they did it defiantly, and with a view, as counsel say, of having a test made of the law and their rights and liabilities under it. This purpose is boldly announced in the brief, and that it might not fall on account of any defect in the indictment, or lack of proof to sustain some allegation, aside from that of the sale as charged, counsel for plaintiff in error entered into written stipulation with the state, which appears of record, attempting to waive formal defects in the indictment and any lack of proof to sustain certain allegations therein. This way of curing defects, if any, is entitled to take rank as a new discovery in criminal practice; but counsel for plaintiff in error, in all after stages of the case, seems to have abided by the stipulation, apparently through the pressing desire of his client to have a test case made on the facts and the law applicable to such facts. The courts below have agreed upon the judgment in the test case, and it now waits our opinion.

In the character of the instructions which defendant desired given to the jury, the question of the case is evident; but, lest we might not comprehend it, counsel mould it in the brief as follows: "Can there be a conviction of the manufacturer, whether he be a person or corporation, under the county local option law, where the manufacturer, who is a manufacturer of beer from the raw material, sells it at the manufactory in quantities of a gallon or more?"

We proceed to answer, and note that in various forms of positive assertion we are urged to believe that, notwithstanding Tuscarawas county was voted "dry" (as the term goes) under the provisions of a law that is plain and free of ambiguity, the manufacturer of beer in such county can legally sell it at the place of making, to be used as

a beverage, if the quantity sold is one gallon or more. Saloons and other places where beer is retailed in any quantity whatsoever must close; but the manufacturer may, like the brook "go on forever," if he does not condescend to sell in quantities less than one gallon. The fountainhead may flow in gallon or larger measures, and the thirsty may flock thither and buy, drink, and take away for beverage purposes, so they buy in gallon or larger quantities, thus giving the manufacturer a monopoly of the business, and that, too, free of the tax which the state imposes on the saloon or other retailer. The manufacturer—the brewer in this case—becomes a person of most exalted privilege.

At page 17 of brief for plaintiff in error, counsel exclaim: "In the case at bar, the Tuscarawas Valley Brewing Company sold the liquor in a quantity of a gallon or more to Kuemerly, as it had a perfect right to do. The company was not amenable to the payment of the Dow tax, nor to the operation of any of the provisions of the Rose law upon which this indictment is predicated." True, the sale under review was of two dozen pint bottles of beer, and these pints must be added in order to get within the gallon standard; but we apprehend the sale was not made with the expectation that the purchaser would gulp all down at once, but rather use the bottles singly, at least one at a time, for beverage purposes. Can counsel's view of this law be sound?

Let us see: The act is entitled: "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties." It was passed March 5, 1908, and took effect September 1, 1908 (99 Ohio Laws, p. 35). The first section provides that 35 per cent. of the qualified electors of the county may petition the commissioners or any common pleas judge of the county for the privilege to determine by ballot "whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county," etc. Acting on such petition, a special election is to be ordered, and notice thereof given, which shall be conducted in all respects as are elections for county officers. The result of the election shall be forthwith "entered upon the record of the proceedings of the commissioners, and with the clerk of the common pleas court," and in all trials for violation of this act the original entry of the record, or a copy thereof certified by the clerk of the county common pleas court or any commissioner, provided that said record shows that a majority of the votes cast at said election was against the sale of intoxicating liquors as a beverage, "shall be prima facie evidence that the selling, furnishing or giving away of intoxicating liquors as a beverage, or the keeping of a place where such liquors are sold, kept for sale, given away or furnished, if such selling, furnish-

ing or giving away or keeping of such place occurred after thirty days from the day of holding the election, was then and there prohibited and unlawful."

Section 2 provides for the form and contents of the ballot to be voted, and then provides that, "if a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then from and after thirty days from the date of holding said election, it shall be unlawful for any person personally, or by agent, within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes, and whoever from and after the thirty days aforesaid violates any of the provisions of this act or in any manner directly or indirectly, sells, furnishes, or gives away or otherwise deals in any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle either permanent or transient, for such selling, furnishing or giving away, or in which or from which intoxicating liquors are sold, given away or furnished, or otherwise deal in as aforesaid, shall be guilty of a misdemeanor, and shall on conviction thereof be fined," etc.

We see no exception of the brewer or manufacturer, and no privilege defined if sold, furnished, or given away in quantities of one gallon or more. There is no intimation of such exemption in favor of any one.

Section 3 defines the meaning of the phrase "intoxicating liquor" as "any distilled, malt, vinous or any intoxicating liquors whatever." The only limitation placed on the operation of the statute is found in the section where it is said: "But nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes; and when sold for medicinal purposes, it shall be sold only in good faith upon a written prescription, signed and dated in good faith by a reputable physician in active practice and the prescription used but once. The words 'giving away,' where they occur in this act, shall not apply to the giving away of intoxicating liquors by a person in his private dwelling unless such private dwelling is a place of public resort." The Legislature has carefully hedged about the exception or exemption from the operation of this statute.

The other sections concern matters of procedure—what shall constitute 35 per cent. of the electors of the county; the character of record to be made of the results of the election; disposition of fines, etc. The bill as enacted is complete within itself, not depending or conditional upon any other statute for construction or operation, and, on the conceded fact in this case that the beer was sold and purchased to be used as beverage,

we are unable to see in this statute any place of refuge for the defendant.

However, it is argued by counsel that it should be construed with reference to the provisions of the township and municipal local option statutes, but more especially to section 8 of an act passed March 21, 1887 (84 Ohio Laws, p. 224), recently section 4364—18, Rev. St. This section is part of the so-called Dow law, assessing a tax on the business of trafficking in intoxicating liquors, and, for the purpose of applying the argument, we quote the section: "The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known medicinal, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time." This section was amended as to the amount of the tax by the so-called Alkin law in 98 Ohio Laws, p. 99, or section 4364—9, Rev. St. (Bates').

Counsel for plaintiff in error also refer to the provisions of the local option laws in townships, being section 4364—24 et seq.; and the municipal local option law, being section 4364—20a; and the so-called Brannock residence district local option law, being section 4364—30a. And we are asked to throw the county local option law into hotch-potch with the others and consider them as one scheme of legislation, construing the county option law with liberal consideration of the other enactments. It is then added that, as all these are a part of chapter 7, Rev. St., such mode of construction is necessary.

At this point, it must be observed that since the revision of 1880, until recently, we have had no legislative revision of our statutes, and the order in which the statutes were placed, after enactment, was determined by the compiler or publisher of what we have been prone to call the Revised Statutes. Hence the Legislature had made no attempt to weld or merge them. Who has the right or authority to say that the county local option law is but a part only of the former legislation on the liquor traffic? It in no word or phrase refers to prior enactments for local option in townships or municipalities, nor to the statutes taxing the traffic, and it should not be thus uncereemoniously consigned to the fellowship of other independent prior statutes. The compiler had not performed this service as to the act under consideration, when the present controversy started in the courts. However, we may be benefited by a cursory notice of these prior local option statutes. The exception in the township local option law

is in favor of one who manufactures and sells cider, or wine manufactured from the pure juice of the grape cultivated in this state, and in favor of a legally registered druggist who sells or furnishes pure wines or liquors for exclusively known medicinal, art, scientific, mechanical, or sacramental purposes; but the exception is not to be construed to authorize the keeping of a place where wine, cider, or other intoxicating liquors are sold, kept for sale, furnished, or given away as a beverage.

The law for local option by municipalities has a different and broader exception as found in section 4364—20b, Rev. St. There it is in favor of a manufacturer of intoxicating liquors from the raw material, "to sell, deliver and furnish his product in wholesale quantities to bona fide retail dealers trafficking in intoxicating liquors, or in wholesale quantities to any party or parties residing outside the limits of said municipality." The next section defines the rights of a regular druggist to sell for certain purposes on prescription by a regular physician. A person may give away such liquors in his private dwelling, if the same is not a place of public resort. The so-called Brannock law contains exceptions of a similar nature.

If the law involved here is to be construed with reference to the prior local option law, which one shall be chosen as the standard of comparison? And why should we single out section 8 quoted above from the Dow-Alkin law and measure the Rose law by the terms of that section? Where is the authority to import section 8, *supra*, bodily into the county local option law? When the latter was enacted, the Legislature is presumed to have known of the pre-existing laws referred to by counsel and already cited herein, and if any of the exceptions or exemptions contained in the former acts were in legislative contemplation to be reflected in, or affect the provisions of, the new law, why were they not embraced in it by appropriate language, or intelligent reference? Both are absent, and we must observe the rule that an exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience. See *Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N. E. 945. Another rule is that consistency of interpretation of a statute is of first importance and requires the assumption that the Legislature knew and took into consideration existing legislation. *Charles v. Fawley*, 71 Ohio St. 50-53, 72 N. E. 294. And including none of the provisions of the prior acts, conclusively suggests that they were intentionally excluded.

The principle is akin to the declaration of this court in *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574. The first proposition of the syllabus gives the latitude of interpretation. In the second it is said: "But the intent of the lawmakers is to be sought first of all in the language employed, and if

the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact? That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

The plaintiff in error appeals to *Senior v. Ratterman*, 44 Ohio St. 861, 11 N. E. 321, and *State v. Rouch*, 47 Ohio St. 478, 25 N. E. 59, for vindication of his contention; but we think neither case can be so applied. The question in *Senior v. Ratterman*, as stated by the court on page 670 of 44 Ohio St., 11 N. E. 323, was: "Whether wholesale dealers in intoxicating liquors are subject to the tax imposed upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors" by the act of the General Assembly passed May 14, 1896 [83 Ohio Laws, p. 157], entitled 'An act to provide against the evils resulting from the traffic in intoxicating liquors.' The court then quotes section 8 of the act (Dow law), and discusses former legislation and decisions of the court pertaining to the same; but the principle held by this court is in the second section of the syllabus, and which is the law declared, to wit: "Wholesale dealers in intoxicating liquors, who are not manufacturers, are within the terms of the act of the General Assembly passed May 14, 1896 [83 Ohio Laws, p. 157], entitled 'An act to provide against the evils resulting from the traffic in intoxicating liquors,' and are liable to the tax therein imposed."

So the point involved and decided was that wholesale dealers in intoxicating liquors, who were not manufacturers, were taxable under that law. It was also decided that the law was valid. There is much in the opinion of the court which might be read with profit in connection with this case, but all of it appears in the report itself. We find nothing there inconsistent with the views expressed here. In fact, what appears on pages 672 and 678 of 44 Ohio St., 11 N. E. 321, sustains the position taken in this case.

The controversy in *State v. Rouch*, *supra*, related to obtaining a refunding of a portion of the tax paid where the dealer ceased business before the period paid for. This is manifest in the language found on pages 482, 483, and 487 of 47 Ohio St., 25 N. E. 59. Section 4 of the township local option act and section 11 of the Dow law were under consideration as to the right to a refunder, etc., and it is on page 487 of 47 Ohio St., 25 N. E. 59, that the court uses the language quoted in the brief, to wit: "The same meaning applies to section 4 of the township local option act. The provision is similar as to a return of a ratable portion of the tax paid to that of section 11 of the Dow law. The two acts are in *pari materia*. Their titles and their subject-matter show that

they relate to the same subject. One spirit and policy pervade both statutes, and the two are intended to be consistent and harmonious. The refunder provided for is intended to be carried out by one and the same officer, and in one and the same way."

When we bear in mind the ground of contest in *State v. Rouch*, supra, we will understand how little light it reflects on the question at bar. We know of no rule or decision that authorizes the court to interpolate into a plain statute a section from an entirely different act.

Finally, it is asserted and argued that the *Rose* law is unconstitutional; that it is not of uniform operation throughout the state, although a law of a general nature; that it is confiscatory in that it destroys property or its values without compensation, and so on. Since *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672, *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. 683, *Gordon v. State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749, and numerous later cases reported without opinion, we have regarded the constitutionality of such legislation as foreclosed. These cases reported without opinion were decided on the authority of the above cases reported with opinion, and we do not feel justified in setting aside such a steady current of authority.

The enforcement of the county local option law may, and doubtless will, work loss in property investments. It doubtless will cause a decrease in the product of the brewery in counties where the law is in force, and therefore the sales of the product, and thereby diminish the value of the plant itself. Breweries in adjoining counties may thrive because of the misfortunes of their neighbors. Do such results render the law invalid?

The saloonkeeper or other retail dealer has made the same charge, when either township or municipal local option closed his place of business. Some of such places may have been equipped and furnished at great expense and operated for many years. Their investment of money and property differs from that of the brewer in degree only, and yet the financial loss of the keeper of the saloon, however grand its trappings, has never been sufficient to defeat the law.

Why should such appeal succeed now that the Legislature has adopted the larger unit of the county as the field of its operations?

Whether the law in question expresses the best public policy on the subject is not a question for our determination. That pertains to the legislative department, and not to the judiciary.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SUMMERS, C. J., and CREW, SPEAR, and DAVIS, JJ., concur.

(207 Mass. 588)

MINOT et al. v. STEVENS, Treasurer and Receiver General.

(Supreme Judicial Court of Massachusetts. Suffolk. Feb. 13, 1911.)

CONSTITUTIONAL LAW (§ 283*)—DUE PROCESS OF LAW—TAXATION.

St. 1909, c. 527, § 8, providing that where property subject to a power of appointment passes into new hands, either through the donee's exercise or failure to exercise the power, it shall be subject to taxation in the same manner as if it had belonged to the donee and had been bequeathed or devised by him, is not unconstitutional in taking without due process of law the property of those who take in default of appointment, for the donee, while not having the title to the property, has such an unqualified right of disposal that those taking by an appointment take by succession and those who take in default of appointment have no vested right to the succession.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 891-906; Dec. Dig. § 283.*]

Case Reserved from Supreme Judicial Court, Suffolk County; Arthur P. Rugg, Judge.

Proceedings by Laurence Minot and others, as trustees under a deed of trust, against Elmer R. Stevens, as Treasurer and Receiver General, for a determination of the succession tax. From a decree of the probate court imposing the tax, the trustees appeal. Case reserved for the full Supreme Court. Decree affirmed.

Rackemann & Brewster, for appellants. Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for appellee.

KNOWLTON, C. J. This case comes before us by reservation on an appeal from a decree of the probate court, instructing the trustees that a succession tax is due upon certain property, referred to in a deed of trust which conveyed the property to trustees who were to pay the income of it to Nancy Willing Wharton for her life, and, on her death, to convey it to such person or persons as she by her will, or by any instrument of appointment in the nature of a will, should devise or bequeath it to, or should order and appoint to receive it; and, in default of such will or instrument of appointment, to convey it in fee to her heirs at law. Mrs. Wharton has deceased, leaving a will in which she expressly disclaimed any intention to exercise any power of appointment that she might have.

The respondent claims a succession tax upon the property under St. 1909, c. 527, § 8, the first part of which is as follows: "Whenever any person shall exercise a power of appointment derived from any disposition of property made prior to September 1, 1907, such appointment when made shall be deemed to be a disposition of property by the person exercising such power taxable under the provisions of chapter 563 of the Acts of

the year 1907 and of all acts in amendment thereof and in addition thereto, in the same manner as though the property to which such appointment relates, belonged absolutely to the donee of such power and had been bequeathed or devised by the donee by will. And whenever any person possessing such a power of appointment, so derived, shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property, taxable under the provisions of chapter 563 of the Acts of the year 1907, and all acts in amendment thereof and in addition thereto, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." This statute was intended to cover certain cases where property passing into the possession of new owners was not previously subject to a tax upon the succession, and other cases where, with a possible construction of previous statutes, the property might be subject to a tax under them. It provides that the taxation shall be in the same manner as though the property belonged absolutely to the donee of the power, and had been bequeathed or devised by the donee by will. In this respect the provision is different from the construction that was given by this court to the previous statute in its application to the taxation of property passing under the execution of a power. *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033. The statute must be held to cover all cases that come within its terms, and to supersede all previous inconsistent legislation applicable to such cases.

The facts of the case before us are strictly within the language and purpose of the statute, and our decision must be governed by this enactment if it can be supported as constitutional.

It is contended that it calls for a taking of property without due process of law, because the persons who would take under a previously existing will or deed containing a power of appointment, if the power is not exercised, have a vested right in the property under the will or deed, such that their subsequent acquisition of it, in possession and enjoyment, is not a succession, and cannot be taxed as such.

It generally has been held that a title derived through a power of appointment in a will or deed is to be taken as coming from the donor of the power, rather than from the donee. But in many particulars the donee is often more directly responsible for the possession and enjoyment of the beneficiary than the donor. This is referred to in some of the cases from the English reports that are cited in *Emmons v. Shaw*, 171 Mass.

410-413, 50 N. E. 1033. In England it is expressly provided by statute that, in the case of a general power, the person executing the power shall be deemed to be the one from whom the estate is received. The reasonableness of this doctrine is also shown in the opinion in *Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882.

The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. If the power is to dispose of it by an instrument in the nature of a will signed by three witnesses, as was the fact in this case, if he exercises the power the property becomes a part of his estate for administration after his death, and may be used for the payment of his debts. His relation to it is very much like that of an owner. *Clapp v. Ingraham*, 126 Mass. 200; *Olney v. Balch*, 154 Mass. 318, 28 N. E. 258. Those who would take, in default of an appointment, have only an interest which is contingent upon the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. He can make it vest in possession by an appointment to the persons named as the takers in default of appointment, in which case it will be theirs, subject only to a possible use for the payment of his debts, or he can do it by an omission to exercise the power, or he can dispose of it by an appointment to others, thus terminating the contingent interest and leaving the contingent remaindermen nothing. After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax. *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033; *Crocker v. Shaw*, 174 Mass. 266, 54 N. E. 549; *In re Dows' Estate*, 187 N. Y. 227, 60 N. E. 439, 52 L. R. A. 433, 88 Am. St. Rep. 508; *In re Cooksey's Estate*, 182 N. Y. 92, 74 N. E. 880; *Chanler v. Kelsey*, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882. The tax is imposed as of the time when the succession in possession and enjoyment occurs through the happening of the event that determines it.

The cases above cited, from the New York Court of Appeals and the Supreme Court of the United States, show that the succession is not so vested, in those who will take

if the power is not exercised, that it may not go to the appointee through the exercise of the power of appointment. Until the time comes for the final determination, it is not established as belonging to any one. Then comes the statute which we are considering, and which was considered in the above cited cases in New York and in the Supreme Court of the United States. It declares, in substance, that the exercise of the power shall be considered as giving the succession to the appointees, and that the refusal or omission to exercise the power shall be considered as giving the succession to the persons who are to take in default of the exercise of it. The statute treats the result as depending upon the conduct of the donee, who may appoint or refrain from appointing. If he appoints, the succession under the statute is to be treated as determined by him, and the right thus acquired by the appointee is treated as taxable, because received as a benefit under our law. Can there be any doubt of the power of the Legislature so to treat the coming of the appointee into the succession? It seems not. To this extent the cited cases seem to go.

It is but a short step further to apply the second part of the statute, which refers to coming into succession through the conduct of the donee in refusing or omitting to make an appointment that might carry the succession elsewhere. While he has the power of appointment, he is in control of the succession. He may allow it to go to the persons named in the will or deed, or he may transmit it elsewhere. By exercising the power he may even give the appointees' creditors the benefit of it after his death. When property is held subject to such possibilities of disposition, is it usurpation or an unlawful interference with vested rights for the Legislature to say that the succession in possession and enjoyment is not yet determined, that it belongs to no one until it is determined, that the determination of it depends upon the will and conduct of the donee of the power, and that when it is determined by his conduct, either by action or by refraining from action, it shall be subject to a tax? We think it is in the power of the Legislature to say, in reference to succession in possession after the death of the persons whose decease is awaited, that property so held is not vested in anybody, and that when it vests in possession, through a proper disposition of it which is dependent upon the will and conduct of the donee, a succession tax shall be imposed. We think that *Chanler v. Kelsey*, ubi supra, looks in this direction, although it does not discuss this particular subject. The decision in *Moffit v. Kelly*, 218 U. S. 400, 31 Sup. Ct. 79, 54 L. Ed. 1036, published since the argument in the present case, is almost, if not quite, decisive of the question.

The decision to the contrary in the *Matter of Lansing*, 182 N. Y. 238, 74 N. E. 882, was by four of the judges, two others dissenting in a well-reasoned opinion. So the decision in the *Matter of Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679, which was afterwards affirmed by the Court of Appeals in 196 N. Y. 561, 90 N. E. 1157, without an opinion, was by three judges, while two others joined in a dissenting opinion.

We hold that the decree of the probate court was correct.

Decree of probate court affirmed.

(300 N. Y. 577)

CENTRAL TRUST CO. OF NEW YORK v. MORTON TRUST CO. et al.

(Court of Appeals of New York. Jan. 10, 1911.)

1. MUNICIPAL CORPORATIONS (§ 398*)—PUBLIC IMPROVEMENTS—DAMAGES—PERSONS ENTITLED—MORTGAGOR AND MORTGAGEE.

A mortgage of "all and singular, the corporate property, rights, powers, privileges and franchises," together with "all rights, contracts, easements and other rights or interests," of a railroad company, is broad enough to pass the company's right to compensation as the owner of property abutting a street on the change of grade thereof, awarded prior to default of the mortgagor and deposited with the trustee.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 953-955; Dec. Dig. § 398.*]

2. FRAUDULENT CONVEYANCES (§ 179*)—REMEDIES OF CREDITORS—PERSONS ENTITLED TO ATTACK VALIDITY—LESSEES.

Where a mortgage of railroad property is valid as between the parties, it is immaterial, in a contest between the mortgagor and its lessee, whether provisions of the mortgage passing choices in action would render the mortgage void as to creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 179.*]

3. MUNICIPAL CORPORATIONS (§ 398*)—PUBLIC IMPROVEMENTS—DAMAGES—PERSONS ENTITLED—LANDLORD OR TENANT.

A lease of railroad property, providing that the lessor grants to the lessee the control of the expenditure of moneys belonging to the lessor when the lease takes effect, which are in the treasury of the lessor, whether on deposit or otherwise, and of all rights of action for the collection of money and also all rights of action to enforce rights or privileges for the construction, maintenance, or operation of a railroad, which are necessary for such purposes, does not convey to the lessee the right to the principal of an award of damages on the change of grade of a street on which the lessor's property abuts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 953-955; Dec. Dig. § 398.*]

4. MUNICIPAL CORPORATIONS (§ 398*)—PUBLIC IMPROVEMENTS—DAMAGES—PERSONS ENTITLED—INTEREST.

Under a mortgage of railroad property, by which the mortgagor was entitled to the rents and income until default, a lessee of the mortgagor was entitled as against the mortgagee to interest on an award of damages on the change of grade of a street on which the property

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

abuttet, which interest had accrued at the date of default.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 953-955; Dec. Dig. § 398.*]

5. MUNICIPAL CORPORATIONS (§ 398*)—PUBLIC IMPROVEMENTS—DAMAGES—PERSONS ENTITLED—ESTOPPEL.

The default of a lessee of railroad property in complying with the terms of a mortgage, subject to which the lease was taken, and the surrender of the lease, does not estop the lessee from claiming interest accrued at the time of default on an award of damages on the change of grade of a street on which the property abutted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 398.*]

6. RECEIVERS (§ 171*)—SET-OFF.

The obligations of a lessee of a railroad under a mortgage, subject to which the lease was taken, which had not matured when receivers of the lessee were appointed, cannot be set off against the claim of the receivers for interest accrued at the time of default of the mortgagee, on an award of damages from the change of grade of a street on which the property abuts.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 171.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Central Trust Company of New York, as substituted trustee, etc., against the Morton Trust Company and others. From a judgment (118 N. Y. Supp. 1098) unanimously affirming a judgment for plaintiff, entered on the report of a referee, defendants Morton Trust Company and others appeal. Modified and affirmed.

Theodore W. Morris, Jr., for appellants. William H. Van Benschoten and Herbert J. Bickford, for respondents.

CULLEN, C. J. In 1893 the city of New York began, and in 1898 completed, the construction of a new bridge across the Harlem river at Third avenue. This bridge was constructed at a greater elevation than the old bridge, and the statutes which authorized the work (Laws 1892, c. 413; Laws 1896, c. 716) provided for awarding compensation to the owners of land fronting on the avenue for damage occasioned by the change of grade. During this period the defendant the Third Avenue Railroad Company was the owner of a tract of land abutting on Third avenue. In 1900 the Third Avenue Railroad Company executed a mortgage of all its property to the Morton Trust Company as trustee to secure the payment of an issue of bonds, and subsequently the plaintiff was appointed trustee under said mortgage in the place of the original trustee. About the same time it leased all its property to the Metropolitan Street Railway Company for the term of 999 years subject to the provisions of said mortgage. An award having been made to the Third Avenue Company for damage done by the construction of the new bridge in September, 1907, the comptroller

of the city of New York paid the amount of the award and the interest accumulated thereon to the Third Avenue Company by which it was deposited in the defendant the Morton Trust Company. Out of this fund the legal expenses of securing the award were first deducted, and of this no complaint is made by any party. The amount of such deposit less the deduction aforesaid was \$105,469.10. The lessee the Metropolitan Street Railway Company having become insolvent, the appellants Joline and Robinson were on the 24th day of September, 1907, in a creditor's action in the Circuit Court of the United States, appointed receivers of all the property of said company. On the 13th of October the Metropolitan Company defaulted in the payment of the rent reserved in the lease from the Third Avenue Company, and subsequently the receivers Joline and Robinson threw up the lease and returned to the Third Avenue Company (or to its receivers, that company having also become insolvent, and the plaintiff having commenced the foreclosure of its mortgage) the leased property. On December 31, 1907, the plaintiff instituted this action against the Third Avenue Company to recover the fund on deposit, claiming it by virtue of the mortgage. In January, 1908, the appellants Joline and Robinson were permitted to intervene in the action, claiming the fund by virtue of the terms of the lease. The action was referred, and the learned referee awarded the whole fund, principal and interest, to the plaintiff. Judgment on that report has been affirmed by the Appellate Division, and an appeal is now taken to this court by the receivers of the Metropolitan Company; the Third Avenue Company having taken no appeal from the original judgment.

To sustain their claim the appellants must establish two propositions: First, that the fund was not included within the mortgage; second, that by the lease title to it was vested in the lessee; otherwise, even if the fund or the claim out of which it arose was not included within the mortgage, the appellants have no right to it. We think the appellants failed on each of these propositions. Both instruments, the mortgage and the lease, are of exceptional length, and it would be impossible to present a full analysis of their various provisions within the reasonable limits of an opinion. Therefore we are confined to briefly stating our conclusions and the salient reasons therefor. The mortgage in the broadest language possible sells, conveys, and assigns unto the mortgagee, "all and singular, the corporate property, rights, powers, privileges and franchises" of the mortgagor, together with "all rights, contracts, easements, and other rights or interests; * * * but the particular description of real and personal property herein

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contained shall not be construed to exclude any other property which now belongs to or which may hereafter be acquired by the railroad company." The language is broad enough to include all property of every kind owned by the mortgagor at the time. As the Third Avenue Company's right to compensation by the city was not for any land taken, but solely the creature of the statute resting on equitable obligations, it may be, as held by the referee, that the claim for an award was a mere chose in action not appurtenant to the land. Assuming such to be its character, that fact would not tend to withdraw it from the broad general language of the mortgage, for a large portion of the mortgaged property were mere choses in action, claims by the Third Avenue Railroad Company against its subsidiary companies for work done in their improvement and betterment, as to dealing with which both by the mortgagee and by the lessee express provisions are made in the mortgage. Nor is it necessary to consider whether certain provisions of the mortgage would render the mortgage, so far as it covered choses in action, void as to creditors of the Third Avenue Company. The mortgage was good between the parties. The lessee acquired only the rights of the lessor, and the appellants represent only the creditors of the lessee, not those of the lessor.

The granting clause of the lease demised to the lessee all the property of the lessor in as broad terms as those of the mortgage. Of course this demise would not transfer the corpus of the property to the lessee, but only its usufruct during the demised term. The appellants' claim to the principal of the fund is based on another provision of the lease. This provision following the enumeration of the demised property is: "Subject to the conditions of this agreement the said party of the first part doth also hereby grant to the party of the second part the control of the expenditure of the moneys belonging to the party of the first part at the time of the taking effect of this lease, which are in the treasury of the party of the first part, whether on deposit or otherwise, and of all rights of action for the collection of money, and also all rights of action for the enforcement of rights or privileges for the construction, maintenance or operation of a railroad which are proper or essential to such construction, maintenance or operation." It is contended that the right to control the expenditure was a grant of the money itself. We do not think so. If it were intended to transfer absolutely to the lessee all moneys that might be recovered on claims or choses in action held by the lessor, in other words, to make a present sale of such, it was very easy to say so, and the parties knew well how to express such an intention, as is found in other parts of the lease where certain property is conveyed absolutely to the lessee, not demised. It is urged that by the lease

the lessee guaranteed the payment of all the debts of the lessor, including all its mortgaged bonds. But the lessee did not expect to pay them out of its own property, for express provision is made for the issue of new bonds on the lessor's property to meet those that might mature. It is evident from reading the whole instrument that the lessor did not intend to part with the corpus or principal of its property except in particular cases where it used apt terms for the purpose, but to give the lessee the right to enjoy the use thereof as long as it complied with the conditions of the lease. Consistent with the general design and object of the instrument, the right to control the expenditure of the money realized on choses in action should be limited to the application of such moneys for the benefit or improvement of the demised property.

These views dispose of the claim of the appellants to the principal of the fund on deposit, but we think the courts below erred in failing to award to the lessee the interest accrued prior to its default. Under the terms of the mortgage the mortgagor was entitled to the rents and income of the property until default was made in complying with the requirements of the mortgage, and under that provision the income of this fund prior to default would not pass under the mortgage, even though the mortgage purported to convey the income and profits of the mortgaged property. *N. Y. Security & Trust Company v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132. As the mortgagor was entitled to this interest against the mortgagee, so also was its lessee. The theory on which the appellants have been denied the accrued interest is that the subsequent default of the lessee and action by the receivers in surrendering the lease estopped them from claiming title to anything under the lease. We think that this contention is incorrect. Under the construction we have given these instruments, had the Metropolitan Company not become insolvent, but continued to hold the Third Avenue property under the lease when this payment was made by the city, the lessor company or the mortgagee would have been entitled to the principal, or at least its application to the corpus of the demised property; but the lessee, by virtue of the lease, would have been entitled to so much of the deposit as represented accrued interest. It could have maintained an action at law against its lessor to recover that money. Had it then been in default, its obligations to the lessor would have been a good offset; but the difficulty is that at the time of the appointment of the appellants as receivers the obligations of the lessee had not matured, and it is the settled law of this state (though the rule is different under the federal bankrupt act) that against a receiver or assignee obligations of the assignor not matured cannot be set off against demands in favor of

the assignor or insolvent. *Fera v. Wickham*, 135 N. Y. 223, 31 N. E. 1028, 17 L. R. A. 456.

The judgment entered on the report of the referee and that of the Appellate Division should be modified so as to award the appellants that portion of the fund deposited which was for accrued interest on the award, and as so modified affirmed, without costs to either party. If the counsel can agree on the amount of such interest, reduction may be made by the order of this court; otherwise it will be remitted to Special Term for that purpose.

HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment accordingly.

(200 N. Y. 374)

TAVSHANJIAN et al. v. ABBOTT et al.
(Court of Appeals of New York. Jan. 10, 1911.)

DESCENT AND DISTRIBUTION (§ 47*)—PERSONS ENTITLED TO INHERIT—OPERATION OF WILL.

Under Rev. St. (5th Ed.) pt. 2, c. 6, tit. 1, art. 3, § 49, as amended by Laws 1869, c. 22, § 1, providing that whenever a testator shall have a child born after the making of a will, either in his lifetime or after his death, and shall leave the child unprovided for and unmentioned in the will, the child shall receive the same portion of the testator's estate as would have descended or been distributed to such child if the parent had died intestate, where a will executed before the birth of children to testator contained no reference to after-born children, and the only reference in a provision after the birth of a son, who died before testator, was in the provision that, in the event of the death of testator, his wife and child or children at one and the same time, the legatees should receive double the amount named, etc., children born after the execution of the codicil are entitled to take as if there had been no will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 128; Dec. Dig. § 47.*]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Arax H. Tavshanjian and others against Harrison B. Abbott and others. From a judgment (130 App. Div. 863, 115 N. Y. Supp. 938) for plaintiffs, defendants appeal. Affirmed.

Charles W. Sinnott, for appellants. George S. Kebabian and Edwin C. Dusenbury, for respondents.

GRAY, J. This appeal presents the question whether children, born after the making by their father of a will, which gave all of his estate to certain other designated persons, shall, upon his death, nevertheless, be entitled to such shares therein as would have been theirs had he died intestate. The

testator, whose will has been judicially construed, died in 1907. In 1895 he had made a will, which, after making numerous bequests to relatives and for charitable purposes, and, among them, one to his wife of \$50,000, in lieu of dower, gave to her the residue of his real and personal estate. At the time of the execution of the will, he was married and had no child. Subsequently, a son was born, and thereafter he executed a codicil, which, after revoking certain legacies in the will and making some changes, immaterial here, gave to the son a legacy of \$50,000 and provided as follows: "Ninth. In the event of the death of myself, wife and child or children at one and the same time, through some accident or otherwise, I direct my executors to give to each and every one of my legatees double the amounts each and every one of my legatees would have received under natural circumstances, and in that event I give, devise and bequeath all the rest, residue and remainder to the Armenian Hospital of the St. Saviour, in Constantinople, Turkey, absolutely." In this clause occurs the only mention by the testator in will, or codicil, of the words "child" or "children." After the execution of the codicil, this son died, and two daughters were born, who survived the testator. The testator then died, and the courts below have held that the daughters were entitled to receive from the legatees, proportionately, so much of the legacies as would give them two-thirds of the personal estate of the father, and, if the widow accepts the bequest of \$50,000 in lieu of dower, to take all of the real estate, but, otherwise, subject to her dower right.

The statute, whose provisions have been held to cover the case of the children born after the making of the will, reads: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." Rev. St. (5th Ed.) pt. 2, c. 6, tit. 1, art. 3, § 49, as amended by Laws 1869, c. 22, § 1.

What difficulty may arise in the application of the statute is in the meaning to be given to the language "neither provided for, nor in any way mentioned in such will." These after-born children are not provided for, and if they are not mentioned, in the sense that their birth is referred to by the

testator as an event comprehended within his testamentary provisions, then they will take their proportionate share of his estate. They would take under the provisions of the statute and not subject to any of the provisions of the will. *Smith v. Robertson*, 89 N. Y. 555. Is it possible to read, in a provision of the will, which "in the event of the death of myself (the testator), wife and children at one and the same time, through some accident, or otherwise," doubles the bequests and gives the residue to a hospital, an intent not to provide for after-born children? I think not. The mention of children is not such as to convey any idea of a purpose not to provide for those who might be born thereafter. We have approved of a construction of the statute that "it is not sufficient that the will should show that the testator had in mind the possibility of children born after the making of the will. The child will take, unless it is mentioned in some way, or included in some class that is mentioned." *Stachelberg v. Stachelberg*, 124 App. Div. 232, 234, 108 N. Y. Supp. 645, 646, affirmed on the opinion below 192 N. Y. 576, 85 N. E. 1116. This testator was contemplating the possibility of some disaster terminating the lives of his family simultaneously, and it is quite plain that it was not the birth thereafter of children, which was in his mind, nor a provision, which was to exclude them from any share of his estate. The statutory provision was derived from a rule of the civil law, which, upon the subsequent birth of a child, unnoticed in the will, annulled the will. It is based upon the strong presumption of an oversight, or an unintentional neglect of the testator to provide for those who have a natural and moral claim to a provision for their support out of their father's property. It was not intended to contravene the policy of our law to give to every one, competent to make a will, the right absolutely to control the disposition of his estate; it was intended to provide a rule, by which an intent to disinherit must appear from the will itself. *Brush v. Wilkins*, 4 Johns. Ch. 506. As it was said by the chancellor in *Brush v. Wilkins*, so it may be said here, that, if this will was to prevail, it would be the case of the testator's only children left destitute and without any provision, under a will of a man of large fortune disposing of his whole estate.

If there were any doubt as to the construction to be given to this will, it should be resolved in favor of the testator's children, upon the soundest principles of justice. I think that no doubt does arise, upon a fair consideration of the will, and that there is nothing to suggest an intention not to make provision for unborn children.

The judgment below was right, and it should be affirmed, with costs to all par-

ties appearing by counsel, to be paid out of the estate.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment affirmed.

(200 N. Y. 253)

CARY v. KOENER et al.

(Court of Appeals of New York. Dec. 16, 1910.)

1. LIMITATION OF ACTIONS (§ 19*)—TAX SALE CERTIFICATES—RIGHTS OF HOLDER.

A suit by the holder of a Buffalo tax sale certificate to obtain actual possession of the premises by an action at law, authorized by Buffalo City Charter (Laws 1891, c. 106) § 112, may be brought within 20 years from accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73-85; Dec. Dig. § 19.*]

2. MUNICIPAL CORPORATIONS (§ 981*)—TAX SALE CERTIFICATES—FORECLOSING RIGHT OF REDEMPTION.

In a suit under Laws 1909, c. 384, to foreclose a Buffalo tax sale certificate, the holder can recover the amount for which the property sold, which may exceed the tax; the certificate not merely transferring the city's lien.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2137; Dec. Dig. § 981.*]

3. MUNICIPAL CORPORATIONS (§ 981*)—TAX SALE CERTIFICATES—FORECLOSURE OF RIGHT OF REDEMPTION.

That under Buffalo City Charter (Laws 1891, c. 106) § 106, the city of Buffalo's lien for taxes and assessments expires in 10 years, does not affect a tax sale certificate holder's right to sue thereon under Act 1909, c. 384.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2137; Dec. Dig. § 981.*]

4. LIMITATION OF ACTIONS (§ 58*)—CONSTRUCTION OF STATUTES.

A statutory right of action cannot be deemed to have accrued before the statute took effect.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328; Dec. Dig. § 58.*]

5. LIMITATION OF ACTIONS (§ 43*)—ACCRUAL OF RIGHT OF ACTION.

The time when a cause of action has accrued within the statutes of limitation means the time when plaintiff first became entitled to sue.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 217-219; Dec. Dig. § 43.*]

6. LIMITATION OF ACTIONS (§§ 34, 39*)—TAX SALE CERTIFICATES—FORECLOSURE—LIMITATIONS.

Neither the 6-year limitation prescribed by Code Civ. Proc. § 382, subd. 2, for suits on statutory liability, nor the 10-year limitation prescribed by section 388 for suits not otherwise provided for, applies to suit, under Laws 1909, c. 384, to foreclose a Buffalo tax sale certificate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151-157, 190-211; Dec. Dig. §§ 34, 39.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Thomas Cary against Hazel M. Koener, individually and as Charles D. Marshall's administratrix, and others. From an order of the Fourth Appellate Division (139 App. Div. 811, 124 N. Y. Supp. 501), reversing an interlocutory judgment, defendant Koener appeals, and a question is certified. Order affirmed, and question answered.

See, also, 124 N. Y. Supp. 1112.

The Appellate Division certified the following question to this court: "Are the defenses consisting of new matter contained in the answer of the defendant Hazel M. Koener, individually and as administratrix, etc., and to which the plaintiff has demurred, insufficient in law upon the face thereof?"

Adolph Rebadow, for appellant. W. H. Cuddeback, for respondent. Clark H. Hammond, for the city of Buffalo in support of the order appealed from.

WILLARD BARTLETT, J. The plaintiff is the assignee of a certificate of the tax sale of certain lands in the city of Buffalo, which certificate was made and delivered to one Walter Cary on May 26, 1898, by the comptroller of the city, and certified that the sale had been made for taxes and assessments upon said lands contained in the general tax rolls of the city for the year 1897, returned by the treasurer to the comptroller as being unpaid. None of the lands were redeemed, and the plaintiff elected to recover the amount paid therefor, to wit, \$139.36, together with interest thereon from May 26, 1898, at the rate of 12 per cent. per annum. The plaintiff thereupon commenced this action on June 21, 1900, against the appellant Hazel M. Koener, individually and as administratrix, and against other defendants alleged to claim or have some interest in the premises, praying judgment that the defendants and each of them and all persons claiming under them be barred and foreclosed of all right, title, interest, claim, lien, and equity of redemption in the said lands, and that the same be sold under the direction of the court and the plaintiff recover the amount paid on the purchase thereof as mentioned in the certificate of sale with all interest, additions, and expenses allowed by law.

The complaint contained eight causes of action. The dates of sale were, respectively, as follows: May 26, 1898; May 28, 1897; May 28, 1896; May 28, 1895; May 29, 1894; May 26, 1893; May 27, 1892; April 29, 1891.

The defendant Hazel M. Koener, individually and as administratrix of Charles D. Marshall, deceased, interposed an answer setting up an affirmative defense to the first cause of action to the effect that all taxes and assessments in the city of Buffalo are a lien upon the land upon which they are assessed for only 10 years from the delivery of the tax or assessment roll to the treasurer of the city and the first publication of notice

of receipt of the same; that the tax or assessment roll which contained the general city tax of 1897 was delivered to the city treasurer, and the first publication of notice of receipt of the same was made more than 10 years before the commencement of this action, and hence said taxes had ceased to be liens at the time when the action was commenced; and that the cause of action stated in the complaint did not accrue within 10 years or even within 6 years before the commencement of the action, and was, therefore, barred by the statute of limitations. The same defense was set up as to each of the other seven causes of action.

The plaintiff demurred to each of these defenses, contending that a cause of action arising upon a Buffalo tax sale certificate falls within the 20-year statute of limitations relative to actions to recover real property. The demurrer was overruled at Special Term, and an interlocutory judgment rendered accordingly; but this interlocutory judgment has been reversed by the Appellate Division which sustained the demurrer, thus pronouncing the defense insufficient. We are now called upon to pass on its sufficiency.

The respondent's contention that the purchaser at a tax sale of lands in Buffalo has 20 years from the time when his cause of action accrues within which to enforce his rights is based upon section 112 of the city charter (Laws 1891, c. 105). That section provides for the payment of the bids upon a tax sale within 48 hours, and prescribes the contents of the certificate to be executed by the comptroller to each purchaser. "Such purchaser or his legal representatives or assigns, may, upon receiving such certificate, by virtue thereof and of this act, lawfully hold and enjoy for his and their own proper use and benefit and the use and benefit of his and their heirs and assigns forever, the real estate described in said certificate, unless the same shall be redeemed as hereinafter provided." The section then goes on to provide that at any time after the time limited in section 114 for the redemption of the premises shall have expired, and the notice therein provided for has been given and the premises have not been redeemed, and not before, the purchaser and his heirs and assigns may "obtain actual possession of the premises by an action at law" or by proceedings, as in the case of a tenant holding over after the expiration of his term without the permission of his landlord.

According to the respondent the right to which this section of the charter gives the purchaser to obtain actual possession of the premises by an action at law must mean the right to obtain possession through the agency of an ejectment suit. He makes the 20-year statute of limitations begin to run at the earliest date when the owner's right of redemption may be cut off. The subject of redemption is dealt with in section 114 of the

city charter, which provides that the owner of any real estate sold for taxes as aforesaid may redeem the same at any time within 18 months (made 9 months by chapter 280, section 3, Laws 1898) after the date of the sale. Notice shall be given by the purchaser to the occupant at any time after the expiration of that period, but the last day of redemption, to be specified in the notice, must be not less than three months from the day of its service, "nor prior to two years from the date of such sale." Thus the earliest day on which the right of redemption can be cut off is two years from the sale, and the respondent concedes and asserts that the purchaser's cause of action in ejectment then accrues whether a notice to redeem is served or not. He also concedes that a notice to redeem is a condition precedent to the maintenance of the action of ejectment.

Where a purchaser or his assignee is suing to "obtain actual possession of the premises by an action at law" under section 112 of the charter of the city of Buffalo, I see no escape from the conclusion that he is in time if he brings his suit within 20 years from the time when the cause of action accrues. But the present suit is not such an action. It is a statutory suit, authorized by chapter 384 of the Laws of 1909, in the nature of an action to foreclose a mortgage, in which the plaintiff seeks a sale of the land described in the tax sale certificates which he holds and the application of the proceeds to the payment of the amount paid on the purchase of such land, together with interest and costs. The statute under which it is brought, as expressly appears from its title, was designed to amend the charter of the city of Buffalo "by providing an additional remedy for purchasers of land within the city at city and county tax sales." The act provides that the holder, including the city, of any certificate of sale heretofore or hereafter executed by the comptroller, instead of taking a conveyance of the property purchased, may recover the amount paid therefor, as in such certificate mentioned, with all interest, additions and expenses allowed by law, and for that purpose may maintain an action in the Supreme Court, or in the county court of Erie county, to sell such real property.

The action may be commenced at any time after five years from the date of the sale mentioned in the certificate, and is made subject to all the provisions of law and rules of practice relating to mortgage foreclosure suits so far as practicable. The plaintiff must make parties to the action the city of Buffalo, the county of Erie, the owner of the real property affected and all other persons interested therein, or any part thereof, including the holders of all other prior and subsequent certificates of sale as shown by the records of the comptroller and county treasurer. "The court shall have full power to determine and enforce in all respects the

rights, claims and demands of the several parties to said action, including the rights, claims and demands of the defendants as between themselves, to direct a sale of such real property and the distribution or other disposition of the proceeds of sale." Laws 1909, c. 384, § 115e.

It is obvious that the remedy thus provided for is very different from the "action at law" which a certificate holder is authorized to institute by section 119 of the charter. An action at law under section 112 contemplates the acquisition of the land itself. It is to "obtain actual possession of the premises" that he may bring the action. An equity suit under the act of 1909 contemplates a disposition of the land to others. The certificate holder brings his action under the act of 1909 "to sell such real property," and get the purchase price back out of the proceeds. The first remedy is legal, corresponding to an action of ejectment; the second remedy is equitable, being virtually a suit to satisfy charges on land by selling the premises.

The charges for which the land may be sold, however, under the act of 1909, include something more than the city's lien for taxes. In the suit which that act authorizes the plaintiff may recover not merely the amount of the tax but the amount which the property sold for at the tax sale, which may be in excess of the tax. It is not a correct view, therefore, as argued in behalf of the appellant, that a tax sale certificate in Buffalo simply transfers or assigns to the purchaser the lien of the municipality. Since the enactment of chapter 384 of the Laws of 1909, such a certificate confers upon the holder the right, after the lapse of five years from the sale, to recover the amount paid for the property purchased and to have the land sold under the direction of the court in order to procure the means of payment. The fact that the city's lien for taxes and assessments is only ten years from the delivery of the tax or assessment roll to the treasurer and the first publication of notice of the receipt of the same (Laws 1891, c. 105, § 106) does not affect the duration of the statutory right to sue in equity conferred upon a certificate holder by the act of 1909. It is that right which the plaintiff is endeavoring to enforce in the present action; and the question is whether the new matter set up in the answer constitutes a defense to his claim. As has been stated it is substantially a plea of (1) the 6-year and (2) the 10-year statute of limitations. Is either of these limitations a bar to the maintenance of an action brought under chapter 384 of the Laws of 1909?

Where the right to maintain an action is conferred upon an individual or class of persons by statute it is impossible that the cause of action shall be deemed to have accrued in favor of such individual or class at any period prior to the date when the statute took

effect. The time when "the cause of action has accrued," as that term is used in those provisions of the Code of Civil Procedure limiting the periods within which actions must be commenced, means the time when the plaintiff first became enabled to maintain the particular action in question. Chapter 384 of the Laws of 1909, under which the present action is brought, took effect on May 18, 1909. See Sess. Laws 1909, vol. 1, pp. 813, 815. That was the earliest date, therefore, under which a cause of action thereunder could accrue in behalf of the holder of a certificate of a Buffalo tax sale. It was only a month and three days before the commencement of this suit. Obviously, therefore, neither 6 years nor 10 years could possibly have elapsed since the plaintiff's cause of action accrued, and it is immaterial to inquire which limitation is applicable to such an action, inasmuch as it cannot affect our determination of the present appeal. The theory on which the six-year limitation is supported is that the action is one to recover upon a liability created by statute. Code Civ. Proc. § 382, subd. 2. If this does not apply, then it is contended that the case must fall within the general limitation of 10 years applicable to all actions, the limitation of which is not specifically prescribed in the Code. Code Civ. Proc. § 388. However this may be, as no cause of action could accrue under chapter 384 of the Laws of 1909 until the 18th day of May in that year, when it was enacted, neither provision constitutes a bar to the maintenance of this suit.

The order of the Appellate Division should be affirmed, with costs, and the question certified answered in the affirmative.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and CHASE, JJ., concur. GRAY, J., not voting.

Order affirmed.

(200 N. Y. 303.)

PEOPLE v. MONAT.

(Court of Appeals of New York. Jan. 3, 1911.)

1. HOMICIDE (§ 308*) — INSTRUCTIONS — DEGREES.

In a prosecution for murder, where the defendant entered a building and struck down his victim with a piece of iron, and beat the victim's wife into unconsciousness, the court having instructed as to murder in the first and second degrees, and the verdict being for murder in the first degree, it was not error to fail to instruct as to a lesser degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 642-648; Dec. Dig. § 308.*]

2. HOMICIDE (§ 18*) — DEGREES — COMMISSION OF ACT WHILE COMMITTING FELONY.

A conviction of a lesser degree than murder in the first degree is not justified where the killing occurred while accused was engaged in the commission of a felony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 24-31; Dec. Dig. § 18.*]

3. CRIMINAL LAW (§ 1174*)—HARMLESS ERROR—TAKING PAPERS TO JURY ROOM.

It was not prejudicial error to allow the jury at its request to take a portion of the charge, written out for that purpose, to the jury room.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3176; Dec. Dig. § 1174.*]

4. CRIMINAL LAW (§ 470*) — OPINION EVIDENCE—MATTERS FOR JURY.

A medical expert having in answer to a complete hypothetical question stated that accused was not insane when he committed the crime, a further question "Now, Doctor, assuming the aforesaid to be true and taking into consideration the oral and physical examination of the defendant which you have already testified to, are such assumed facts inconsistent with the sanity of the defendant on day of the murder," was not objectionable as calling for an expression of opinion as to a matter which it was the province of the jury to determine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1059; Dec. Dig. § 470.*]

5. CRIMINAL LAW (§ 354*)—WITNESSES (§ 379*) CONFESSIONS—USE AS EVIDENCE.

A confession by defendant of the commission of other offenses of like character was admissible on the question of accused's mental condition and to affect his credibility, especially where he testified that he was unable to remember the confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 760; Dec. Dig. § 354; Witnesses, Cent. Dig. § 1249; Dec. Dig. § 379.*]

6. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence is not ground for reversal of a conviction for murder where substantially the same evidence has been otherwise admitted without objection, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

Appeal from Supreme Court, Trial Term, Dutchess County.

Napoleon Monat was convicted of murder in the first degree, and he appeals. Affirmed.

John F. Ringwood, for appellant. John E. Mack, for the People.

HISCOCK, J. The defendant has been convicted of the crime of murder in the first degree because he killed one Kliff early in the morning of January 24, 1909, in the latter's restaurant. The theory of the prosecution in brief was and is that defendant and one Conrow, who were coemployes on a railroad, formed a scheme to rob the deceased of several hundred dollars, which he was known to keep in his house; that in pursuance of this scheme on the morning in question the defendant went to Kliff's house, wherein was a store or saloon, and struck down Kliff with a piece of iron, causing injuries from which he soon died, beat his wife into unconsciousness, and then ransacked their sleeping room and obtained the desired money. On the trial, in addition to the general issue raised by defendant's plea of not guilty, the special issue of insanity was tried, although we are not able to find that it was pleaded.

It does not seem necessary or desirable to enter into any extended review of the evidence in this case in announcing our conclusion that the judgment appealed from should be affirmed. The testimony, consisting of defendant's confessions and of proof of independent facts corroborating those confessions at many important points, leaves no reasonable doubt whatever that the defendant committed the act with which he is charged. In fact, neither on the trial nor on the argument of this appeal was it seriously contended that he did not kill Kliff at the time and place charged. The burden of his defense was that he was either afflicted with permanent mental irresponsibility or that as a result of drugs and intoxicating liquors he was temporarily rendered incapable of appreciating what he was doing. On these latter issues again, without recapitulating the evidence, it may be stated that the jury were fully justified in rejecting his claims and in holding him responsible for what he did.

This leaves us simply to discuss briefly such legal questions arising in the course of the trial as are urged on our attention by counsel and seem to require any consideration whatever. Scarcely any of these questions are presented by any proper exception taken on the trial, but nevertheless we have given them the same examination as though proper exceptions had been taken.

It is claimed that the court by its instructions compelled the jury to find the defendant either guilty of murder in the first or second degree or else to acquit him, and thus left them no option to find him guilty of an offense of a lesser degree.

The trial judge, with perfect accuracy and clearness, defined the ordinary cases of murder in the first and second degrees where the killing is committed with a design to effect death, and is or is not the result of deliberation and premeditation, and also the crime of murder in the first degree when the killing is effected without design to cause death by a person engaged in the commission of or in an attempt to commit a felony. He also with equal clearness and accuracy defined to the jury the insanity or defect of reason which would excuse the defendant from legal responsibility for killing Kliff, and also instructed them as to the effect which intoxication would have as bearing on the purpose, motive or intent of defendant if he was found to have committed the acts charged against him while in that condition. No exception was taken to the charge as made on these points, and no request was made for further instructions on any of them. As suggested, however, counsel for the defendant now claims that by confining his instructions to those phases of the case which have been mentioned the trial judge may have prevented the jury from finding the defendant guilty of an offense of a lesser degree, and thereby committed error.

The answer to this contention is twofold. The instructions given to the jury were the only logical ones suggested by all of the evidence in the case if the defendant killed Kliff, and while, of course, the jury had the legal right to convict the defendant of some lesser crime than was fixed on him by the verdict, his counsel, if he thought that any such view was permitted by the evidence, should have called the attention of the court to it and specifically requested charges on the line now urged by him. As a matter of fact, the only request which he did make was that the jury might find his client guilty of murder in the first or second degree. The second and quite conclusive answer, however, to this argument, is that the jury were specifically permitted to find the defendant guilty of murder in the second degree, and inasmuch as they did not avail themselves of this permission, but instead found him guilty of murder in the first degree, it is not to be apprehended that they would have found him guilty of some offense less serious than murder in the second degree under the ordinary definitions applicable to this case even if they had been specifically instructed that they might so do. So far as concerns the killing of a human being by one engaged in the commission of a felony, conviction in a lesser degree than murder in the first degree is not justified. *People v. Schielman*, 197 N. Y. 383, 90 N. E. 950, 27 L. R. A. (N. S.) 1075.

Further complaint is made because the trial judge on the request of the jury permitted part of his charge to be written out and to be taken by the jury with them into their room. This was done in response to the specific request of the jury after they had been deliberating for some time and only after submission of this written portion to counsel both for the people and the defendant and without any objection whatever on their part. We are unable to see where any error was committed or legal injury inflicted on the defendant by this course. The jury had received the general and complete instructions of the court and had retired for deliberation. Thereafter they returned to the court and requested not only additional instructions, but also that a certain portion of the charge should be written out so as to enable them to give more careful and complete consideration thereto. At the time they made this request, it is to be assumed that their deliberations had led them to select this specific portion of the charge as especially applicable to the views which were prevailing in their minds; and personally I see no reason why as a matter of convenience the court could not cause to be written out for them a portion of the charge, so as to secure greater accuracy in their consideration and appreciation of it. But, however this may be as a general proposition, there was nothing erroneous in what was submitted to them, and

this submission was made with the acquiescence of the counsel for the defendant, and, under those circumstances, certainly no error was committed.

Of the errors alleged to have been committed in the admission of evidence, it is only necessary briefly to consider a very few.

The complaint in regard to the admission of defendant's confessions as reduced to writing by the witness Graham is fully answered by the decision of this court in *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978.

One of the medical experts called by the people had described with great detail what was said and done on the occasion of an examination of the defendant by the witness and two other medical experts. Then, in answer to an hypothetical question which embodied various facts concerning the defendant which the evidence tended to establish, and also the above observations of the witness as detailed by him, he stated that in his opinion the defendant was sane on the date of the alleged murder. Counsel for the people then framed a question embodying a description of various alleged irrational acts on the part of the defendant which his evidence tended to establish, and asked, "Now, Doctor, assuming the aforesaid to be true and taking into consideration the oral and physical examination of the defendant which you have already testified to, are such assumed facts inconsistent with the sanity of the defendant on the 24th day of January, 1909?" This was objected to on the ground, amongst others, that the question presented was one for the jury. Of course, the question was one for the jury, but as it seems to us the people had a right to call on this witness as an expert to state whether these acts, even if they occurred, were inconsistent with or modified his opinion as to the sanity of the defendant. That was the real purpose and result of the question and answer as more fully appears by the continuation of the examination.

One of the defendant's alleged confessions was claimed to have been made to a chief of police. As part of the people's case this witness was allowed to testify to what defendant had told him concerning the commission of the crime here involved. He testified that this confession had been reduced to writing and signed by the defendant, and without objection, which raised the question now under discussion, said written confession was received in evidence. Although his oral testimony did not cover that subject, the written confession contained admissions that defendant prior to the commission of this crime had formed a scheme with the same Conrow already mentioned to rob a station agent, and had only been diverted from the consum-

mation of this purpose by accident; that he had climbed into a house and stolen some money. After the defendant had taken the stand and testified that he was entirely unable to remember whether he had made confession to this witness, and also unable to tell whether he had intended to rob the station agent, and whether he had climbed into the house and stolen the money, and on rebuttal, the chief of police was permitted over defendant's objections to tell of defendant's admissions to him concerning the two transactions last mentioned. The court overruled the objections and took the evidence "on the mental condition, and also the defendant's veracity, that he had no recollection of what was said and done at the interview with the chief." Likewise, in his charge the court instructed the jury that these transactions could not in any way be made the basis of convicting him in this case, and that evidence of them was only to be considered as bearing on the question of defendant's credibility and in so far as they related to his mental condition at the time he was in jail and was said to have made the statements.

While I am inclined to think that the district attorney in recalling the chief of police and bringing in this evidence of the alleged confession of other alleged misdeeds by the defendant had another purpose than that defined by the court and incurred unnecessary risks, I do not feel that under any view any such error was committed on the part of the court or any such injury done to the defendant as requires us to reverse the judgment. Possibly the evidence of everything which the defendant said on the occasion in question was permissible as bearing on his mental condition in view of his denial on the stand that he could remember anything which occurred. Moreover, as already has been pointed out, his written confession, covering substantially everything that was testified to by the chief of police when last recalled, was already in evidence without proper objection and presumably before the jury for consideration. But, furthermore and lastly, in view of the general merits of this case and of the evidence of defendant's prior misdeeds, we cannot feel that this evidence, even if technically objectionable, substantially influenced the jury in finding the verdict which was rendered against him.

For these reasons we think that the judgment must be affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, CHASE, and COLLIN, JJ., concur.

Judgment affirmed.

(200 N. Y. 299.)

SMITH v. DOTTERWEICH.

(Court of Appeals of New York. Jan. 8, 1911.)

1. APPEAL AND ERROR (§ 927*)—REVIEW—PRESUMPTIONS—INFERENCES FROM EVIDENCE.

A party against whom a verdict has been directed is entitled on appeal to the most favorable inferences from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.*]

2. BILLS AND NOTES (§ 537*)—ACTION—CONDITION SUBSEQUENT.

If an oral agreement made at the making of a note amounts to a condition subsequent, the construction of the note is for the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871; Dec. Dig. § 537.*]

3. BILLS AND NOTES (§ 537*)—ACTIONS—CONDITION PRECEDENT—QUESTION FOR JURY.

Whether notes were given payable only on the performance of a condition precedent *held*, on the evidence, a question for the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1871, 1874; Dec. Dig. § 537.*]

4. EVIDENCE (§ 444*)—PAROL EVIDENCE AFFECTING WRITINGS—SEPARATE ORAL AGREEMENT—CONDITION PRECEDENT TO OBLIGATION IN WRITING—NOTE.

Parol evidence to show that a note was given payable only on the performance of a condition precedent is competent, since it is not evidence to contradict or change the written instrument, but evidence tending to show that a writing purporting to be a contract is in fact no contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944; Dec. Dig. § 444.*]

5. EVIDENCE (§ 397*)—PAROL EVIDENCE AFFECTING WRITINGS—CONTRACTS.

Though parol evidence tends to establish the existence of a written contract, if it is designed to contradict and change the contract, it is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.*]

6. BILLS AND NOTES (§ 64*)—REQUISITES—DELIVERY—CONDITIONAL DELIVERY.

The effect of delivery and the extent of the operation of an instrument not under seal as a negotiable note may be limited, as between the parties to it or others having notice, by the condition upon which delivery is made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 104; Dec. Dig. § 64.*]

7. EVIDENCE (§ 432*)—PAROL EVIDENCE—INVALIDITY OF WRITTEN INSTRUMENT—CONSIDERATION.

As between the original parties and others having notice, the want of consideration in a contract may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981-1989; Dec. Dig. § 432.*]

8. INSURANCE (§ 187*)—PREMIUM NOTES—DEFENSES—CONDITION PRECEDENT.

Where a note for a premium was made and delivered to the general agent of an insurance company on oral agreement and understanding that the policy would not be taken or have any effect, nor the note be binding, unless the agent secured a loan for the maker, the securing of the loan is a condition precedent, and, in an action on notes given in renewal of the original note, the maker on proof of nonperformance of the condition is not liable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 390-401; Dec. Dig. § 187.*]

9. EVIDENCE (§ 444*)—PAROL EVIDENCE AFFECTING WRITING—GROUNDS FOR ADMISSION OF EXTRINSIC EVIDENCE.

Where a premium note delivered to the general agent of an insurance company on condition that the agent should procure a loan for the maker is split up and renewed by several notes given to an insurance broker, who had aided the general agent in negotiating the original note, evidence of what took place at the renewal of the notes is competent, as tending to show that the renewal notes were affected by the same condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1943; Dec. Dig. § 444.*]

10. INSURANCE (§ 197*)—EXISTENCE OF AGENCY—QUESTION FOR JURY.

In an action on a premium note which had been given by the maker to the general agent of an insurance company, after negotiations by insurance brokers, evidence *held* sufficient to make it a question for the jury whether one of the brokers in obtaining renewal notes for the original note was acting for the general agent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 454; Dec. Dig. § 197.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by George N. Smith against Rudolph Dotterweich. From a judgment for plaintiff (132 App. Div. 489, 116 N. Y. Supp. 896), defendant appeals. Reversed, and new trial ordered.

See, also, 118 App. Div. 917, 103 N. Y. Supp. 1142.

Adelbert Moot, for appellant. William R. Daniels, for respondent.

WERNER, J. On the 28th day of February, 1901, the defendant executed and delivered to the plaintiff a promissory note for \$3,740, payable in six months. When this note became due it was renewed by the four notes in suit, which were dated August 28, 1901, and payable in six months from that date. These renewal notes were not paid at maturity, and the plaintiff brought this action upon a complaint in the usual form. Upon the trial the plaintiff introduced evidence to show that the original note was given in payment of premiums upon two life insurance policies issued to the defendant by the John Hancock Life Insurance Company through the plaintiff, as its general agent.

The defendant interposed an answer, denying that the notes were given for value received and that the plaintiff was the lawful holder and owner thereof, and alleging an oral agreement under which neither the notes nor the insurance policies were to become valid and enforceable obligations, unless the plaintiff should secure for the defendant a certain loan of money. The defendant's testimony in support of these allegations was to the effect that in February, 1901, he was visited in Olean by two insurance brokers named Marvin and Larabee, who solicited him to take some life insurance; that he at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

first replied that he did not want any; that he afterwards called Larabee into his private office in the Dotterweilch Brewery and told him that he had an option to buy the stock of the brewing company and wanted to raise \$70,000 to pay for it; that, if he could get a loan for that amount on the life insurance and the brewing company's stock as collateral, he would take the insurance; that Larabee assured him that it could be done, and cited instances in which certain department stores in Buffalo had made loans under similar conditions. The defendant further testified that a week later the plaintiff, Larabee, and Marvin called; that after he had been introduced the plaintiff said: "The boys have been talking—Mr. Larabee and Mr. Marvin have been talking—to you about taking out an insurance for a loan," and I said "Yes." He says, "Do you want it?" I said, "I do, providing you can make the loan." "And Mr. Smith said that if I would take out an insurance he could make the loan for me, and that this company could take at least 50,000 and he knew where he could place the other 20. They even advised me to split up the policy, so that they wouldn't have any trouble making the loan." The defendant further testified that he met the plaintiff in Olean about 10 days later, at which time the latter produced the policies; that he then told the plaintiff "that under no consideration could I take out a policy of that kind without he could guarantee to make me a loan"; that when the plaintiff handed the original note to the defendant, "I told him there was no use of my signing that note for a policy at the wages I was getting. I was getting \$75 a month and I couldn't pay no \$100,000 insurance on \$75 a month, and he said, 'You sign this note, and I will hold it in my safe until this deal is closed, and, if it is not closed, I return you the note and you return me the policy. I will hold this note in my safe and won't try to sell it.' He was to loan me \$70,000 at 5 per cent. for five years or ten, and with the privilege of having it longer. He said, 'I can get you the \$70,000 loan, and I can get it for you at 5 per cent. for five years or ten, with the privilege of having it longer.' He said, unless I would sign the note to show that everything was in good faith, he couldn't make me the loan on the policy. He said there wouldn't be any effect in the policy; the policy would be null and void if he didn't get me the loan; that they would take the same chance as I."

These are the circumstances in which the defendant says he executed the original note and delivered it to the plaintiff, receiving at the same time two policies issued by the John Hancock Life Insurance Company for \$70,000 and \$30,000, respectively, together with receipts showing that the premiums for the first year had been paid.

The defendant sought to show what took place in August, 1901, between Marvin and

himself regarding the renewal of the original note, but the learned trial court excluded the proffered evidence, upon the ground that Marvin's declarations and admissions could not bind the plaintiff, as there was no proof that Marvin had authority to do anything except to get an unconditional renewal. Then the defendant further testified that the plaintiff never procured the loan for him; that soon after the notes in suit became due, and before this action was commenced, he went to the plaintiff's office in Buffalo, and asked for a return of the notes and tendered back the policies.

When the defendant rested his case the learned trial court granted the plaintiff's motion for the direction of a verdict, and to this ruling the defendant duly excepted. The defendant also asked the court to submit to the jury the question whether the insurance policies were accepted by the defendant and the original note was delivered to the plaintiff, upon condition that the same should be returned in case the plaintiff did not within a year procure a loan of \$70,000 for the plaintiff, with the insurance policies and the brewery stock as collateral. This motion was also denied, and the defendant took an exception.

We have quoted or cited only such parts of the evidence as bear directly upon the question whether the learned trial court erred in directing a verdict for the plaintiff. The case is characterized by a number of peculiarities which may, or may not, be influential in determining the ultimate result, but with these we have no present concern. The question now before us is whether the testimony of the defendant, supplemented by such legitimate inferences therefrom as are most favorable to him, is of sufficient weight and probative force to create a question of fact for the jury, and that question obviously depends upon the nature and effect of the oral agreement to which he testified. If that agreement, which for present purposes must be assumed to have been made, created a condition precedent, without the performance of which the notes never became valid obligations in favor of the plaintiff, then there is a question of fact for the arbitration of a jury. The converse of the proposition is equally simple. If the effect of that agreement was to ingraft upon a valid contract a condition subsequent, the learned trial justice was right in ruling that the issue was one of law for his decision. A careful analysis of the defendant's testimony has convinced us that he is right in the contention that the case should have been sent to the jury. He testified that he told the plaintiff that under no consideration would he take the insurance, unless the plaintiff would guarantee to make him the loan; that the plaintiff told him to sign the note, which would be held in the plaintiff's safe until the deal was closed; that if it was not closed, the note would

be returned to the defendant and the policy would be returned to the plaintiff; that the policy would be null and void if the plaintiff did not get the loan for the defendant, and that both of them would be taking the same chance. If these statements mean anything, they plainly import a condition which was to be performed before the transaction, witnessed by the delivery of the note to the plaintiff and the delivery of the policies and receipts to the defendant, was to be regarded as consummated and binding. That condition was the procurement of the loan which, concededly, was never made. Giving to the defendant's story a fair, natural, and unstrained interpretation, we have a case in which there is failure of the precise condition which must determine the existence or nonexistence of any contract between him and the plaintiff. We are not unmindful of the opposing facts and antagonistic inferences which other features of the transaction may suggest. These are not proper subjects for present discussion. We simply emphasize the controlling circumstance that, if the defendant's story is true, there is no binding contract between him and the plaintiff, and the issue of its truth or falsity is for the jury, and not for the court.

There is no subtlety or ambiguity in the law of the subject; but there is difficulty in applying it to some cases in which there may be uncertainty as to the effect of oral testimony upon contracts which are wholly or partly reduced to writing. When the oral testimony goes directly to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then the spoken word must yield to the written compact.

There are many decided cases upon this branch of the law both in this state and in other jurisdictions, but we shall refer to only a few, as illustrating the line of cleavage between the case at bar and the case of *Jamestown Business College Ass'n v. Allen*, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740, upon which the respondent relies to support his contentions. In *Benton v. Martin*, 52 N. Y. 570, this court very clearly enunciated the rule which has always obtained in this state: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with

which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown." Page 574. This quotation sums up the whole of the law applicable to the case at bar in its present state, and outlines comprehensively the rule which has been followed in *Bookstaver v. Jayne*, 60 N. Y. 146, *Griereson v. Mason*, 60 N. Y. 394, *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127, *Schmittier v. Simon*, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621, and other cases, under a variety of circumstances.

The case of *Jamestown Business College Ass'n v. Allen*, supra, is a salient illustration of the converse of this rule. There the promissory note was rendered effective and complete by an unconditional delivery. The payee agreed to release the maker, and to cancel the note, upon a future contingency which might or might not arise. That was clearly a condition subsequent, which brought the case within the general rule that a contract reduced to writing, and complete in its terms, cannot be varied and contradicted by oral testimony. *Eighmie v. Taylor*, 98 N. Y. 288; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Stowell v. Greenwich Ins. Co.*, 163 N. Y. 298, 57 N. E. 480; *Mead v. Dunlevie*, 174 N. Y. 108, 66 N. E. 658. Thus, to state the difference most concretely, the case at bar is one in which the oral testimony tends to show that the writing purporting to be a contract is in fact no contract at all; while in the case of the *Jamestown Business College* the oral testimony was in direct contradiction of the written contract, as to the existence and validity of which there was no controversy.

We think the court erred in excluding the evidence offered by the defendant to show what took place between him and Marvin at the time when the original note was renewed by the notes in suit. It needs no argument to demonstrate that, if it was competent for the defendant to show under what conditions he delivered the original note, he must logically be permitted to show that the renewal notes were affected by the same conditions. Quite aside from this, there is enough in the record to make it a question for the jury whether Marvin was or was not the alter ego of the plaintiff in the dealings with the defendant.

As there must be another trial, we have eliminated from this discussion everything that is not germane to the questions which are before us on this appeal. We have not referred to the defendant's counterclaim, which is manifestly inconsistent with his defense, or to the evidence relating to his asserted possession of options for the purchase of the brewery stock. These and various other features of the case may be of importance in determining the verdict of a jury, but they cannot affect our decision.

The judgment should be reversed and a

new trial ordered, with costs to the appellant to abide the event.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ.; concur.

Judgment reversed, etc.

(200 N. Y. 323)

PEOPLE ex rel. NEW YORK CENT. & H. R. R. CO. v. GAUS, Comptroller.

(Court of Appeals of New York. Jan. 3, 1911.)

1. TAXATION (§ 376*)—FRANCHISE TAX—INCREASED CAPITAL STOCK.

In view of Tax Law (Consol. Laws, c. 60) § 182, requiring a franchise tax to be paid in advance, where the capital stock of a railroad company was increased in January and remained at the increased sum until the end of the tax year, the franchise tax was properly assessed on the basis of the whole outstanding stock at the end of the tax year, and not of the average amount of stock outstanding during the year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

2. TAXATION (§ 376*)—FRANCHISE TAX—ASSESSMENT—MARKET VALUE.

The Tax Law (Consol. Laws, c. 60) § 182, provides that where stock pays 6 per cent. dividends or more, the franchise tax assessed against the corporation shall be based on the amount of the dividends, but if it pays less than 6 per cent. the tax shall be computed on the value of the stock, and the rates of taxation prescribed, make the tax, if computed on the basis of 6 per cent. dividends, the same in amount as if computed on the par value of the stock. The statute also provides that if a corporation has more than one kind of stock, and the dividends vary on the several kinds, the franchise tax shall be computed separately for each kind of stock. The capital stock of a railroad company was increased during the tax year, and 6 per cent. dividends were paid on all of the stock outstanding when dividends were paid, but as the dividends were declared quarterly, those paid on the new stock amounted to less than 6 per cent. Held, that there was only one kind of stock upon which dividends were paid, the new stock not constituting a different kind of stock from the old within the meaning of the statute, which contemplated different kinds of stock, as preferred and common stock, so that the franchise tax should be computed on the basis of all of the stock having paid 6 per cent. dividends, and not on the market value of the stock.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 625, 629-631; Dec. Dig. § 376.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari by the People, on the relation of the New York Central & Hudson River Railroad Company, against Charles H. Gaus, as comptroller, to review a determination of the comptroller in assessing a franchise tax. From a final order of the Appellate Division (188 App. Div. 834, 123 N. Y. Supp. 1136) confirming such determination, relator appeals. Order modified as stated.

Thomas Emery, for appellant. Edward R. O'Malley, Atty. Gen. (Edward H. Letchworth, of counsel), for respondent.

CULLEN, C. J. The relator's capital stock on November 1, 1906, was \$149,197,800. On the 1st of January following it was increased to \$178,632,000, and remained at that sum until October 31, 1907, the end of the tax year. Not all of the relator's capital was engaged within this state, but there is no question as to the correctness of the apportionment made by the comptroller in that respect. It is the increase of stock that has given rise to the dispute in this case. Two questions are presented: (1) The comptroller assessed the tax on the basis of the whole outstanding stock at the end of the tax year. The relator claims that as the increased stock was outstanding during only a part of the year, the assessment should have been made on the average amount of stock during the year. (2) The relator paid during the year dividends at the rate of 6 per cent. per annum on all its stock outstanding at the time of the dividends, but as the dividends were declared quarterly, necessarily those paid on the new stock aggregated less than 6 per cent. The comptroller held that 6 per cent. not having been paid on the new issues, the tax should be computed under section 182 of the tax law (Consol. Laws, c. 60) on the market value of the stock, a sum in excess of its par value. The relator contends that all the stock should be deemed to have received dividends amounting to 6 per cent. and the tax computed on that basis, which would result in a smaller tax than that imposed by the comptroller. This difference in result is occasioned by the fact that under the tax law annual dividends of 6 per cent. seem to be considered the normal return of a stock worth par. Where stock pays dividends amounting to that sum or more, the franchise tax is based on the amount of dividends, but if less than 6 per cent., then the tax is computed on the value of the stock, and the rates of taxation prescribed by the statute are such that if computed on the basis of 6 per cent. dividends the tax is exactly the same in amount as if computed on the value of the stock at par. This leads at times to very queer results. Not only a safe 6 per cent. stock, but even a safe 5 per cent. stock, is apt to be worth more than par, and hence it is that the same corporation, when it is able to pay stockholders only 5 per cent., may be subject to a greater tax than in a more prosperous year when it is able to pay 6 per cent. Also as between two corporations, if both are of the highest financial standing, the 5 per cent. corporation may have to pay a greater tax than the 6 per cent. one.

As to the first question, this court held in *People ex rel. Mutual Trust Co. v. Miller*,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

177 N. Y. 51, 69 N. E. 124, where the relator began business a few days before the end of the tax year, that it was only the average outstanding stock during the year which was to be taken as the basis of the tax. In that case we treated the franchise tax as an excise for the privilege afforded to the corporation for the past year. After our decision, however, the Legislature amended section 182 of the tax law so as to provide that the tax should be paid in advance. The amendment changed the character of the tax as to corporations embraced within that section, from a payment for past privileges already enjoyed to a payment for privileges to be enjoyed in the following year. Trust companies are not taxed under section 182, but under section 187a. While the tax in each case is a franchise tax and so regarded in law, there is a very marked distinction between the two. The tax imposed on corporations generally under section 182 amounts to $1\frac{1}{2}$ mills on the capital stock of a corporation paying 6 per cent. dividends, and its payment does not exempt the corporation from local or property taxes. On the other hand, the tax on a trust company is 1 per cent., and relieves the company from all other taxation. After the amendment of section 182, the grounds on which we placed our decision in the Mutual Trust Co. Case became no longer applicable to corporations taxed under that section. But that amendment in no way affected corporations taxed under section 187a, where a very different tax is imposed. For this reason our decision in the Mutual Trust Co. Case, so far as it related to trust companies, remained unaffected. Subsequently there arose the case of *People ex rel. Lincoln Trust Co. v. Glynn*, 182 App. Div. 546, 116 N. Y. Supp. 1078, the decision in which was affirmed by this court on the opinion below in 198 N. Y. 501, 92 N. E. 1097. In that case it was held that the method of taxation of trust companies had not been altered by the change in the law. The distinction between the two cases was clearly pointed out in the opinion of the learned Appellate Division. Seeking, however, as the ablest courts occasionally do, to add additional strength to its decision, the Appellate Division expressed some views as to the effect of the amendment upon the method of the computation of the franchise tax on corporations generally. These remarks were obiter, and in adopting the opinion of the Appellate Division we did not intend to be bound by them. Indeed the Appellate Division by its decision in this very case has evinced the same disposition. It follows that the determination of the comptroller in this respect was right.

On the second question, we think the comptroller erred. In his view there were two kinds of stock; the old stock on which had been paid 6 per cent., and the increased stock

on which has been paid less than 6 per cent., and the distinction between the two is sought to be justified by the provisions of the tax law. The law substantially directs that if a corporation has more than one kind of stock and on the different kinds of stocks the dividends vary, the tax should be computed for each kind of stock separately. This provision evidently contemplates the ordinary case of preferred and common stock. It has no application to a condition such as is presented here. The relator has only one kind of stock. It is all common stock, and the relator has paid at the rate of 6 per cent. on the whole of its stock that has been any time outstanding. The tax, therefore, should have been assessed on the theory that the whole of the relator's stock was 6 per cent. stock.

The determination of the comptroller and the order of the Appellate Division should be modified accordingly, without costs to either party. The order of this court is to be settled on notice by the chief judge, when, if the parties can agree on the amount, reduction can be made by the order of this court without further proceedings.

GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Ordered accordingly.

(200 N. Y. 332)

BRYAN v. McGURK.

(Court of Appeals of New York. Jan. 8, 1911.)

1. TAXATION (§ 805*)—OPERATION OF STATUTES.

In the operation of a statute of limitations, otherwise valid, fixing the time within which to sue to set aside a tax deed, there is no difference in its effect on jurisdictional defects or on irregularities.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

2. TAXATION (§ 805*)—TAX SALES—RECORDING OF TAX DEED—EFFECT.

The recording of a tax deed in violation of the statute providing that a deed shall not be recorded where there was an actual occupant, except when accompanied by proof of service of notice to redeem, to be recorded with the conveyance is a nullity, and does not set running the statute of limitations fixing the time within which to sue to set aside tax deeds.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

3. TAXATION (§ 805*)—TAX SALES—RECORDING OF TAX DEED—EFFECT.

The provisions of the tax law are not enacted in the form of a statute of limitations, and when applied to the future, they may, if otherwise good, operate as such, but when applied to the past, where they can operate only as curative acts, the question whether the defects are jurisdictional or mere irregularities is of vital importance.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. TAXATION (§ 734*)—SALES—DEEDS—VALIDITY.

A sale of land for taxes made when the taxes were paid in full to the state officers who gave a receipt therefor is invalid, and no title passes to the purchaser.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 734.*]

5. TAXATION (§ 688*)—SALES—DEFECTS.

The defect in a sale of land for taxes that the taxes had been paid in full, is jurisdictional, and is beyond the saving grace of a curative act, and the Tax Law of 1896 (Laws 1896, c. 908), to be available in favor of the purchaser, must operate as a statute of limitations.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 688.*]

6. TAXATION (§ 805*)—TAX DEEDS—ACTIONS.

Under Tax Law 1896 (Laws 1896, c. 908) § 132, authorizing actions for the cancellation of tax deeds within five years from the end of the period allowed by law for the redemption of land sold for taxes, an owner may sue in ejectment for land sold for taxes when the taxes had been paid, where the action is brought within five years after the recording of the Comptroller's conveyance, the effect of a recovery in ejectment being to avoid the sale.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 805.*]

7. JURY (§ 14*)—RIGHT OF TRIAL BY JURY.

Under the Constitution providing that the right of trial by jury shall remain inviolate, an action to recover possession of land is triable before a jury as of right, and a claimant may not be deprived of that right under any statute.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 67; Dec. Dig. § 14.*]

8. LIMITATION OF ACTIONS (§ 4*)—VALIDITY OF STATUTE.

A statute of limitation to be valid must give a reasonable time after its enactment to enforce existing rights.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 10, 11; Dec. Dig. § 4.*]

9. TAXATION (§ 805*)—TAX SALES—ACTIONS—LIMITATIONS.

Where an owner had paid the amount of taxes demanded by the comptroller who sold the land for nonpayment of taxes because the amount paid was not in full, the right of the owner to sue in ejectment for the land was not affected by Tax Law (Laws 1896, c. 908) § 132, limiting the time to sue for the cancellation of deeds on the grounds that the taxes were paid, that the municipality had no legal right to assess the same, or because of defects in the proceedings on constitutional grounds.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 805.*]

10. TAXATION (§ 791*)—LIMITATION STATUTES—VALIDITY.

The provision of Tax Law (Laws 1896, c. 908) § 131, which sets the running of limitation within which to sue to set aside a tax deed from the date of the tax deed by the Comptroller without any record thereof, is invalid because it does not give the landowner any notice that his title is sought to be divested, and an owner who is informed by the Comptroller that his land has not been sold for taxes is not chargeable with notice of a sale until the tax deed is recorded.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 791.*]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by William W. Bryan against Henry McGurk. From an order of the Appellate Division (134 App. Div. 93, 118 N. Y. Supp. 912), reversing a judgment of dismissal and granting a new trial, defendant appeals. **Affirmed.**

Nash Rockwood, for appellant. Charles C. Lester, for respondent.

CULLEN, C. J. The action is in ejectment to recover possession of a tract of wild land in Saratoga county. The plaintiff proved an unbroken chain of title since the year 1818, which, under section 960 of the Code of Civil Procedure, was presumptive evidence of ownership. The defendant relied on a sale by the Comptroller for unpaid taxes in 1900, purporting to be made for default in payment of taxes prior to 1897, amounting to 23 cents, the deed given on that sale dated June 2, 1903, and recorded in the county clerk's office June 1, 1905, and a deed from the state's grantee to himself, dated April 27, 1905, and recorded the same time as the preceding deed. In answer to this the plaintiff proved a demand upon the Comptroller prior to the sale for a statement of the taxes due on his property, which was returned to him as being \$6.02; payment of that amount and a receipt from the treasurer's office for said sum in full for the tax bills; a letter from the Comptroller on December 1, 1904, in answer to his application, stating that the lands had not been sold. The trial court held that the plaintiff's title was barred by the provisions of section 131 of the tax law (Laws 1896, c. 908), two years having elapsed since the date of the conveyance, and rendered judgment for the defendant. This judgment was reversed by the Appellate Division on both the facts and the law and a new trial ordered (134 App. Div. 93, 118 N. Y. Supp. 912) and from that order an appeal has been taken to this court.

The repeated changes in the tax laws of the state and the apparent inconsistency between some of the provisions render it at times difficult to determine how those laws operate in a particular case. That the earlier statute of 1885 (ch. 448) did, in many cases, operate as a statute of limitations is settled by repeated decisions of this court. *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; *Id.*, 145 N. Y. 451, 40 N. E. 400; *Meigs v. Roberts*, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322; *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303, 88 N. E. 753; *Halsted v. Silberstein*, 196 N. Y. 1, 89 N. E. 443. It is equally clear that in the operation of a statute of limitations, otherwise valid, there is no difference in its effect on jurisdictional defects or on irregularities. In *People v. Ladew*, 189 N. Y. 355, 82 N. E. 431, the decision was for the defendant, not on any

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

theory that there was any defect that could not be cured by a statute of limitations, but because by the terms of the statute of 1885 its operation as a statute of limitations could commence to run only from the record of the Comptroller's deed in the clerk's office. Another provision of the statute expressly provided that the deed should not be recorded where there was an actual occupant except accompanied by proof of service of proper notice to redeem, to be recorded with the conveyance. No such proof was given or recorded. Therefore, the record being in violation of the statute was a nullity and did not set the statute running at all. But, as pointed out in *Wallace v. McEchron*, 176 N. Y. 424, 68 N. E. 663, which arose under the present Tax Law of 1896, the provisions of the tax laws are not enacted in the form of a statute of limitations. When applied to the future they may, if otherwise good, operate as such; but when applied to the past, where they can operate only as curative acts, the question whether the defects are jurisdictional or mere irregularities is of vital importance. With this distinction clearly in mind, we reach the consideration of the case before us.

The plaintiff clearly proved the payment of the taxes due on his property. Even if we should consider the recital in the tax deed that 23 cents was still unpaid as proof of the fact, nevertheless, as he paid the full amount the state officers stated to be the amount of taxes, for which taxes they gave a receipt in full, the sale was invalid and no title passed to the purchaser. This was plainly a jurisdictional defect (*People ex rel. Cooper v. Registrar of Arrears*, 114 N. Y. 19, 20 N. E. 611; *Wallace v. McEchron*, supra), and beyond the saving grace of a curative act. Therefore, to be available in favor of the defendant, the statute must operate as a statute of limitations, if at all. The statute of 1885 received a definite construction by the decisions of this court. There, by the provisions of the statute, the record of the Comptroller's deed in the clerk's office set the statute running, and two years were given before any rights were barred. There was no limitation of the means by which the owner might assail the hostile title. It could not run against the state until the state permitted itself to be sued, for it is an elementary principle that a statute of limitations must give a reasonable opportunity to assert one's rights. *Saranac Land & Timber Co. v. Roberts*, supra. There was a question left open in all the cases whether the mere record of a deed in the clerk's office without a hostile entry was, as against an owner in actual possession, sufficient to compel him to institute an action to defend a possession which he already had. The provisions of the present statute are manifestly different. It is conceded by both parties that the case before us is controlled by section 131 or 132 of the Tax Law

or by both. There seems to be an inconsistency between these two provisions. Section 131 provides that after the expiration of two years from the date of a tax conveyance the presumption that the sale and all proceedings prior thereto, including the assessment of the lands sold and notices of redemption, were regular shall be conclusive. Section 132 prescribes that the same efficacy be given the record of a conveyance in the clerk's office for a period of two years. But the section also provides that the same shall be subject to cancellation by reason of the payment of such taxes, or by reason of the levying of a tax by a town or ward having no legal right to assess the land on which they are laid, or by reason of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the Comptroller, or in an action brought before a competent court therefor; "provided, however, that such application shall be made, or such action brought, in the case of all sales held prior to the year eighteen hundred and ninety-five, within one year from June fifteenth, eighteen hundred and ninety-six; and in the case of the sale of eighteen hundred and ninety-five and of all sales hereafter held, that such application shall be made, or such action brought, within five years from the expiration of the period allowed by law for the redemption of lands sold at the particular sale sought to be canceled." The caption of this section is "Effect of former deeds." But the statute which was passed in 1896 seems to expressly include all sales thereafter held. Under this section the plaintiff's action was well brought. Five years had not elapsed between the record of the Comptroller's conveyance and the commencement of the action. It is claimed, however, that this is not an action to cancel the sale, but in ejectment. I think there is no force in this objection. The effect of a recovery in ejectment would be necessarily to avoid the sale. If the Legislature intended to limit the owner to an equity action the validity of such a restriction might be questioned. It must be remembered we are dealing with the statute solely as a statute of limitations. Doubtless the Legislature may change the mode and character of legal proceedings, except so far as they are restricted by the Constitution. The Constitution provides that the right of trial by jury in all cases in which it has been heretofore used shall remain inviolate. An action to recover possession of land has always been triable before a jury as of right, and a claimant cannot be deprived of that right under a statute of limitations more than in any other manner.

Our decision in *Wallace v. McEchron*, supra, should not be difficult to understand. In that case the tax sales, Comptroller's deed, and the record of the conveyances had all been made prior to the enactment of 1896, and the question before the court was wheth-

er that statute, acting as a limitation could bar the rights of the plaintiff. There the owner, while he had not paid the full amount of the taxes on the property, had paid the amount stated by the Comptroller, and the error was on the part of that officer. That made the sale void under the authorities cited. It is elementary law that a statute of limitation to be valid must give a reasonable time after its enactment to enforce existing rights. The statute of 1896, as already appears, did give the owner one year after its enactment to enforce the owner's right, but the difficulty with the statute lay just here: It gave him a year in which to enforce his remedy against a tax purchaser to avoid the sale on three specific grounds, to wit: (1) That the taxes were paid; (2) that the town or ward had no legal right to assess the same; and (3) defects in the proceedings on constitutional grounds. But it did not give him an instant of time during which he might assail the tax sale on any other ground. In that case the sale was void for reasons other than the three specified in the statute. For that reason the statute could not be valid as a statute of limitations against such a claim. If, as the appellant claims, the taxes were not really paid, but only the amount demanded by the Comptroller, the Wallace Case is conclusive against any contention that section 132 has barred the plaintiff's rights.

I am frank to say I do not appreciate the object sought to be obtained by the Legislature in the enactment of sections 131 and 132. Why provide for giving the original owner five years after the record of the Comptroller's deed to assert his rights in section 132, while in section 131 the lapse of two years from the date of the conveyance, without record, is apparently made a bar to those rights? Assuming, however, that they are cumulative, and that full force must be given to both, I am of opinion that the provisions of section 131, setting the running of the statute from the date of the deed by the Comptroller, without any record thereof, is

invalid. It is entirely insufficient to give the landowner any notice that his title is sought to be divested. It is going quite far enough to require the landowner to keep track of any conveyance, in the office of the clerk of the county where his land is situated, in derogation of his title. To require him to examine every conveyance which may be noted in the Comptroller's office seems to me quite unreasonable. But it appears that in the present case within two years from the date of the conveyance the plaintiff applied to the Comptroller for information concerning the sale and received an answer stating that his lands were not sold, but had been withdrawn from the sale. We know of nowhere else where a plaintiff could have sought information as to the existence of the sale, and he was entitled to rely on the statement made to him by the Comptroller. The same principle would seem to apply in such case as where an erroneous statement of the amount of the taxes due on the property is given by the public officer. *Van Benthuyzen v. Sawyer*, 36 N. Y. 150; *People ex rel. Cooper v. Registrar of Arrears*, supra; *Wallace v. McEchron*, supra. Under the circumstances I can imagine no principle on which the plaintiff can be chargeable with notice that there had been actually a sale of his land, at least until the Comptroller's deed was recorded or the defendant entered into actual possession of the land, the date of which does not appear in the record, but was stated on the argument to have been but a few months before the commencement of the action.

The order of the Appellate Division should be affirmed and judgment absolute rendered against the defendant on the stipulation, with costs in all courts.

HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

Order affirmed, etc.

(175 Ind. 236)

CITY OF FRANKLIN v. SMITH.
(No. 21,760.)

(Supreme Court of Indiana. Feb. 17, 1911.)

1. CONSTITUTIONAL LAW (§ 309*)—DUE PROCESS OF LAW.

Laws 1907, c. 153, providing that no action for injuries resulting from any defect in streets shall be maintained against a city unless written notice, describing the time, place, and cause and nature of the injury shall have been given within a certain time, does not violate Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. § 309.*]

2. STATUTES (§ 107*)—PLURALITY OF SUBJECTS.

Laws 1907, c. 153, is entitled "An act concerning actions against cities and towns on account of injuries resulting from defective highways and bridges," and provides that no action for injuries from any defect in a street, highway, or bridge shall be maintained against any city or town unless written notice describing the time, place, cause, and nature of the injury shall, within 60 days thereafter, or, if the defect consist of ice or snow, within 30 days thereafter, be given to the city. *Held*, that the statute was not objectionable as violating Const. art. 4, § 19, on the ground that it embraced more than one subject-matter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-184; Dec. Dig. § 107.*]

3. STATUTES (§ 117*)—EXPRESSION OF SUBJECT IN TITLE.

Such statute is not objectionable on the ground that its subject-matter is not embraced in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 153-167; Dec. Dig. § 117.*]

4. MUNICIPAL CORPORATIONS (§ 816*)—STREETS—ACTIONS—EXHIBITS—NOTICE OF INJURY.

A copy of the notice of injury given to the city was properly filed with the complaint as an exhibit in an action against the city for damages from a defective sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1714; Dec. Dig. § 816.*]

5. MUNICIPAL CORPORATIONS (§ 816*)—STREETS—ACTIONS FOR INJURIES—ALLEGATIONS OF COMPLAINT—NEGLECT.

The complaint, in an action against a city for injuries resulting from a defective sidewalk, alleged that on the day plaintiff was injured the sidewalk was allowed to be out of repair by defendant's negligence, and that a particular part of such sidewalk, constructed of flagstones, was out of repair and dangerous, in that one of the flagstones was raised above the level of the grade about five inches, and had been so raised for more than a year prior thereto, which defendant well knew, and that it had failed to repair the sidewalk. *Held*, that the complaint sufficiently alleged actionable negligence as against a demurrer for want of facts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1724; Dec. Dig. § 816.*]

6. MUNICIPAL CORPORATIONS (§ 816*)—SIDEWALKS—INJURIES—ACTIONS—ALLEGATIONS OF COMPLAINT—PROXIMATE CAUSE OF INJURY.

In an action against a city for personal injuries sustained by a defective sidewalk, the complaint alleged that, while plaintiff was walking along the sidewalk exercising due care, sud-

denly and without fault of plaintiff "he was precipitated violently to the sidewalk, his feet striking the said raised flagstone at said point on said sidewalk with such force that the first metatarsal bone of the right foot was fractured and broken." *Held*, that the complaint did not allege that the negligent condition of the sidewalk was the proximate cause of plaintiff's injuries, and was demurrable on that ground.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1712; Dec. Dig. § 816.*]

Appeal from Circuit Court, Brown County; Wm. E. Deupree, Judge.

Action by David F. Smith against the City of Franklin. From a judgment for plaintiff, defendant appeals. Reversed, with instructions to sustain demurrer to complaint.

Elba L. Branigin and Thos. Williams, for appellant. L. E. Ritchey, for appellee.

MORRIS, J. Appellee, Smith, sued appellant in the Johnson circuit court for alleged personal injuries sustained because of a defect in a sidewalk. The venue of the action was changed to the Brown circuit court, where, after trial by jury, judgment was rendered for appellee on a verdict for \$500. Appellant has assigned error in the action of the court below in overruling its demurrer to the complaint for insufficient facts, in overruling its motion for judgment notwithstanding the verdict, on the answers to interrogations submitted to the jury, and in overruling its motion for a new trial. The cause was appealed to the Appellate Court; but on October 4, 1910, on petition by appellee, showing that the case presented a question of the constitutionality of a statute of Indiana, it was transferred to this court.

Under the assignment of error in overruling the demurrer to the complaint, appellant contends that the complaint is insufficient, because the notice to the city prescribed by Acts 1907, p. 249, is not a written instrument within the meaning of section 368, Burns' Ann. St. 1908, and a copy of such notice filed with the complaint, as an exhibit, did not thereby become a part of the complaint and cannot be considered in determining its sufficiency. The allegation of the complaint with reference to the notice is as follows: "Plaintiff said that he served notice upon the mayor of said city within 60 days after said injury was received as above, a copy of which notice is hereto attached, made a part hereof and marked 'Exhibit A.'" The appellee contends that, in any event, notice was unnecessary because the above statute is in conflict with section 23 of article 1, and section 19 of article 4 of the Constitution of Indiana, and the fourteenth amendment to the Constitution of the United States.

Since this cause was transferred from the Appellate Court, it was decided by this court in *Touhey v. City of Decatur*, 98 N. E. 540, that the statute in question is not in viola-

tion of section 23, art. 1, of the Constitution of Indiana, nor the fourteenth amendment to the federal Constitution. The further contention of appellee that the act violates section 19, art. 4, of our Constitution, because, as he asserts, it embraces more than one subject-matter, and because the subject-matter is not expressed in the title, cannot prevail. The legislation is not open to either objection, and the statute is not invalid because of any of the questions raised by appellee with reference thereto.

Was it proper to file a copy of the notice with the complaint as an exhibit? In *Touhey v. City of Decatur*, supra, this court held that the giving of a notice as provided in the act of 1907 is a condition precedent to a right of action. In proceedings to foreclose mechanics' liens, it has been held proper to file a copy of the notice as an exhibit. *Wasson v. Beauchamp*, 11 Ind. 18; *Scott v. Goldinghorst*, 123 Ind. 268, 24 N. E. 333. For analogous reasons, it was proper for appellee to file with his complaint, as an exhibit, a copy of the notice to the city. The sufficiency of the notice itself is not questioned by appellant.

Appellant next contends that the omission to keep the sidewalk in repair is not characterized as negligent, and sufficient facts are not alleged to compel the inference of negligence. So much of the complaint as refers to this matter is as follows: "That Jefferson street, in said city, is, and has been, the principal and public street for 25 years. * * * That on about the 10th day of April, 1909, said street and sidewalk were, by the negligence of defendant, allowed to be and remain out of repair, and the sidewalk along the north side of said street, in front of the residence property of Mrs. Frank Sibert and now occupied by her as her home, near the intersection of said Jefferson street and Home avenue, in said city, which has been and now is constructed of flagstone, was out of repair and dangerous to travelers and defective in this, to wit, at said last described portion of said street one of said flagstones was raised above the level of the grade of said sidewalk about five inches, and that said flagstone has been so raised for more than a year prior to said 10th day of April, 1909, and which fact was well known to the defendant and all its proper officers for more than a year prior to said last date, and that said city and its said officers at all times failed and refused to repair said sidewalk at said point." It will be noticed that the complaint charges that the entire sidewalk was negligently permitted to be and remain out of repair, and that at one portion thereof one of the flagstones was raised above the level of the grade of the sidewalk about five inches, and had been in that condition for more than a year with appellant's full knowledge. The above allegations are sufficient, on the question of appellant's negligence, to repel a demurrer for want of facts.

It is finally contended by appellant that the complaint is fatally defective because it does not allege any causal connection between the negligent omission of defendant and plaintiff's injury. If such connection is alleged, it is in that portion of the complaint which reads as follows: "That on said 10th day of April, 1909, between the hours of 10 o'clock p. m. and 11 o'clock p. m., plaintiff was lawfully and with due care passing along said street upon said sidewalk wholly unaware of the dangerous condition at said point where said defect existed, and suddenly and without any fault on the part of this plaintiff, while walking there he was precipitated violently to the sidewalk, *his feet striking the said raised flagstone at said point on said sidewalk with such force that the first metatarsal bone of the right foot was fractured and broken.*" Appellant maintains that the portion of the complaint which we have italicized above is merely a recital, and cannot be considered; but, even with such recital deemed as well pleaded, there is still lacking any charge that defendant's negligence was the proximate cause of the injury.

That it is not enough for a complaint, in such a case as this, to charge the defendant with negligent acts or omissions, without the further charge that such negligence was the proximate cause of the injury, and be sufficient to repel a demurrer, is settled beyond all possible controversy. *City of Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595 (1902); *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479 (1896); *Corporation of Bluffton v. Matthews*, 92 Ind. 213 (1883); *Burns' Ann. St.* 1908, § 343; 28 Cyc. 1467.

In *Corporation of Bluffton v. Matthews*, supra, the portion of the complaint in controversy was nearly like this one, and was as follows: "That on the evening of the — day of —, 1881, plaintiff, without any fault or negligence on her part, and while with due caution passing along said sidewalk, was precipitated and fell into said excavation in said sidewalk, to the depth of said excavation, and striking the bottom thereof with great force and violence, by means whereof she was greatly injured," etc. In reversing the judgment, the court said: "To render the appellant liable it was necessary to show, in the complaint, by the averment of issuable facts, a wrong on the part of the appellant and damage to the appellee, and that the wrong was the proximate cause of the damage. The complaint did not show that when the appellee was injured the appellant was chargeable with fault, or that her injury was caused by the appellant's wrongful act or omission."

In the complaint in this case it is true that it is stated that the fracture was caused by his feet striking the raised flagstone with violence; but this does not suggest the inference that it was the raised position of the flagstone that caused the injury. If any portion of the human body strikes a flagstone

with sufficient force, injury will surely result, and it would make no difference whether the flagstone lies on a level with those surrounding it, or projects far above. The proximate cause of appellee's injury was whatever "precipitated him violently to the sidewalk." The flagstone, in itself, was harmless. In discussing the question of proximate cause, this court said in *New York, etc., R. Co. v. Hamlin*, 170 Ind. 20, 83 N. E. 343 (1908): "There has been much learning indulged by the courts in defining the distinction between the paramount or efficient cause of an accident, and the causes that are merely incidental or instrumental to the superior responsible agency. Being the nearest in order of time is no criterion. The proximate cause is that which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments, or vehicles, in a natural line of causation to the result."

Waiving the question of recital of facts, and treating them as directly averred, the complaint does not state a cause of action, because it wholly fails to aver any causal connection between appellee's injury and appellant's negligence. The other errors assigned are not considered, because on another trial of the cause it is not likely that the same questions will arise.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

(175 Ind. 218)

COOK v. BOARD OF COM'RS. (No. 21,568.)
(Supreme Court of Indiana. Feb. 16, 1911.)

On petition for rehearing. Petition denied.
For former opinion, see 92 N. E. 876.

MYERS, C. J. Upon a petition for a rehearing the learned counsel for appellant claim that we were in error in holding that the shares of stock owned by appellant did not represent appellant's property actually and permanently invested in another state. The court did not so hold, and did not regard the question as involved in the case, but based its decision upon the ground that as to that matter the statute fixes the rule of construction, by expressly declaring as subject to taxation "all shares of stock in foreign corporations," leaving nothing to construction, and it is conceded that the state has the power to select the subjects of taxation.

We were in error in citing the case of *Darnell v. State*, 90 N. E. 769, as determining the point that the assessment in this case was not the taking of appellant's property without due process of law. The case intended to be cited was *Board of Commissioners v. Johnson*, 173 Ind. 76, 89 N. E. 590.

The New York cases urged upon our attention in the original briefs, and upon the petition for rehearing, arose under a different statute, and cannot be regarded as throwing any light upon the question here, for they

were not based upon a statute specifically making stocks in foreign corporations taxable, but taxation was restricted to property "within this state," and it was very properly held that shares of stock were only evidence of property in another state. If our statute stopped with section 10,142, Burns' Ann. St. 1908, providing that "all property within the jurisdiction of this state not expressly exempted shall be subject to taxation," those cases would be in point. But our statute adds to property "within the jurisdiction" numerous specific subjects of taxation, where the property is beyond the "jurisdiction of this state," such as "ships, boats, and vessels, * * * goods, chattels and effects not actually and permanently invested in business in another state," indebtedness due from debtors "within or without the state," and "all shares in foreign corporations." In the Connecticut case cited (*Lockwood v. Weston* [1891] 61 Conn. 211, 23 Atl. 9), there was one section of a statute providing that for the purposes of taxation "personal property in this state or elsewhere, not exempt," shall be taxable, and shall include "notes, bonds and stock, * * * goods, chattels," etc.; another section exempted property situated in another state "when it can be made satisfactorily to appear * * * that the same is fully assessed and taxed in such state," and it was held that stocks in foreign corporations were taxable in Connecticut, unless it was shown that they had been assessed and taxed elsewhere. The Connecticut statute is in effect the same as our own, except that the former exempted the stocks paid on in another state, while under our statute they are not exempted.

We are not advised by the opinion in *Seliger v. Kentucky* (1908) 213 U. S. 200, 204, 29 Sup. Ct. 449, 53 L. Ed. 761, what the statute of Kentucky was; but it is stated in the opinion that the Court of Appeals of Kentucky, "accepting the fact that the whisky was beyond the taxing power of Kentucky, nevertheless sustained the tax as a tax on the warehouse receipts," and there is a significant statement by the court at the close of the opinion, viz.: "We discuss the case on the facts assumed by the Court of Appeals. Whether a finding would have been warranted that the whisky still was domiciled in Kentucky (though in fact it was in Germany), or for any other reason was not exempt, is a matter upon which we do not pass." Upon looking to the statute of Kentucky (Ky. St. § 4020 [Russell's St. § 5912]), we find that "all personal property owned by persons residing within this state * * * whether the property be in or out of this state * * * shall be subject to taxation," and we see the reason for the court's statement. The difficulty in the case is that, instead of taxing the whisky, the authorities valued the warehouse receipts, and assessed the taxes upon them, and the Supreme Court of the United States expressly bases its de-

cision on the assumption of the Court of Appeals of Kentucky that the whisky was not itself taxable, and upon the basis that under the ruling of the Kentucky court it would follow that, if the whisky were in Kentucky, both the whisky and the warehouse receipts would be taxable, and double taxation result where not intended, and that the receipts were only evidence of property in the whisky, and not taxable as such.

With the correction of the citation as above shown, the petition for a rehearing is overruled.

(175 Ind. 196)

PITTSBURG, C. C. & ST. L. RY. CO. v. MITCHELL. (No. 21,494.)

(Supreme Court of Indiana. Feb. 14, 1911.)

Appeal from Circuit Court, Henry County; Ed. Jackson, Judge.

On petition for rehearing. Petition denied. For former opinion, see 91 N. E. 735.

MYERS, C. J. We have withheld action upon the petition for a rehearing in this cause, awaiting the decision of the Supreme Court of the United States as the final arbiter, involving the question originally determined by us as to the validity of the Carmack amendment to the interstate commerce act, and here the question upon which rehearing is urged. That question was determined in that court January 3, 1911, in the case of Atlantic Coast Line, etc., Co. v. Riverside Mills, 219 U. S. 186, 81 Sup. Ct. 164, 55 L. Ed. —, adversely to the contention of appellant.

The petition for a rehearing is therefore overruled.

(175 Ind. 211)

MARION STATE BANK v. GOSSETT. (No. 21,604.)

(Supreme Court of Indiana. Feb. 15, 1911.)

1. **APPEAL AND ERROR (§ 343*)—SCOPE OF REVIEW—MATTERS NOT NECESSARY TO DECISION.**

Where the same questions are presented by the exceptions to the conclusions of law as are presented by the overruling of a demurrer to the complaint, the Supreme Court need only pass on the ruling on the demurrer, since the determination of the latter question necessarily determines the other.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 343.*]

2. **BANKRUPTCY (§ 302*)—PREFERENCE—NECESSARY ALLEGATIONS.**

In an action by a trustee in bankruptcy to recover money alleged to have been paid defendant within four months before the filing of the petition in violation of section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314), it is not necessary to allege facts sufficient to constitute a cause of action to set aside a fraudulent conveyance of real estate; all that is necessary being an allegation of a pref-

erence by an insolvent within four months of the filing of the petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

Appeal from Superior Court, Grant County; P. H. Elliott, Judge.

Action by Jacob B. Gossett, trustee in bankruptcy, against the Marion State Bank. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Carroll, for appellant. W. S. Marshall, for appellee.

MONKS, J. This action was brought by appellee as trustee in bankruptcy to recover money from appellant alleged to have been paid to it by the bankrupt within four months before the filing of the petition in bankruptcy, thereby giving appellant a preference over other creditors of the same class, in violation of the provisions of section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, pp. 1314, 1315). Collier on Bankruptcy (7th Ed. 1909) 1167, 1168. The complaint was in two paragraphs. A demurrer for want of facts to each paragraph was overruled. The court made a special finding of facts, and stated conclusions of law thereon against appellant. Over appellant's motion for a new trial, judgment was rendered in favor of appellee for the amount of the alleged preference.

The errors assigned and not waived call in question the conclusions of law, the action of the court in overruling the demurrer to each paragraph of the complaint, and the motion for a new trial. While appellant complains of the action of the court in overruling the demurrer to each paragraph of the complaint, we need only consider the sufficiency of the second paragraph for the reason that the special finding of facts, conclusions of law, and final judgment rest upon that paragraph. Goodwine v. Cadwallader, 158 Ind. 202, 204, 205, 61 N. E. 939, and cases cited.

As the same questions are presented by the exceptions to the conclusions of law that are presented by the action of the court in overruling the demurrer to the second paragraph of the complaint, we need only to determine the sufficiency of said paragraph of the complaint, for the reason that the determination of the latter question necessarily determines the other. Goodwine v. Cadwallader, 158 Ind. 202-205, 61 N. E. 939. Appellant's objections to the second paragraph of the complaint are based upon the theory that, to be sufficient, a complaint under section 60 of the bankruptcy act as amended in 1903 must allege facts sufficient to constitute a cause of action to set aside a fraudulent conveyance of real estate under

the decisions of this court. The cases cited by appellant to sustain this contention are decisions of this court in cases brought to set aside fraudulent conveyances of real estate and decisions in courts of other jurisdictions which deal only with the provisions of the bankruptcy act concerning the capacity of the trustee to avoid transfers of property in fraud of creditors which in the absence of bankruptcy proceedings such creditors might themselves maintain an action to avoid, and are not therefore in point here. This action is not under that part of the bankruptcy act, but is under that part of said act relating to unlawful preferences, which is as follows: "Sec. 60. A person shall be deemed to have given a preference, if being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. * * * (b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." As no such conditions precedent to the right of the trustee to recover as contended by appellant are contained in the bankruptcy act, it is evident that appellant's objections to said second paragraph are not tenable. Said second paragraph contains all the essential elements required by said section 60a, b, supra, and was therefore sufficient. *Jackman v. Eau Claire Nat. Bank*, 125 Wis. 468, 104 N. W. 98, 115 Am. St. Rep. 955, and note; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 27 Sup. Ct. 391, 51 L. Ed. 596; *Crooks v. People's Nat. Bank*, 46 App. Div. 335, 61 N. Y. Supp. 604. It follows for the same reasons that the conclusions of law are not erroneous.

The only cause for a new trial not waived is that "the findings of the court are not sustained by sufficient evidence." After a careful examination of the evidence, we cannot say that the same does not sustain the findings which are necessary to appellee's recovery in this case. *American Varnish Co. v. Reed*, 154 Ind. 88, 90, 91, 55 N. E. 224; *Rownd v. State*, 152 Ind. 39, 44, 46, 51 N. E. 914, 52 N. E. 395; *Tinkle v. Wallace*, 167 Ind. 382, 394, 79 N. E. 855; *Doering v. Dav- enport* (App.) 91 N. E. 43, and cases cited.

Judgment affirmed.

(175 Ind. 522)

BRENNEMAN v. STATE. (No. 21,756.)¹
(Supreme Court of Indiana. Feb. 17, 1911.)

1. CRIMINAL LAW (§ 211*)—AFFIDAVIT—SUFFICIENCY.

Burns' Ann. St. 1908, § 2280, provides that any one entering unlawfully on the land of another who shall be forbidden "to do so" by the owner, and shall thereafter enter shall be guilty of trespass. An affidavit before a justice of the peace alleged that defendant unlawfully entered on the land of one N. "and, having been forbidden by the said N., the owner thereof" did unlawfully enter. Held, that the affidavit was not insufficient for failure to add the words "so to do" after the allegation "forbidden by the said N."; Burns' Ann. St. 1908, § 2063, cl. 10, providing that no affidavit shall be quashed for any defect not prejudicing the substantial rights of defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 211.*]

2. CRIMINAL LAW (§ 1186*)—APPEAL—IMMATERIAL ERROR.

Where an affidavit charged the offense of trespass with reasonable certainty, an omission or imperfection not tending to prejudice the substantial rights of the accused will not be regarded on appeal under Burns' Ann. St. 1908, § 2221.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8219; Dec. Dig. § 1186.*]

3. CRIMINAL LAW (§ 1159*)—APPEAL—EVIDENCE.

Where the evidence was conflicting, but there was sufficient in the record fairly tending to establish a finding of guilty, it will not be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Circuit Court, Grant County;
H. J. Paulus, Judge.

John C. Brennenman was convicted of trespass before a justice of the peace, and he appeals. Affirmed.

W. O. Johnson and Blacklidge, Wolf & Barnes, for appellant. Thomas M. Monan, Thos. H. Branaman, Edw. M. White, and James E. McCullough, for the State.

COX, J. The appellant was prosecuted before a justice of the peace for trespass under section 388 of the Criminal Code of 1905 (Burns' Ann. St. 1908, § 2280), and convicted. He appealed to the circuit court, and met a similar fate after a trial by the court without the intervention of a jury. In this court he asks a reversal on two grounds: (1) That the trial court erred in overruling his motion to quash the affidavit; and (2) that the evidence is not sufficient to sustain the finding of the trial court.

The statute provides: "Whoever, being about to enter unlawfully upon the inclosed or uninclosed lands of another, shall be forbidden to do so by the owner, or occupant, or his agent or servant, * * * and shall thereafter enter upon such land, * * * shall be guilty," etc. That part of the affidavit upon which appellant was convicted which it is claimed is defective and insufficient charges that the appellant "did then

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹ Rehearing denied.

and there unlawfully being about to enter upon the inclosed land of Joseph R. Neal, and having been forbidden by the said Joseph R. Neal, the owner thereof, did then and there, and thereafter unlawfully enter and go upon said land." It is urged that, because the word "forbidden" as set forth is not followed by the further words "so to do," it is not made to appear what appellant was forbidden to do, and that without these words the affidavit does not charge sufficiently that he was forbidden to enter upon the lands of the complaining witness described. The phrase "having been forbidden" is used in connection with the purpose of the appellant, threatened or about to be carried out, to enter upon the land, and that it was used to indicate anything else forbidden than such entry could not well be implied without straining its meaning in the connection with which it is used. The offense of trespass was charged with reasonable certainty, and the omission urged as a defect or imperfection, if it is one, did not tend to the prejudice of the substantial rights of the appellant, and it was therefore not proper to quash the affidavit on account of it. Burns' Ann. St. 1908, § 2063, cl. 10; section 2221.

The evidence was conflicting. The trial court had the witnesses before it and decided that the defendant was guilty, and, as there is in the record evidence fairly tending to sustain that finding, this court will not say that the finding was wrong.

Judgment affirmed.

(176 Ind. 193)

BULLOCK v. ROBISON, County Treasurer, et al. (No. 21,637).¹

(Supreme Court of Indiana. Feb. 14, 1911.)

1. STATUTES (§ 77*)—GENERAL AND SPECIAL LAWS—CLASSIFICATIONS OF MUNICIPAL CORPORATIONS—VALIDITY.

To be valid within the constitutional limitations relating to general and special laws, a classification must embrace a class of subjects or places without omitting any naturally belonging to such class, and must be based on a reasonable distinction between the objects or places included and those excluded, and not be a mere arbitrary distinction; whether a law is general or special depending on its subject-matter, and not on its form.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82; Dec. Dig. § 77.*]

2. OFFICERS (§ 28*)—PUBLIC OFFICERS—PERSONAL INTEREST.

At common law, a public officer could not exercise discretionary power as to a matter in which he was personally interested.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 28.*]

3. STATUTES (§ 96*)—SPECIAL LAWS—ESTABLISHMENT OF SCHOOLS—TAXATION.

Act March 31, 1909 (Laws 1909, c. 38) § 4, provides that where there is in any school city an art association owning buildings, etc., in which a certain sum has been invested, which has made the city superintendent of schools,

directors of art instructions, and two others nominated by the board of school commissioners members of its governing board, and which shall give free admission to its galleries to teachers and pupils of all schools in the city, and provide free illustrated lectures and instruction to teachers designated by the superintendent of schools at half the usual rates, the board of school commissioners shall pay to it annually from the special fund of the city a sum equal to one-half cent on each \$100 of taxable property, and further permits the board, in co-operating with such association in furthering art instruction in the public schools, to accept contributions from the association, providing the total expenditure by the board from its own funds does not exceed annually a sum equal to one-half cent on each \$100 of the taxable property as valued in the year 1908. *Held*, that the act was void as contravening Const. art. 4, § 22, cl. 13, prohibiting local and special legislation, providing for the support of common schools.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 107; Dec. Dig. § 96.*]

Appeal from Circuit Court, Marion County; Chas. Remster, Judge.

Action by Henry W. Bullock against Edward Robison, County Treasurer, and others. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Reversed, with instructions to overrule demurrer.

Henry W. Bullock, pro se. Albert Baker, Smith, Duncan, Hornbrook & Smith, for appellees.

MORRIS, J. Bullock, appellant, filed his complaint in the Marion circuit court, against Robison, county treasurer, the board of school commissioners, and the city comptroller of Indianapolis and the Art Association of the same city. The complaint alleges that the treasurer has in his hands the sum of \$10,000 belonging to the school fund of the school city of Indianapolis, that was collected from the taxpayers of the school city by virtue of an assessment and levy made by the proper officers pursuant to the provisions of section 4 of an act of the General Assembly approved March 1, 1909 (Acts 1909, p. 89); that, unless enjoined, the school commissioners will authorize the city comptroller to draw a warrant for \$10,000 payable to defendant Art Association out of the school funds of the school city, and the treasurer will pay the same; that the defendant Art Association is a private corporation conducting, for gain, the John Herron Art Institute in the city of Indianapolis, and has a board of 25 directors, 4 of whom were chosen by the school authorities, and the remaining 21 were chosen by the stockholders of the association; that the association is not managed by any public authority, but is controlled entirely by its board of directors. The complaint further alleges that section 4 of the act of March 1, 1909, is void because it is in conflict with the Constitution of Indiana, and in the capacity of a resident tax-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Rehearing denied.

payer he brings the suit and prays that the threatened payment of the \$10,000 be perpetually enjoined. To this complaint the several defendants each filed separate demurrers for want of facts. The court sustained each demurrer, and, plaintiff declining to plead further, a judgment was rendered against him, from which he brings this appeal. The errors assigned by the appellant consist of the action of the circuit court in sustaining each of the demurrers of appellees.

Section 4 of the act of March 1, 1909, reads as follows (italics ours): "Sec. 4. That (in) any school city in this state, such as is designated in section one of this act, where there is, or hereafter shall be, an *art association which owns buildings, grounds, works of art and other equipment*, for the study of art, located in said city, and in which more than two hundred thousand dollars shall have been invested, and which association shall cause to be made and continued as members of its governing board of directors, trustees or other managing body, the superintendent of schools of said school city, its director of art instructions, if any there be, and two other persons to be nominated by the board of school commissioners, and which association shall give free admission, at reasonable times, to its museum and art galleries to all teachers and pupils of the public, private and parochial schools in said city, and which shall provide free illustrated lectures, on some art or kindred subject, throughout the public school year of said city not less frequently than one lecture a week for school children, the same to be given at its museum or in a public school; and which shall at half the rates established in other cities for similar service provide instruction in the teaching of drawing and design for all teachers in said city nominated by the superintendent of schools of said city, and which shall provide throughout such school year free for not fewer than fifty pupils to be nominated on competitive examination by said superintendent of schools advanced instruction in drawing and in such applied arts as it teaches, it shall be the duty of said board of school commissioners so long as such art association continues to do and perform all said things, or is able and ready and willing to do and perform them, to avail itself thereof for the benefit of the school children and teachers in said city, and to pay such art association annually in quarterly installments from the special fund of said school city a sum equal to one half cent on each one hundred dollars of taxables of said city as valued on the tax duplicates for the year next before the date of each such payment; and said board of school commissioners may co-operate with such association in further improving or enlarging the instruction in drawing and in manual and industrial training in the public schools and, to those ends, may accept contributions of money or

services or equipment from such association on such conditions as in the judgment of said board of school commissioners may benefit the public schools, *provided that such co-operation and the acceptance of such contributions do not involve a total expenditure by said board from its own funds exceeding, in any one year, a sum equal to one half cent on each one hundred dollars of the taxables of said city as valued on the tax duplicate made in the year 1908*; but the right is hereby reserved to the state to repeal, alter or amend, at the pleasure of the Legislature, this section and all the rights and powers it gives." Acts 1909, p. 89.

The title of the act reads as follows: "An act concerning common school corporations in cities of more than one hundred thousand inhabitants." Section 1 of the act relates to acts of boards of school commissioners "in all cities of this state of more than one hundred thousand inhabitants according to the last United States census."

Appellant contends that section 4 above quoted is unconstitutional and void because (1) money raised by taxation cannot be used to assist private persons or corporations, or for other than public purposes; because (2) no aid can be given parochial schools out of the public treasury; because (3) the act deprives school cities of local self-government; because (4) it conflicts with clause 13, section 22, of article 4 of our state Constitution, which prohibits local or special laws concerning the preservation of the school funds; and because (5) it conflicts with the same clause which prohibits local and special laws providing for supporting common schools. Appellant contends that the enactment is invalid for some other reasons which we do not deem necessary to consider.

Appellees concede that public moneys cannot be appropriated to private uses, but contend that that question is not involved in the consideration of the act; that the General Assembly may provide for the payment of public moneys to private agencies engaged in work for public benefit; that the act in controversy does not seek to affect the common school fund; that the section of the act complained of does not confer aid on any parochial school, in conflict with the section of our Constitution which prohibits the drawing from the public treasury of any money for the benefit of any religious institution (section 6, Bill of Rights), and, even if it should be conceded that the act had such effect, it would be the duty of the court to eliminate from the enactment the words "private and parochial" and let the legislation stand; that the act does not interfere with the rights of cities in the matter of local self-government, because the school system of Indiana is a state system and under its control, and it may directly command its local agencies to levy taxes for particular purposes; that the act is not local nor special

in reference to providing for supporting common schools, but provides for its application by a just and lawful classification.

It is evident that appellees are correct in regard to appellant's fourth contention because the legislation in question does not seek to affect the common school fund. Assuming, without deciding, that appellees are correct on all the other propositions involved, except the last one, which assails the validity of the section in controversy, because it is an act relating to provisions for the support of common schools, and is local and special in character, we will consider this contention.

In *Campbell v. City of Indianapolis* (1900) 155 Ind. 187, 57 N. E. 920, it was held that an act relating to the issuance of bonds by school corporations in cities having a population of 100,000, "according to the last United States census," did not conflict with the above provision of the Constitution, because, while the act did not, when adopted, apply to any other city except Indianapolis, it would, in the future, apply to all cities of the state that should thereafter attain the requisite population. But, in the same case, it was held that an act in relation to the same subject-matter, applying to cities of a certain population, as shown by the census of 1870, was invalid because it was special and local. It would appear therefore that, if the application of the act in question had been made to depend alone on population, it would not be invalid under the doctrine announced in that case.

But it will be noticed that there are many other restrictions besides population that limit the application of the statute to a corporation having the requisite population, and it is therefore proper to consider the general principles governing the proper classification of corporations of this character.

The provisions of section 22 of article 4 of our Constitution, prohibiting local and special laws in the cases therein enumerated, did not appear in our Constitution of 1816. But the many evils that sprang up from the enactment of local and special laws, caused in part by a lack of interest on the part of legislators in measures that did not affect the districts represented by them, induced the constitutional convention of 1851 to eradicate the source of these evils, by restricting the power of the Legislature to enact local or special laws, relating to certain matters, among which was the providing for the support of common schools. Similar limitations on legislative power have been ingrafted on the Constitution of other states.

The intention of the people, in adopting these restrictions, is too plain for misapprehension. *Wanser v. Hoos*, 60 N. J. Law, 482, 38 Atl. 449, 64 Am. St. Rep. 600, and note. The General Assembly is as much bound by the limitations fixed by the Constitution as individuals. *Board, etc., v. State* (1904) 161

Ind. 616, 69 N. E. 442. The General Assembly may, however, without conflicting with the constitutional limitation, classify the cities to which an enactment applies. *City of Indianapolis v. Navin* (1897) 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344; *Evansville, etc., R. Co. v. City of Terre Haute* (1903) 161 Ind. 28, 67 N. E. 686; *Campbell v. City of Indianapolis*, supra. But a valid classification must not conflict with well-recognized rules, some of which are as follows: The classification must embrace a class of subjects or places, and not omit any one naturally belonging to the class. It must be based on some reasonable ground, which bears a just and proper relation to it, and not be a mere arbitrary selection. More is required than a mere designation by such characteristics as will serve to classify. The characteristics serving as a basis must be of such substantial nature as to mark the objects so designated as particularly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in the enactment, and the objects or places excluded. Whether a law is general or special depends on its subject-matter, and not on its form. *Town of Longview v. City of Crawfordsville* (1905) 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622; *Bedford Quarries Co. v. Bough* (1907) 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Board v. Johnson* (1909) 173 Ind. 76, 89 N. E. 590; *Bumb v. City of Evansville* (1907) 168 Ind. 272, 80 N. E. 625; *School City of Rushville v. Hayes* (1904) 162 Ind. 193, 70 N. E. 134; *Board, etc., v. State ex rel.* (1904) 161 Ind. 616, 69 N. E. 442; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *Hetland v. Board of Commissioners*, 89 Minn. 492, 95 N. W. 305; *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931, 21 Am. St. Rep. 772, and notes; *Wanser v. Hoos*, supra; *State, etc., v. Hammer*, 42 N. J. Law, 435; *State v. Jones*, 66 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592; *People v. Martin*, 178 Ill. 611, 53 N. E. 309.

Tested by the above requirements, does this legislation fall within the prohibited class? It will be noted that, before section 4 can apply to any city, it must not only have a population of 100,000, but it must have the following further characteristics: (1) It must have within its limits an art association which owns buildings, grounds, etc., of the value of \$200,000; (2) the association shall have as members of its managing body, the superintendent of schools, the director of art instruction, if any, and two persons nominated by the school boards; (3) it shall give free admission to its museum, etc., to all teachers and pupils of the public, private, and parochial schools, etc.; (4) it shall, at half the rates established in other cities, for similar service, provide instruction, etc., for teachers nominated by the school superin-

tendent, and for 50 pupils nominated by the superintendent on competitive examination. Under the above conditions, it is mandatory on the part of the school commissioners to pay such art associations from the special fund of said school city, annually, a sum equal to one-half cent on each \$100 of the taxables of the city.

It is next provided that the school commissioners may co-operate with such association in further improving or enlarging the instruction, etc., provided the co-operation does not involve a total expenditure by the board from the school funds, exceeding, in one year, a sum equal to one-half cent on the hundred dollars of taxables, as valued on the tax duplicate made in the year 1908.

It is altogether possible that there may, in the future, be cities in Indiana, having a population of 100,000 that had no existence in 1908, and as to such cities the act as an entirety could never apply because of the lack of taxables for the year 1908. It is very probable that in the future there will be cities attaining the 100,000 class, whose taxables, as shown by the tax duplicate of 1908, are small in comparison with those of Indianapolis, in 1908, and yet the needs of such supposed city for further improvement in instruction in drawing and in manual and industrial training might be greater than those of Indianapolis. Consequently the legislation cannot operate equally upon all within the class, and the reason for the partial or total exclusion of some cities from the class does not inhere in the subject-matter.

The evident object of the enactment is instruction in art and kindred subjects, which instruction is to be furnished by a private association, which may be a corporation organized for gain, and is the defendant Art Association, as alleged in the complaint. That any school city should be prohibited from employing an instructor unless such instructor shall also furnish free instruction, by means of free admission to its museum and art galleries to all teachers and pupils of private and parochial schools, implies a classification that is merely arbitrary and without reasonable basis. In *School City of Rushville v. Hayes*, supra, this court said: "There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation on the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation." It cannot be said that the restriction under consideration is justified by any substantial distinction that has reference to the subject-matter of the legislation.

Another restrictive feature of this act pro-

vides that the association employed as instructor must have, as members of its governing board of directors or managers, the school superintendent, director of art instruction, if any, and two persons nominated by the school commissioners. The school commissioners, by the terms of the act, are given the discretionary power to co-operate with the art association (managed by a board consisting, in part at least, of four appointees of the board of school commissioners) in the further improvement, etc., of instruction in drawing, etc., and to accomplish the purpose may expend from the school funds a sum equal to one-half cent on the hundred dollars of the taxables of the city as shown by the duplicate of 1908.

It may be that the General Assembly considered that if the private corporation had, as members of its managing board, officers and appointees of the school city, the school interests would thereby be better protected. It should not be forgotten, however, that directors of a private corporation owe a very high duty to its stockholders, and that the interests of the school corporation and those of the Art Association may be adverse. It is unnecessary to say that no man can render faithful service to two masters in a matter where their interests conflict. Section 21 of an act entitled "An act concerning common schools in cities having a population of more than 100,000 providing penalties for the violation of the provisions thereof, and declaring an emergency," approved March 4, 1899, in part provides: "It shall be unlawful for any commissioner or officer chosen by the board of school commissioners, in any manner, directly or indirectly, to profit by, or be interested in any contract of said board, and any person convicted of a violation of this section shall be fined in any sum not less than one hundred nor more than one thousand dollars, and expelled from office." Laws 1899, c. 200; Burns' Ann. St. 1908, § 6535. Similar statutes have been enacted with reference to officers of cities. Burns' Ann. St. 1908, §§ 2423, 5930. Aside from statutory enactments, at common law, a public officer was not permitted to exercise discretionary power in a matter in which he was personally interested. 29 Cyc. 1435. It would scarcely be contended that a restriction is grounded on a reasonable basis when it might require a violation of the law.

Without extending further this opinion, it is sufficient to say that section 4 of the act of March 1, 1909, is void because in conflict with clause 13, § 22, art. 4, of the Constitution of Indiana, prohibiting local and special legislation providing for the support of common schools.

The judgment of the circuit court is reversed, with instructions to overrule each of the demurrers of the appellees.

(47 Ind. App. 118)

HOLT v. MYERS. (No. 7,096.)
(Appellate Court of Indiana, Division No. 2.
Feb. 15, 1911.)

1. APPEAL AND ERROR (§ 701*)—ERRONEOUS INSTRUCTIONS—RECORD.

Where no evidence could be introduced under the issues that could render an instruction complained of proper, the judgment must be reversed on appeal, though the evidence is not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2933; Dec. Dig. § 701.*]

2. ANIMALS (§ 74*)—INJURIES FROM DOGS—COMPLAINT—EVIDENCE.

Where the complaint in an action for injuries from a vicious dog charged defendant with owning and keeping a large and vicious bulldog on his stock farm, and that he knew of the dog's propensities to attack persons, or should have known by the exercise of reasonable care, proof of the vicious propensities of the dog, to charge defendant with notice, was admissible.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 74.*]

3. APPEAL AND ERROR (§ 928*)—INSTRUCTIONS—REVIEW—RECORD.

Where the complaint in an action for injuries from a dog would justify proof of the vicious propensities of the dog to charge defendant with notice, and the evidence is not in the record, the court on appeal must presume that an instruction submitting constructive notice of the propensities of the dog was supported by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3751; Dec. Dig. § 928.*]

4. ANIMALS (§ 70*)—DOGS—LIABILITY OF KEEPER.

To charge a keeper of a dog with knowledge that under some circumstances it will attack persons, it is sufficient to prove that the dog was of a ferocious nature.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 228-237; Dec. Dig. § 70.*]

5. ANIMALS (§ 68*)—DOGS—LIABILITY OF KEEPER.

Where a dog is kept as a watchdog, the very purpose for which it is kept is evidence of its vicious character.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 225; Dec. Dig. § 68.*]

On petition for rehearing. Denied.
For former opinion, see 93 N. E. 31.

ADAMS, J. A petition for a rehearing is presented in this case based upon the ground that the court erred in holding as harmless that part of instructions 9, 11, and 12, reading, "Or should have known by the exercise of reasonable care." It is assumed by counsel for appellant that the court in the original opinion conceded that the words were erroneous. The opinion will not bear such construction, but holds that as the evidence was not in the record the court must assume that there was evidence of actual notice of the vicious nature of the dog, and, if such proof was before the jury, then the charge that appellant would be bound by constructive notice was harmless. There is no denial in the opinion of the well-settled rule that, where no evidence could be introduced under the issues that could have rendered the

instructions proper, the cause must be reversed even though the evidence is not in the record.

The appellant was charged in the complaint with owning and keeping a large and vicious bulldog upon his stock farm, and that he knew of the dog's propensities to bite and attack persons, or should have known by the exercise of reasonable care. Counsel for appellant are in error in assuming that constructive notice could not be shown in a case of this kind. Proof could have been offered upon the trial showing the vicious propensities of the dog, for the purpose of charging the appellant with notice, and, assuming that such proof was offered, the instructions were correct and are abundantly supported by authority. It is sufficient to prove that the dog was of a ferocious nature to charge his keeper with knowledge that, under some circumstances, the dog would attack persons. *Barclay v. Hartman*, 2 Marv. (Del.) 351, 352, 43 Atl. 174; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717. If a dog is kept as a watchdog, the very purpose for which he is kept is evidence of his vicious character. *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454; *Duval v. Barnaby*, 75 App. Div. 154, 77 N. Y. Supp. 338; *Nelson v. Barrett*, 89 App. Div. 468, 85 N. Y. Supp. 817; *Hahnke v. Friederich*, 140 N. Y. 227, 35 N. E. 487. In the last case it is said: "When a person keeps a dog for the purpose of guarding his property against trespassers or criminals, it is not unreasonable to infer knowledge on his part of the propensity of the dog to attack and bite mankind, and negligence in allowing him to be at large."

It is held in *Robinson v. Marino*, 8 Wash. St. 434, 28 Pac. 752, 28 Am. St. Rep. 50, in a similar action, that it is not necessary for the owner to have actual notice. The court say: "If he has notice that the disposition of the animal is such as it would be likely to commit an injury similar to the one complained of it is sufficient. It is not necessary that the notice be of injury actually committed." This case is followed in the later case of *Grissom v. Hofius*, 39 Wash. 51, 55, 80 Pac. 1002.

It has been uniformly held that proof of the savage and ferocious disposition of an animal is equivalent to express notice. *Muller v. McKeelson*, 73 N. Y. 195, 29 Am. Rep. 123; *Grissom v. Hofius*, supra; *Robinson v. Marino*, supra; *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630. It has also been held that knowledge may be imputed. *Corliss v. Smith*, 53 Vt. 532; *Hahnke v. Friederich*, 140 N. Y. 227, 35 N. E. 487; *Brice v. Bauer*, 108 N. Y. 428, 15 N. E. 695, 2 Am. St. Rep. 454.

In *Brice v. Bauer*, supra, it is said: "A man who keeps a dog is bound either to have it under his own observance and inspection,

or if not, to appoint some one under whose observation and inspection it may be, and that person's knowledge is the knowledge of the owner." "When it appears that a domestic animal is vicious, and has a propensity to do mischief, of which facts the owner or keeper has notice, either express or implied, the law imposes the duty upon such owner or keeper of keeping such animal secure, from which duty a liability arises in favor of any person who without his fault is injured by it, either in person or property." Knowles v. Mulder, 74 Mich. 202, 41 N. W. 896, 16 Am. St. Rep. 627.

Rehearing denied.

(47 Ind. A. 159)

McGRAW v. NICKEY et al. (No. 7,154.)
(Appellate Court of Indiana, Division No. 2.
Feb. 16, 1911.)

1. APPEAL AND ERROR (§ 105*)—APPEALABLE ORDERS—ORDERS OF DISMISSAL.

An order dismissing a suit is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. § 105.*]

2. APPEAL AND ERROR (§ 76*)—APPEALABLE ORDERS—FINAL JUDGMENTS.

So long as a case is pending below, an appeal cannot be taken as from a final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 76.*]

3. APPEAL AND ERROR (§ 76*)—APPEALABLE ORDERS.

No appeal lies from orders refusing to allow plaintiff to file a petition to be permitted to prosecute as a poor person a suit which was stayed until payment of costs of the former suit, and refusing to allow him to file an affidavit for a change of venue; no order of dismissal appearing to have been entered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 76.*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by Thomas McGraw against Addison B. Nickey and another. From a judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal. Appeal dismissed.

R. W. Armstrong, W. E. Cox, M. W. Fields, and G. V. Menzies, for appellant. Robinson & Stilwell, Henry Kister, and Chas. L. Wedding, for appellees.

LAIRY, J. The appellant brought an action against the appellees in the Gibson circuit court to recover damages for personal injuries. The complaint was filed on the 8th day of February, 1908. On the 19th day of February of the same year the defendants filed a motion in the Gibson circuit court to stay the proceedings of the plaintiff until the costs of a former suit brought by appellant against appellees were paid. The motion was verified, and stated that some time in the year 1907 appellant had brought a suit against appellees in the Posey circuit court,

and that, after a jury had been impaneled and the case partially tried, the appellant had voluntarily dismissed his case in the Posey court, and that the costs of the proceedings in that court including the cost of a struck jury had been taxed to appellant, that the case brought in the Posey circuit court and dismissed as aforesaid was between the same parties and was for the same cause of action set up in plaintiff's complaint, and that said costs had not been paid. The appellant made no showing to the court as to why said motion should not be sustained, and the court sustained the motion, and ordered that the proceedings in this case be stayed until the costs in the preceding suit were paid. After this order was made, appellant offered to file a petition in the Gibson circuit court, to be permitted to prosecute his action as a poor person. The court refused to allow appellant to file this petition, after which appellant offered to file an affidavit for a change of venue from the judge of the Gibson circuit court. The court refused to allow appellant to file this affidavit. The appellant excepted to the ruling of the court in refusing to allow him to file the affidavit for a change of venue, and also to the ruling refusing to allow him to prosecute his action as a poor person. Bills of exception were filed by which these rulings were properly brought in the record. The appellees filed a motion in the court below to dismiss the case, but, so far as the record discloses, their motion was not ruled upon, and the cause is still pending in the Gibson circuit court. The appellant prayed an appeal, and has filed a transcript in this court disclosing the matters heretofore recited. Appellees file a motion to dismiss the appeal upon the ground that no judgment was rendered by the Gibson circuit court from which an appeal lies.

If the motion to dismiss had been sustained by the trial court, this would have terminated the proceedings in that court, and an appeal could have been taken from the order dismissing the case. So long as the case is pending in the court below an appeal cannot be taken to this court as from a final judgment. Trogdon v. Brinegar, 26 Ind. App. 441, 59 N. E. 1066; Withers v. Haines, 2 Pa. 435; Boor v. Wilson, 48 Md. 305; Clark v. Bay Circuit Judge, 154 Mich. 483, 117 N. W. 1051; Tracy v. Bible, 181 Ill. 331, 54 N. E. 960.

The appellant may at any time upon payment of costs proceed with his case in the lower court, or, in the event that the order of the trial court should be set aside for any reason, he could so proceed.

The case is not properly in this court, and therefore we cannot review the action of the trial court upon the question sought to be presented.

Appeal dismissed.

(47 Ind. App. 199)

SWING v. MARION PULP CO. (No. 6,909.)
(Appellate Court of Indiana, Division No. 1.
Feb. 22, 1911.)

1. CONTRACTS (§ 28*)—WHEN COMPLETE—NEGOTIATIONS BY MAIL.

A contract is formed by depositing in the mail an unqualified acceptance of an offer made by mail.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 80; Dec. Dig. § 28.*]

2. INSURANCE (§§ 125, 136*)—VALIDITY OF CONTRACT—LAWS GOVERNING.

Where fire policies were mailed from another state to insured in Indiana, with a request that they be returned by a certain date if found to be unsatisfactory, insured's retention of them beyond that time, or mailing an acceptance, constituted an acceptance of the terms and completed the contracts, making them subject to the laws of Indiana.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 173-175, 219-230; Dec. Dig. §§ 125, 136.*]

3. APPEAL AND ERROR (§ 1010*)—REVIEW—SUFFICIENCY OF EVIDENCE.

A judgment will not be disturbed for want of evidence of a particular fact, where there is evidence from which the finding might be inferred.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

Appeal from Superior Court, Grant County; P. H. Elliott, Judge.

Action by James B. Swing against the Marion Pulp Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Todd & Rauch and P. A. Reece, for appellant. St. John, Charles & Gemmill, for appellee.

MYERS, C. J. James B. Swing, as trustee for the creditors of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, brought this action against the Marion Pulp Company, as a policy holder in said company, to recover an assessment alleged to be due and unpaid. The complaint, in substance, shows that the Union Mutual Fire Insurance Company of Cincinnati, Ohio, hereafter referred to as the "company," on December 18, 1890, was reincorporated by a decree entered by the Supreme Court of Ohio, and on June 11, 1901, by a decree of that court defendant was assessed \$290.80; that said company was a mutual fire insurance company incorporated under the laws of Ohio; that, at the time the policies to the defendant were issued, said laws in force provided that every person, who effects insurance in a mutual company and continues to be insured, shall thereby become a member of the company during the period of insurance, and shall be bound to pay for losses and such necessary expenses as accrue in and to the company, in proportion to the original amount of his deposit note or contingent liability, and fixing such contingent liability at not less than three nor more than five annual cash

premiums as written in the policy; that, by reason of said policies held by the defendant, it incurred a contingent liability of five times the amount of its annual premium. The defendant answered in four paragraphs: First, general denial; second, it is admitted that the defendant contracted with said company for the policies named in the complaint; that said policies were issued by said company to the defendant. But in substance it is averred that at the time said contracts of insurance were entered into, and at the time of the final dissolution of said company, and at the time plaintiff was appointed as trustee to wind up its affairs, it was a foreign insurance company organized under the laws of the state of Ohio, and during all of that time, and continuously thereafter, the defendant has been and is now a resident of Grant county, in the state of Indiana; that said property named in said policies of insurance is located in Grant county, Ind.; that said contracts were made and said policies delivered to the defendants in said county and state; that, at the time said contracts were made and delivered to the defendant, said company had not complied with the laws of the state of Indiana relating to foreign insurance companies doing business in this state, nor has said insurance company at any time since the making of said contracts and the issuing and delivering of said policies complied with said laws of Indiana, wherefore said contracts are null and void. The third and fourth paragraphs averred that plaintiff's cause of action did not accrue in six and ten years, respectively. The plaintiff, for reply to the affirmative paragraphs of answer, admitted that at the time the policies referred to in the answer were issued, and thereafter until the date of dissolution and ouster of the company, it was a foreign insurance company incorporated under the laws of the state of Ohio, having its home office at Cincinnati; that the defendant was at all times and still is a resident of Indiana; that, at the time said contracts of insurance were made, issued, and delivered to said defendant, said insurance company had not complied with the laws of Indiana, and had not, and never has, obtained a certificate from the auditor of state granting it authority to do business within the state of Indiana; and denies each and every allegation of said answer not specifically admitted. The issues thus formed were submitted to the court for trial, resulting in a finding and judgment in favor of the defendant and against the plaintiff. Appellant's motion for a new trial was overruled, and this ruling is assigned as error. In support of said motion, it is insisted that the judgment of the court below is contrary to law and against the evidence adduced in the case.

From the evidence, in addition to the facts

admitted in the pleadings, it appears that the property said to have been insured was situated in Grant county, Ind.; that an agent of said company at the city of Marion solicited and received from appellee an application for insurance from said company, covering said property; that said agent delivered said application to said company at its home office, in Cincinnati, Ohio, and, upon which application, policies of insurance were thereafter issued by said company, and through the medium of the United States mail were by said company sent to the appellee, at Marion, Ind.; that accompanying each of said policies was a letter signed by the secretary of the company addressed to appellee, requesting the latter to return the policies on or before the 25th of the month in case the terms on which they were sent were not satisfactory; that said company was a foreign insurance company organized under the laws of the state of Ohio; that on December 18, 1890, the Supreme Court of the state of Ohio ordered and decreed that said company be ousted and excluded from being a corporation, and from further exercising or using the franchises, privileges, and power of a corporation, and appointed appellant trustee of the creditors and stockholders of said company; that said Swing accepted said appointment, qualified, and entered upon the duties of his said trust; that on June 16, 1891, in an ex parte proceeding, the assessment here in question was ordered by said Supreme Court on the basis of five times the cash premium stated in the contracts.

Appellant insists that, under the evidence, the contracts were made in Ohio and governed by the laws of that state, while appellee contends that they were made in Indiana. All must agree that: "The law in regard to the making of contracts by mail is that, when a letter containing a proposition is forwarded by mail to be accepted or declined in like manner, if the person to whom it is addressed unconditionally accepts the proposition by letter, and mails it to the person from whom the proposition came, the contract is complete as soon as the letter of acceptance is deposited in the mail. Parsons on Contracts (7th Ed.) star page 484." Horton v. Insurance Co., 151 Mo. 604, 619, 52 S. W. 356; Equitable Life Assurance Society v. Perkins, 41 Ind. App. 188, 80 N. E. 682.

Appellant omits to take into consideration the fact that the contracts were sent to appellee conditionally; that is to say, it had the privilege of returning them to the company within a specified time in case the terms on which they were sent were not satisfactory, and thus end the negotiations. While the company may have unconditionally accepted appellee's application, it is certain that the contracts were not completed until the latter's acceptance. Appellee, at Marion, Ind., received the contracts and re-

tained them beyond the time allowed for their return. Its failure to take advantage of its option in this respect was in effect an act of acceptance, and the last act necessary to complete the contracts. Whether appellee's acceptance was in writing, mailed to the company, or the time within which the contracts might have been returned was allowed to pass, either intentionally or unintentionally, can make no difference, for in either event it was a proposition or offer to appellee acted upon in Indiana, and, being the final act of the parties, such contracts will be regarded as made in Indiana. Equitable Life Assurance Society v. Perkins, supra.

The court below evidently found that the contracts were made in this state, and, as there is evidence in the record from which such finding might be inferred, the judgment for want of evidence in this particular will not be disturbed.

Our conclusion as to the place where the contracts were made brings this case within the principles announced by this court in the case of Swing, Trustee, v. Wellington, 44 Ind. App. 455, 89 N. E. 514; and, on the authorities of that case, the judgment in this case is affirmed.

(47 Ind. App. 612)

HITZ et al. v. WARNER et al.¹ (No. 6,828.)
(Appellate Court of Indiana, Division No. 1.
Feb. 14, 1911.)

1. SALES (§ 434*)—ACTION FOR BREACH OF WARRANTY—PLEADING—CAUSE OF ACTION.

A complaint showing a parol contract for the sale of potatoes, accompanied by an express warranty as to their keeping qualities, delivery and acceptance of them, and payment therefor, and a breach of the warranty resulting in damages to the buyer, states a cause of action.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1234-1238; Dec. Dig. § 434.*]

2. FRAUDS, STATUTE OF (§ 189*)—SALES OF GOODS—COMPLETE PERFORMANCE.

Where personal property is sold by parol followed by delivery and acceptance of the property and payment therefor, the contract is taken out of the statute of frauds, since, under Burns' Ann. St. 1903, § 7469, the receipt of a part of the property would be sufficient.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 841; Dec. Dig. § 139.*]

3. EVIDENCE (§ 410*)—PAROL EVIDENCE—SUFFICIENCY OF WRITING.

The seller of goods after making a parol contract of sale with an express warranty of quality left a copy of the following memorandum with the buyer: "Sold 10/2 Warner & Sons, 600 Bu. Potatoes, fifty C. Per. Bu. F. O. B. Summitville, Geo. Hitz & Co. Per Pringle." Held, that the memorandum was not a contract sufficient to exclude parol evidence as to the terms and conditions of the contract of sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1846-1854; Dec. Dig. § 410.*]

4. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS.

Conversations, letters, telegrams, or other communications between the sellers of personal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹ Rehearing denied.

property or between the sellers and their agents or between the sellers and third persons without the knowledge of the buyers is inadmissible against the buyer in an action on a breach of warranty, as self-serving declarations.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1104; Dec. Dig. § 271.*]

5. CUSTOMS AND USAGES (§ 17*) — VARYING EXPRESS CONTRACT.

Where a parol contract of sale is definite and clear in its terms, and embraces an express warranty of quality, evidence of a custom of trade is inadmissible to vary or control the contract.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.* Evidence, Cent. Dig. §§ 1945-1952.]

6. SALES (§ 262*) — WARRANTIES — RELIANCE BY BUYER ON STATEMENTS.

A purchaser may rely upon an express warranty, though he had an opportunity of inspecting before accepting the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 736-739; Dec. Dig. § 262.*]

7. APPEAL AND ERROR (§ 757*) — BRIEFS — SPECIFICATIONS OF ERROR — NATURE OF QUESTIONS AND ANSWERS.

Where a brief does not comply with the rule requiring answers to questions objected to be set out, the objections will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

8. APPEAL AND ERROR (§ 757*) — BRIEFS — STATEMENT OF CASE — STATEMENT OF EVIDENCE.

Where error is predicated upon the exclusion of evidence, briefs should set out the question asked, and also show what the answer was expected to prove, and, if the testimony is remote and inferential, its relevance must be suggested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

9. SALES (§ 441*) — WARRANTIES — EVIDENCE — SUFFICIENCY.

In an action for breach of warranty in the sale of potatoes, evidence held to sustain a judgment for the plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

10. DAMAGES (§ 140*) — EXCESSIVE DAMAGES — BREACH OF WARRANTY OF CONTRACT — WARRANTY OF GOODS.

Where the buyers of 565 bushels of potatoes at 50 cents per bushel f. o. b. under an express warranty by the seller that they would keep in storage, and in an action for breach of warranty showed that the potatoes after four weeks were decayed and worthless, a judgment of \$219 for plaintiff is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 404, 405; Dec. Dig. § 140.*]

Appeal from Superior Court, Madison County; Cassius M. Greenlee, Judge.

Action by Samuel Warner and others against George Hitz and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lovett & Slaymaker, for appellants. Bagot & Bagot and Luther F. Pence, for appellees.

FELT, J. Suit for damages for an alleged breach of a warranty in the sale of personal property resulting in judgment in favor of appellees for \$219, from which this

appeal is taken. The errors relied upon are: (1) The overruling of a demurrer to each paragraph of complaint. (2) Insufficiency of the complaint upon the facts alleged. (3) Insufficiency of the substituted complaint upon the facts alleged. (4) The overruling of appellants' motion for a new trial. The original complaint was in two paragraphs and was lost after the ruling upon the demurrer, and upon order of the court a substituted complaint was filed, but in one paragraph.

The material averments of the substituted complaint, for the purposes of this appeal, are: That on or about October 2, 1906, the appellants, by one of their agents, offered to sell to the appellees a car load of potatoes, consisting of about 600 bushels, at 50 cents per bushel, and that appellants warranted said potatoes to be of good quality, good keepers, and that they would keep in the appellees' cellar throughout the winter next following the sale; that in consideration of said warranty appellees agreed to accept the potatoes and pay therefor, upon their delivery to them, at the town of Summitville. That on or about the 8th day of October, 1906, appellees received said car of potatoes, consisting of 565 bushels, and relying upon said warranty, accepted and paid for the same; that said potatoes were not of good quality, were not good keepers, and did not keep in appellees' cellar and storerooms, but were immature and green potatoes; that appellees relied upon said warranty, and, believing the potatoes to be of the kind and quality sold to them as aforesaid, placed them in their cellar, and within four weeks thereafter the same decayed and became absolutely worthless, and appellees were compelled to remove the same from their cellar. That the appellees were not experienced in judging the keeping qualities of potatoes, and the defects which caused said potatoes to rot were not such as were observable by a person of ordinary intelligence, without experience in handling potatoes. That they paid therefor the sum of \$282.37, and performed all the conditions of said contract of purchase to be by them performed. That if said potatoes had been of the kind and quality warranted, they would have been of the value of the purchase price aforesaid. That on account of the defects aforesaid they were of no value whatever, and said warranty was thereby broken, and the plaintiffs damaged in the sum of \$300.

The substituted complaint for all purposes of the case stands as the original complaint, and in the absence of the original complaint the ruling upon the demurrer will be determined upon the allegations of the substituted complaint. The substituted complaint shows a parol contract for the sale of potatoes accompanied by an express warranty as to their keeping qualities, the delivery and acceptance of the potatoes, payment therefor

by the purchaser and a breach of the warranty resulting in damages. These averments, we think are clearly sufficient to state a cause of action. *Lincoln v. Ragsdale*, 7 Ind. App. 354, 31 N. E. 581; *Shirk et al. v. Mitchell et al.*, 137 Ind. 185-189, 36 N. E. 850; *Aultman, Miller & Co. v. Seichting*, 126 Ind. 137, 25 N. E. 894; *Jones v. Quick*, 28 Ind. 125; *Smith et al. v. Borden*, 160 Ind. 223-228, 66 N. E. 681. The claim that the case is within the statute of frauds cannot be sustained for the reason that it is well settled that where personal property is sold by parol contract and the agreement is thereafter executed by the delivery and acceptance of the property, and payment therefor, the case, though it may have been originally within the statute of frauds, is, by the execution of the contract, taken out of its operation. Our statutes (section 7469, *Burns' Ann. St.* 1908) provide that receipt of part of the property is sufficient to make the contract binding without a written agreement. The facts averred in this complaint show not only the receipt of "part of such property," but all of the property purchased. The statute of frauds, therefore, has no application to the case made by the complaint before us. *Fletcher et al. v. Southern*, 41 Ind. App. 550, 84 N. E. 526; *Barkalow v. Pfeiffer*, 38 Ind. 214. This disposes of all the errors assigned, except the ruling upon the motion for a new trial.

Specifications 1 to 4, inclusive, of the motion for a new trial assert that the damages are excessive, that the decision of the court is not sustained by the evidence, and that it is contrary to law. The other specifications of the motion, to and including the forty-eighth, complain of the rulings of the trial court in the admission and exclusion of certain testimony. It appears from the evidence that after the parol agreement of sale had been made by the appellees and the agent of appellants that said agent prepared a memorandum and left a copy thereof at appellees' store, which was as follows: "Sold 10/2 Warner & Sons. 600 Bu. Potatoes, fifty C. Per Bu. F. O. B. Summitville, Geo. Hitz & Co. Per Pringle." It is contended by appellants that this memorandum is a contract, and that all the negotiations preceding it were merged therein, and that parol testimony on the subject of the sale of the potatoes was therefore inadmissible, and the decision of the court based upon the parol testimony erroneous. If this memorandum can be held to be a contract, and was entered into by the parties with the intention that it should evidence their agreement, then the contention of appellants must be sustained, otherwise a different conclusion must follow. Does this memorandum contain the essential elements of a contract? It is only signed by one of the parties, says nothing about the quality of the potatoes, the time of delivery or payment. Thus far there can be no dispute, but appellees also assert that the

warranty was not only a part of the contract, but was the inducement to the purchase.

In speaking of a memorandum sufficient to take a case out of the statute of frauds, in *Ridgway v. Ingram*, 50 Ind., our Supreme Court, by Worden, J., on page 146 (19 Am. Rep. 706) said: "A memorandum, in order to be sufficient within the statute, must state the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof." This was said with reference to the memoranda of a sheriff indorsed on an order of sale, and the court held that they were not warranted in inferring that the sheriff meant the land described in the order, there being no reference in the memoranda itself to the order of sale or the real estate therein described. In *Sprinkle v. Trulove*, 22 Ind. App. 577, 54 N. E. 461, this court said: "Parol evidence cannot be resorted to for the purpose of supplying anything which it lacks to make it a written agreement containing the essential terms of a sale." In the case of *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135, the question was determined that the memorandum kept by the clerk at a public sale was not sufficient to evidence a contract. See, also, *Lee et al. v. Hills et al.*, 66 Ind. 474; *McMillen v. Terrell*, 23 Ind. 163; *Telluride, etc., Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 322. Furthermore, the evidence is by no means conclusive that the appellees had any knowledge of this memorandum until after the sale was fully consummated, the potatoes delivered, received and paid for by them.

Mr. Pringle testified that, after agreeing to the purchase, Mr. Warner asked for a copy of the contract and was given this memorandum. That he asked for a copy of the agreement or had any knowledge of this memorandum at the time of the sale is denied by Mr. Warner. It is not claimed that the clerk, Leonard Lawrence, who, with Mr. Warner, made the purchase, had anything to do with or knowledge of this memorandum at the time. The reading of the testimony leads us to conclude that the agent of appellants, Mr. Pringle, after the sale was agreed upon, made the memorandum and left it at the appellees' store, but that the appellees had no knowledge of it at the time, and that it was not the mutual agreement of the parties evidencing the contract. Appellants have cited *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984, in support of their contention that the memorandum is sufficient to evidence a contract, and that, as it contains no warranty, the appellees are bound by their inspection and acceptance of the potatoes. The memorandum shown in this case is somewhat similar to the one in the case at bar, but it contained at the bottom thereof, this provision: "Will order out." The memorandum was of date of October 6th,

and on October 11th in the same year, the purchaser, by letter, directed that 600 bushels of potatoes be sent to him in accordance with the memorandum, and specified that he should have good potatoes. The memorandum was signed by the seller, and the letter by the purchaser of the potatoes, and the two instruments were of necessity construed together, and, when so construed, contained more of the essentials of a contract than the memorandum in this case. We hold that this is a suit for damages for the breach of a contract containing an express warranty as to the keeping qualities of the potatoes sold, and that the memorandum was not a contract between the parties, and consequently parol testimony as to the terms and execution of the agreement between the parties was proper. This conclusion makes it unnecessary for us to consider the question of implied warranty, and also disposes of many of the objections to the admissibility of testimony, and many of the questions arising upon the exclusion of certain testimony offered by appellants.

The objections to testimony offered are numerous, and need not be considered in detail. The following well-established propositions of law, together with our views of this case already announced, dispose of most of the questions relative to the evidence:

Conversations, letters, telegrams, or other communications between the appellants, or between the appellants and their agents, or between the appellants and third persons, without the knowledge of appellees for the purpose of this case, must be held to be hearsay evidence, in the nature of self-serving declarations, and not admissible against the appellees. *Goode v. Lodge*, 160 Ind. 251, 66 N. E. 742; *Kellner v. Phillips et al.*, 29 Ind. App. 100, 63 N. E. 877; *George v. Hurst*, 31 Ind. App. 660, 68 N. E. 1031; *Meyer v. Bell*, 65 Ind. 83; *Moelering v. Smith et al.*, 7 Ind. App. 451, 34 N. E. 675.

Evidence of a custom or usage may be admitted to explain what is ambiguous, but not to vary a contract which is plain and definite in its terms. In this case evidence of a custom, or a system of doing business in the line of trade carried on by appellants, cannot control and is immaterial, for the reason that the alleged contract was definite and clear in its terms, embracing an express warranty which could not be varied or supplemented by a custom of trade. *Ewbank's Trial Evidence*, § 545; *Louisville, etc., Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970; *Lupton et al. v. Nichols*, 28 Ind. App. 539, 63 N. E. 477; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. 597; *Atkinson v. Allen*, 29 Ind. 375; *Spears et al. v. Ward et al.*, 48 Ind. 541.

Where a seller expressly warrants the property sold and the goods are received and paid for, the purchaser may rely upon his warranty though he also had the opportunity of inspecting before accepting the goods.

First Nat. Bk. of Kansas City v. Grindstaff et al., 45 Ind. 158; *Shordan v. Klyer et al.*, 87 Ind. 38.

While we are not basing this opinion upon the proposition, many of the alleged errors in the admission of evidence are not available, for the reason the briefs of appellants' counsel fail to comply with the rule requiring that the answers to questions be set out where objections were interposed and overruled, to the end that this court may be advised in its rulings. *Indianapolis, etc., Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068; *Illinois, etc., Co. v. Cheek*, 152 Ind. 603, 675, 680, 53 N. E. 641; *Ewbank's Trial Evidence*, § 286.

If error is predicated upon the exclusion of evidence, the briefs should set out the question asked, and also show what the answer was expected to prove, and if the testimony is remote and inferential, its relevance must be suggested. *Russell v. Stoner et al.*, 18 Ind. App. 543, 47 N. E. 645, 48 N. E. 650; *Huggins v. Hughes*, 11 Ind. App. 465, 39 N. E. 298; *Higham v. Vanosdol*, 101 Ind. 160; *Williams v. Chapman*, 160 Ind. 130, 66 N. E. 460.

We have carefully considered all the objections to the admission and exclusion of evidence, and conclude that the appellants were not harmed by any ruling of the court upon the evidence, and that no available error is shown by the record. No good purpose can be subserved in extending this opinion by taking up the questions on the evidence separately and applying the rules of law thereto, as herein stated. The objections of serious import are of necessity determined by the conclusion here reached as to the sufficiency of the complaint, the character of the contract, the memoranda of the sale and the statute of frauds. The principal contention upon the evidence was on the subject of warranty. Mr. Warner and Mr. Lawrence both testified in substance that they refused to purchase because they thought it was too early to buy potatoes for storage, for fear they would not keep; that thereupon Mr. Pringle said they were good potatoes, and he would warrant them to keep and that they would keep in appellees' cellar all winter; that thereupon Mr. Warner said if they warranted them to keep he would buy them, and immediately thereafter Mr. Pringle accepted the terms and telephoned the order to appellants. This evidence was denied by Mr. Pringle, and his testimony was to the effect that appellees were to inspect the potatoes when received and either accept or reject them.

This is the substance of the testimony upon the subject of warranty, and we cannot upon such showing disturb the decision for insufficiency of the evidence, nor can we say that the damages assessed are excessive.

The decision is fully warranted by the law. Judgment affirmed.

48 Ind. App. 136)

PRINCETON COAL MINING CO. v.
DOWNER. (No. 7,023).¹(Appellate Court of Indiana, Division No. 2.
Feb. 14, 1911.)1. MASTER AND SERVANT (§ 258*)—INJURIES
TO SERVANT—COAL MINE—DANGEROUS
PLACE—NEGLIGENCE.

Where complaint for injuries to a shot firer in a coal mine alleged that defendant failed in its duty to so plan and lay off rooms in the mine that the partitions or pillars of coal between the rooms should be and remain at least 15 feet thick, that defendant for many weeks prior to the accident had in its employ more than 100 men, and that its mining boss did not visit the room each alternate day, or any day, to see that safety was assured and know that it was safe, before permitting plaintiff to set off blasts in a partition between two rooms, and that such blast was caused to break through the wall and cause injury to plaintiff, it charged a failure to discharge a common-law duty, and also a violation of Burns' Ann. St. 1908, § 8580, prescribing the duties of a mine boss, and was not objectionable for failure to state facts from which a duty of the master arose to do the thing alleged to have been omitted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 830; Dec. Dig. § 258.*]

2. MASTER AND SERVANT (§ 88*)—EXISTENCE
OF RELATION—SHOT FIRER IN A MINE.

Where plaintiff was appointed by certain miners to act as shot firer in the mine, and was paid partly by defendant, the mine operator, and partly by the miners, the relation of master and servant existed between plaintiff and defendant within the rule requiring a master to exercise ordinary care to prevent injury to its employes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 88.*]

3. MASTER AND SERVANT (§§ 124, 235*)—MINE
—DUTY OF MINEOWNER OR OPERATOR—IN-
SPECTION—DUTY OF SERVANT.

It is the duty of a mineowner or operator, under both common and statutory law, to inspect working places in mines and keep them reasonably safe for employes who are required to work therein, and an employe may rely on the presumption that the master has performed his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235, 718; Dec. Dig. §§ 124, 235.*]

4. MASTER AND SERVANT (§ 201*)—DANGEROUS
PLACE—FAILURE TO INSPECT—NEGLI-
GENCE OF FELLOW SERVANT.

Where a miner was injured by the master's negligence in failing to inspect a working place, it was no defense to the master's liability that a fellow servant was also negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

5. MASTER AND SERVANT (§ 118*)—INJURY TO
SHOT FIRER IN A MINE—THICKNESS OF
PARTITIONS.

Where plaintiff, a shot firer in a coal mine, was injured by a breakthrough, alleged to be due to the insufficient thickness of partitions between rooms in the mine, a charge that if it was the duty of the mine boss to govern the form and location of the rooms, and see that the partitions were at least 15 feet thick and that the boss negligently failed to so direct and govern the form and location of the rooms, or permitted them to be driven into the coal, at the place where the shot was fired, so that the rooms were separated by a partition only five

or seven feet thick, and that this was the proximate cause of the injury, and plaintiff was not guilty of contributory negligence, and did not assume the risk, he was entitled to recover, was correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.*]

6. MASTER AND SERVANT (§ 291*)—INJURIES
TO SERVANT—INSTRUCTIONS—BURDEN OF
PROOF.

In an action for injuries to a shot firer, in a coal mine, instructions that under the issue, in order to entitle plaintiff to recover, the evidence should preponderate in his favor, and establish the injury substantially as charged, that it was caused by defendant's negligence, and that if the proof fairly showed that plaintiff was an experienced miner, and well acquainted with defendant's mine at the place of injury, and knew the dangerous conditions of the walls in controversy, as well as defendant or its mine boss or any other employe, he could not recover. *Held*, that the instruction, while crude in form, was as favorable to defendant as it was entitled to.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1140, 1141; Dec. Dig. § 291.*]

7. EVIDENCE (§ 540*)—EXPERT TESTIMONY—
MANAGEMENT OF MINES.

Where, in an action for injuries to a shot firer in a coal mine, plaintiff claimed that defendant was negligent in failing to inspect the partition between the rooms of the mine and in permitting them to get so thin that an ordinary shot would break through, plaintiff, who was an experienced miner, was entitled to testify as to why pillars of coal were left standing between rooms in the mine, and to state the duties of the mine boss as to the required thickness of the pillars, and that it was the duty of the boss to give shot firers notice when a shot was being placed to make a breakthrough between two rooms and to tell them where the breakthrough should be made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2353; Dec. Dig. § 540.*]

8. MASTER AND SERVANT (§§ 286, 289*)—INJURIES
TO SERVANT—COAL MINERS—NEGLI-
GENCE—CONTRIBUTORY NEGLIGENCE—QUES-
TION FOR JURY.

In an action for injuries to a shot firer in a coal mine by a breakthrough between two rooms in the mine, evidence *held* to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1026, 1126; Dec. Dig. §§ 286, 289.*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by Wallace D. Downer against the Princeton Coal Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Embree & Embree, for appellant. M. T. Lewis and J. W. Brady, for appellee.

IBACH, J. Appellee brought this action against the appellant to recover for personal injuries, received by him while in the employ of the appellant, as a shot firer in its coal mine, through the alleged negligence of appellant in failing to provide a safe place to work, and through its failure to perform the duties imposed upon it by the statute. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
93 N.E.—64 ¹Rehearing denied. Transfer to Supreme Court denied.

complaint, as originally filed, consisted of three paragraphs, the first of which was dismissed at the trial. The second, omitting the formal parts, as to the nature and organization of the appellant, and description of appellant's mine, substantially alleges: That on October 1, 1907, and prior thereto, appellee was employed by appellant and the miners at work in appellant's said mine, as a shot firer, having been duly elected to said position by the miners of said mine, and prior to and at the time of said election he was employed by the appellant as a miner in said mine. That, at the time of the injury, appellee was firing the shots in a room running in a westerly direction off the second south cross-entry. That, on said date, appellee was in the tenth room from the face of said entry. That the safety of the men required that the rooms or excavations running off from the entries, and running in the same direction, should run parallel with one another, and that there should be a partition of coal, not less than 15 feet in thickness, left standing between the rooms in order to prevent the mine from caving in, and prevent explosions from shots of powder, used in mining coal, from injuring employes in the mine. That it was the duty of the defendant and its mining boss to plan and lay out the rooms in the mine so that the partitions or pillars of coal between the rooms in the mine should be and remain the thickness aforesaid. That appellant at the time, and for many weeks prior thereto, had in its employment more than 100 men, and also a mining boss, but that said mining boss did not visit the room in question each alternate day, or any day, nor did he see that safety was assured in said tenth room where appellee was, nor did he prevent the appellee from going into the room where he was injured; nor did the mine boss or the defendant see that the partition between said rooms was of the requisite thickness, but that the defendant and the mine boss carelessly and negligently refused and omitted to perform any of their said duties. That appellant knew at the time that said partition or pillar of coal was dangerously weak and thin, or might have known by the exercise of reasonable care, but, with this knowledge, assigned one Grubbs to work in the eighth room. That said Grubbs was ignorant of the unsafe and thin condition of said partition or pillar of coal, and without experience necessary to ascertain its condition. That while working in said room, in the discharge of his duties, he drilled a hole in said partition at the point where it was so unsafe and of insufficient thickness, and placed powder therein, for the purpose of shooting down coal in the usual course of mining the same. That, by reason of the unsafe condition and thinness of said pillar, the explosion of powder broke through said partition into said tenth room, and threw coal, slate, and debris

against the plaintiff, inflicting the injuries for which he sues. It is further averred that appellee at the time he sustained said injuries was in the exercise of due care, and had no knowledge whatever of the dangerous condition of the partition or pillar of coal between said rooms; that he received said injuries without any fault or negligence upon his part; but that said injuries were caused solely by the aforesaid negligence of the appellant. The third paragraph of the complaint is the same as the second, except, in its allegations in respect to the employment of the appellee as a shot firer, it charges that the appellee was employed by the miners working in the mine, with the knowledge and consent of the appellant, and the appellant paid the miners one-quarter of a cent per ton for each ton of coal mined by them to be applied by the miners on appellee's wages as a shot firer. A demurrer for want of facts was overruled to each of said paragraphs, and issues were formed by answer in general denial. A trial was had by jury resulting in a verdict in favor of appellee for \$1,725. Over appellant's motion for a new trial, judgment was rendered thereon.

The errors assigned and relied upon for reversal in this court are: First, the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in overruling appellant's demurrer to the second paragraph of the complaint; third, the court erred in overruling appellant's demurrer to the third paragraph of complaint; and, fourth, in overruling appellant's motion for a new trial.

The objections to the second paragraph of complaint are: First, that it does not contain the averment of facts upon which there arises any duty upon the master to do the things alleged to have been omitted; second, it sets forth facts upon which it appears that the appellee was not a servant of the appellant; third, that the appellee is not shown to have had any right to enter the mine, and to act therein as shot firer; and, fourth, assuming that appellee was a servant of appellant, and engaged in its services at the time of the injury, the negligence which caused the injury was the negligence of a fellow servant, whose negligent act which resulted in the injury was open and obvious and known to appellee before he ignited the shot.

The negligence charged in each of said paragraphs is twofold: First, in failing to discharge a common-law duty; and, second, the violation of a mandatory provision of section 12 of the act of April 15, 1905 (Acts 1905, p. 65; section 8580, Burns' Ann. St. 1908). *Hymera Coal Mining Co. v. Mahan*, 44 Ind. App. 583, 88 N. E. 108.

Said second paragraph charges that the appellee was an employe of the appellant in its mine, but whether the appellee was in the direct employment of appellant or indirectly as assistant to the miners can have no

bearing on the question, because in either event, the relation of master and servant existed between appellee and appellant within the meaning of the rule requiring a master to exercise ordinary care to prevent injury to his employes. *Indiana Iron Co. v. Cray*, 19 Ind. App. 565, 48 N. E. 803; *Pugmire v. Oregon, etc., Ry. Co.*, 33 Utah, 27, 92 Pac. 762, 13 L. R. A. (N. S.) 565, 569, 126 Am. St. Rep. 805; *Rummell v. Dilworth, P. & Co.*, 111 Pa. 343, 2 Atl. 355, 363; *Ringue v. Oregon Coal Co.*, 44 Or. 407, 75 Pac. 703; *Ryan v. Boller Works*, 88 Mo. App. 148. In a well-considered case (*Ringue v. Oregon Coal Co.*, *supra*), after a review of the authorities, the court say: "Under the law, therefore, even though there was no direct contract of employment, the plaintiff was entitled to the protection of a servant, if, with the knowledge and consent of the defendant, he was in the mine for the purpose of rendering services for its benefit, and the case should have been submitted to the jury upon that theory." In the Oregon case, the complaint proceeded upon the theory that at the time of the accident the relation of master and servant existed between the plaintiff and the defendant. This was denied, and was therefore a material issue in the case. The plaintiff must recover, if at all, upon the cause of action as alleged; and the burden of proof was upon him to show such a state of facts as, under the law of negligence, would constitute the relation of master and servant. The court further say: "We do not understand, however, that it was necessary for him to prove a direct contract by some authorized agent of the defendant employing him, or that his right to work was included in the terms of the contract with his father. If, as the evidence tended to show, he was going into the mine at the time of the accident, by the request of his father, with the permission or consent of the defendant, express or implied, for the purpose of performing work or labor for it, he was not a trespasser or a licensee, but was rightfully in the mine, and the relation of master and servant existed between him and the defendant, within the meaning of the rule requiring a master to exercise reasonable care to prevent injury to his employes."

It was the duty of the mineowner or operator, under both common and statutory law, to inspect such working place and keep it reasonably safe for employes who were required to work therein. "And an employe may rely on the presumption that his master has not been negligent in this regard, and that he has performed the duties imposed upon him by his relationship. Where a master is guilty of negligence, it is no excuse that a fellow servant was also negligent. We are not unmindful of the fact that the bare allegation of a duty unsupported by facts showing such duty is a nullity; but, when read as a whole, we think said second

paragraph was sufficient to withstand the demurrer.

The same reasons are urged against the third paragraph of complaint. What has been said concerning the sufficiency of the second paragraph applies with equal force to the third paragraph, and the same authorities there cited will be applicable here.

In addition, it is insisted that said third paragraph charges that appellee was employed by the miners and entered the mine as their servant, with the knowledge and consent of appellant; that appellee was a mere licensee. It is provided by statute: "That at any coal mine in the state where the miners therein so elect, persons may be employed to act as shot firers, and their wages shall be paid by the miners working therein. * * * Burns' Ann. St. 1908, § 8610. It appears from the allegations in this paragraph of complaint that the miners working in the mine of appellant attempted at least to take advantage of this provision of the law, and elected appellee to such position. The allegations show, also, that appellant paid certain sums of money to the miners to pay the persons holding the position of shot firer in its mine. Appellee was engaged in performing an indispensable part of the mining operations being carried on in appellant's mine, a part of the business of mining for which the miners were directly employed by appellant. Appellant, with full knowledge of appellee's presence in the mine as shot firer, owed him the same duty it owed the miners. See authorities cited, *supra*. The demurrer was properly overruled.

It is also claimed that the court erred in refusing to give certain instructions requested by appellant. The first instruction was peremptory. The evidence was sufficient to require the cause to be submitted to the jury, and it was properly refused. The remaining instructions, tendered and refused, are based upon the claim of appellant that appellee was not a servant of appellant, but a mere licensee. Under the authorities, they are properly refused.

Complaint is made of the following instruction, given by the court at the request of the appellee: "I instruct you, therefore, that if you find from the evidence that the miners working in defendant company's mine had elected to have the plaintiff employed as a shot firer in said mine, and were contributing of their wages earned by mining coal in said mine to the payment of the wages of said Downer, as such shot firer, and that the defendant company was holding back the portion of the miners' wages so contributed to pay the plaintiff as such shot firer, and paying the same over to the treasurer of the miners' local union, to be paid by such treasurer to plaintiff, then, in that view of the case, the plaintiff was neither a trespasser nor a mere licensee in the defendant's mine, but his employment there was contemplated and

provided for by the law of the state, and while engaged in the performance of his duties under and pursuant to such employment, if you find from the evidence he was so engaged, the defendant would owe him the duty to furnish him a reasonably safe place to perform his duties as such shot firer in defendant's mine." In view of the authorities cited, the court did not err in giving this instruction.

By instruction No. 2, given at the request of appellee, the jury were told, if they found from the evidence that it was the duty of the mine boss to direct and govern the form and location of the rooms made in the mine, and to see that pillars or partitions of coal should be left between such rooms from 12 to 15 feet thick, and the mine boss negligently failed to so direct and govern the form and location of the rooms referred to in the evidence, but permitted them to be driven into the coal, that at the place where the shot was fired, the said rooms were separated by a partition only five to seven feet thick, and that this was the proximate cause of the injury, and that plaintiff was not guilty of negligence proximately contributing to his own injury, and that the risk was not one of the assumed risks assumed by plaintiff, as explained in those instructions, then their verdict should be for the plaintiff. This instruction is a correct statement of the law, and it was competent to instruct the jury upon this branch of the case.

Instruction No. 4, given at the request of appellee, relates to the duty owing to the appellee as shot firer in appellant's mine, and was a correct statement of the law.

Appellant also contends that the court erred in giving instruction No. 1, given by the court of its own motion. Said instruction does not attempt to set out the substance of either paragraph, but only a ground of negligence. The jury were told by said instruction that the appellant filed a general denial to the complaint; that under the issues thus formed, in order to entitle the plaintiff to a verdict, the evidence should preponderate in his favor and establish: (1) The injury, substantially as charged in the complaint; (2) that the injury was caused by the negligence of appellant; (3) but if the proof fairly shows that the appellee was an experienced miner and well acquainted with defendant's mine at the place of his injury, and that he knew of the dangerous condition of the wall in controversy as well as the defendant or its mine boss or any of the employees, in that view of the case he is not entitled to recover. This instruction was as favorable to appellant as could be asked, and, while crude in form, the court did not err in giving it.

Instructions Nos. 2 and 3, given by the court

of its own motion, over the objections of appellant, relate to the questions of contributory negligence and the assumption of risk. They were applicable to the evidence in this case, and the court rightfully instructed the jury upon these two branches.

Appellant also contends that the court erred in permitting the plaintiff as a witness in his own behalf to testify in respect to the reasons why pillars of coal were left standing between the rooms in a coal mine, and in permitting him to testify as to what were the duties of a mine boss in respect to these pillars, and the thickness thereof, and that it was the duty of the mine boss to give shot firers notice when a shot was being placed for the purpose of making a "breakthrough" between two rooms in the mine, and also that the court erred in permitting the witness Cross to testify that it was the duty of the mine boss to see that the pillars were so thick at certain places, and to tell where to drive the breakthroughs. These questions were all pertinent to the issues in this case. The witnesses were competent to testify, and it was relating to matters which were material. It was therefore proper to allow the jury to be informed upon matters presented by the questions to assist them in arriving at a true verdict.

It is insisted by appellant that the verdict is not sustained by sufficient evidence, and is contrary to law. It is shown by the evidence that appellee was hired by the miners in appellant's mine, with the knowledge and consent of appellant; that the appellee on the day of his injury was engaged in the discharge of his duties as shot firer in appellant mine; that it was not the duty of the shot firer to investigate the thickness of the pillars; that there was nothing to indicate that this was a breakthrough shot; that it looked like it was to square up the room, and make it a little wider; that, if the pillar in question had been 15 feet thick, it would have been perfectly safe; that 15 feet would have made it safe; that, by the arrangement of the rooms, the pillar became thinner as the entries were sunk into the face of the coal; that an experienced man going into these rooms would know that the pillars were getting thinner, but he could not tell whether it was 15 feet or 5 feet, unless he would take precautions to sound it; that the miner Grubbs, who placed the shot, had no means of determining the thickness of the pillar; and that the shot was a small one.

The questions as to the negligence of appellant and the contributory negligence of appellee were properly submitted to the jury. There is evidence fairly tending to support the verdict, and appellant's motion for a new trial was properly overruled.

Judgment affirmed.

(48 Ind. App. 379)

DEVIN v. MCCOY. (No. 7,743.)¹(Appellate Court of Indiana, Division No. 2.
Feb. 21, 1911.)**1. WILLS (§ 674*)—CONSTRUCTION—CONTINGENT REMAINDERS—SPENDTHRIFT TRUST.**

A testatrix gave the residue of her estate in trust for her grandchildren upon contingency that if the granddaughter died before she had children her brother was to receive her share, if he survived her; if the grandson died before he had children, his share to go to his sister, if she survived; and, if they both died without children, their shares to be divided among the other beneficiaries. *Held*, that it was not intended to create a spendthrift trust, but that when the grandson had a lawful child born to him the trust as to him was at an end.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1585; Dec. Dig. § 674.*]

2. WILLS (§ 630*)—"CONTINGENCY."

A "contingency" is some future event which may or may not occur, and the termination of a trust estate depending on the death of the beneficiary depends on a certainty and not a contingency.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1487; Dec. Dig. § 630.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1497, 1498.]

Appeal from Circuit Court, Gibson County; Herdis Clements, Judge.

Action by Elmer G. Devin against John E. McCoy. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

M. M. Bacheider and W. W. Medcalf, for appellant. John R. McCoy and O. M. Welborn, for appellee.

LAIRY, J. This action was brought by appellant against the appellee for the purpose of obtaining an accounting by John R. McCoy, trustee under the will of Nancy Devin, deceased, and praying that said trustee be ordered to turn over to appellant the property in his hands, upon the theory that the trust created by the terms of said will had terminated before the commencement of the action.

Items 5, 6, and 7 of the will of Nancy Devin create the trust here under consideration. It is necessary to the decision of this case that a construction be placed upon this part of the will, and therefore we set out these items in full.

"Item 5. All the residue of my estate and personal property shall be divided equally among my children, Susan E. Ragland and Sallie Devin, and my two grandchildren, Nellie R. Devin and Elmer G. Devin, to receive the same share that would have descended to James A. Devin (now deceased), who was their father,—and to take and receive under this will subject to the conditions hereinafter named.

"Item 6. I hereby nominate and appoint Henry L. Wallace as trustee for Nellie and Elmer, and for each of them, who shall take and hold and manage such of my estate as

is given to my said grandchildren until the contingencies named in the next succeeding clause of the will, in the meantime using of the profits thereof enough only for their education and economical support having view of the probable value of their inheritance.

"Item 7. If Nellie R. Devin dies before she have children born unto her, her share of my estate shall go to her brother, Elmer, if he survives her. If Elmer dies before he has children born unto him, his share of my estate shall go to his sister Nellie, if she survives him, but if they both die without having children born to them, their share shall be distributed to the other beneficiaries of item 5 of this will."

The complaint sets out the will, and alleges that it was duly probated after the death of the testator; that Henry L. Wallace who was named as trustee therein, died; that John R. McCoy was by the Gibson circuit court appointed his successor; that appellant was lawfully married on the 9th day of October, 1909; and that a child was born to him by virtue of said marriage, which was still living at the time the action was commenced. A demurrer for want of facts sufficient to state a cause of action was sustained by the trial court, and this is the only error relied upon for reversal.

It is contended by the attorney for appellee that the ruling of the lower court is correct, for the reason that the complaint shows that the trust created by the will of Nancy Devin had not terminated when this suit was commenced. He takes the position that the trust created by the will of Nancy Devin was a spendthrift trust, and that it was intended to continue during the life of Elmer Devin, and that it cannot, by the terms of the will creating it, terminate before his death. The appellant contends that the trust was terminated, so far as Elmer Devin is concerned, before the action was commenced, by the marriage of Elmer Devin, and the birth of a child as shown by the complaint.

When did the testatrix intend that the trust created by her will should terminate? This is the decisive question in this case. In construing a will, effect should be given to the intention and purpose of the testator, if this can be gathered from the terms of the will. Was it the purpose of the testatrix in creating said trust to provide for the maintenance of appellant during his life, and at the same time to secure it against his improvidence and incapacity, and preserve the property unimpaired to his heirs? If so, the trust would continue during the life of the cestui que trust, and the position of appellee should be sustained. We cannot think that the provisions of the will creating this trust indicate such an intention. Item 6 of the will does not expressly provide that the trustee shall hold the estate given to Nellie

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
*Rehearing denied. Transfer to Supreme Court denied.

Devin and Elmer Devin during their lives or the life of either of them; but it does provide that he shall hold and manage such estate until the contingencies named in the next succeeding clause of this will, in the meantime using of the profits thereof enough only for their education and economical support, having in view the probable value of their inheritance.

A "contingency" is some future event which may or may not occur. It is evident that the testatrix had in mind some such event upon the happening of which the trust was to terminate. Item 7 of the will is not entirely clear as to the contingency referred to in item 6. It provides that: "If Nellie Devin dies before she have children born unto her, her share of my estate shall go to her brother, Elmer, if he survives her. If Elmer dies before he has children born unto him, his share of my estate shall go to his sister Nellie, if she survives him, but if they both die without having children born to them, their share shall be distributed to the other beneficiaries of item 5 of this will."

If we should hold that the termination of the trust depended upon the death of the cestui que trust, this would be to say that the termination of the trust depends upon the happening of an event which is a certainty and not a contingency. If we should give the will this construction, the contingency that appellant might or might not have a child or children born to him before his death would have no effect in hastening or delaying the time of the termination of the trust, as the trust would terminate at such death regardless of whether or not he had children born during his lifetime.

To our mind the provisions of the will under consideration do not evidence an intention on the part of the testatrix to create a spendthrift trust. We do not think it was her intention to tie up the property in the hands of the trustee during the life of her grandchildren for the purpose of providing for their maintenance and at the same time securing it against their extravagance and improvidence. The provisions of item 7 seem rather to indicate that it was her purpose to control the ultimate disposition of her property, so that it might not go to strangers or depart from those of her own blood, and that she created this trust for the purpose of securing this end. The provisions of this item in her will indicate that she contemplated that one or both of her grandchildren might marry and die without issue, and in that event that the property, if given to them absolutely, would go to the surviving husband or wife to the exclusion of the kindred, who were of the blood of the testatrix. To prevent this result, she placed the property willed to her grandchildren in the hands of a trustee, and provided he should take, hold, and manage it until the happening of

a contingency which would alike prevent this result. True, the birth of a child might not absolutely prevent this result, for such child might die before his parent, and the cestui que trust might die childless. This consideration does not, however, change our opinion as to the purpose of the testatrix in creating the trust, as she was no doubt willing to take the chance of the child outliving the parent. She evidently intended that, if either of said grandchildren married and had a child born, this contingency should terminate the trust as to him, and he should be entitled to the property willed to him. We therefore hold that the complaint shows that the trust, as far as appellant is concerned, was terminated before this suit was commenced by the happening of the contingency provided for in item 7 of the will of the testatrix. The demurrer to the complaint should have been overruled.

The death of appellant has been suggested to the court, and the judgment in this case is reversed as of date of submission.

(47 Ind. App. 621)

INDIANA UNION TRACTION CO. v.
SCRIBNER. (No. 6,781.)¹

(Appellate Court of Indiana, Division No. 1.
Feb. 17, 1911.)

1. APPEAL AND ERROR (§ 1078*)—REVIEW—
WAIVER OF ERROR—FAILURE TO DISCUSS
ASSIGNMENTS.

Assignments of error not discussed in appellant's brief are waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. TRIAL (§ 359*)—SPECIAL FINDINGS—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Answers to interrogatories and the general verdict must be in irreconcilable conflict before the former will control the latter and the antagonism between them must be apparent on the face of the record beyond the possibility of its removal by any evidence legitimately admissible under the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

3. TRIAL (§ 359*)—SPECIAL FINDINGS—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

If the answers of the jury to interrogatories exclude every conclusion that will authorize a recovery by the party in whose favor the general verdict is rendered, judgment should not be rendered on the general verdict, but on the answers to the interrogatories.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

4. SHIPPING (§ 166*)—DEATH OF PASSENGER—ACTION—VERDICT AND FINDINGS.

In an action for the death, of a passenger on a boat alleged to have been owned by defendant, which the defendant denied, where the jury's answers to interrogatories state that there is no direct evidence that the board of directors of defendant authorized the purchase or operation of the boat, but that such board authorized the purchase of the boat by its general superintendent of transportation, rebuilt it, and transferred its employees from its cars

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
¹ Rehearing denied.

to the boat, and continued them on the pay roll without change of contract; that employes of the defendant were in charge of the boat; that all the money earned by the boat both before and on the day of the accident and that earned by defendant's cars was placed in the same bag and deposited together in the bank to the credit of defendant; that the directors of defendant knew that its employes were operating the boat in the spring preceding the accident, which occurred in August; and that at the time of the accident, the general superintendent of transportation knew that the boat was being operated for defendant—it will be presumed, in support of a general verdict for plaintiff, that the directors and officers of defendant had such knowledge and information about the operation of the boat by its employes as to at least amount to a ratification of their acts.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 186.*]

5. EVIDENCE (§ 73*)—PRESUMPTIONS—PERFORMANCE OF OFFICIAL DUTY.

Officers of a corporation are presumed to do their duty and to be acquainted with the business of their company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 94; Dec. Dig. § 73.*]

6. CORPORATIONS (§ 425*)—REPRESENTATION BY OFFICER—ESTOPPEL TO DENY AUTHORITY.

Where officers of defendant corporation knew the source of money derived from the operation of the boat on which plaintiff's decedent was a passenger, and retained it, this amounted to a ratification of the means employed to procure it, in the nature of an estoppel to repudiate the authority by which the boat was controlled and operated in its behalf; no formal vote or resolution by the board of directors being necessary to that end.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1701; Dec. Dig. § 425.*]

7. EVIDENCE (§ 77*)—PRESUMPTIONS—FAILURE TO PRODUCE WITNESSES.

Where a party fails to produce witnesses, presumably favorably disposed toward him, to explain a transaction, or answer a controverted question, the presumption is that the testimony, if produced, would be unfavorable to him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97; Dec. Dig. § 77.*]

8. CORPORATIONS (§ 428*)—REPRESENTATION BY AGENTS—NOTICE TO AGENT.

Notice to the agent of a corporation relating to any matter of which he has control and management, is notice to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.*]

9. EVIDENCE (§ 241*)—ADMISSION—DECLARATIONS OR ACTS OF AGENT.

The declarations, admissions, or acts of an agent are evidence against his principal only when made as to a business matter within the scope of his agency and which is being transacted at the time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887-892; Dec. Dig. § 241.*]

10. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though agency should be proven before the declarations of an agent are admitted, the error in admitting the declarations is harmless if the agency is afterwards sufficiently proven.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

11. EVIDENCE (§ 148*)—ADMISSIONS—PROOF—PRELIMINARY EVIDENCE.

The conversation of a witness with a certain person preliminary to conversations of both with the general superintendent of defendant, are admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.*]

12. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of a passenger by the sinking of a boat carrying an excursion, any error in the admission of testimony of negotiations by the witness with a third person as to sharing the proceeds of the excursion, preliminary to conversation of the witness and third person with the general superintendent of defendant, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

13. EVIDENCE (§ 263*)—ADMISSION—PROOF—PRELIMINARY EVIDENCE—IDENTITY OF PERSON MAKING ADMISSION.

Where a witness called up the general superintendent of transportation of defendant company over the telephone, testimony as to the conversation is admissible in connection with evidence as to the relations of the superintendent to the defendant and the particular business inquired about, over the objection that the identity of the person with whom the conversation was held was not established.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022-1027; Dec. Dig. § 263.*]

14. EVIDENCE (§ 258*)—ADMISSION—PROOF—PRELIMINARY EVIDENCE—AUTHORITY OF PERSON MAKING ADMISSION.

In an action for the death of a passenger on a boat, evidence of the agency of the general superintendent of transportation of defendant company held sufficient to warrant the admission of a conversation with him about the boat and the proceeds from its use.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

15. APPEAL AND ERROR (§ 1050*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for the death of a passenger on a boat the admission of testimony on the subject of the control and management of the boat, but remotely, if at all, connected with the subject, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

16. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where there is material competent evidence of a fact, admission of incompetent and immaterial evidence of the same fact is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

17. SHIPPING (§ 166*)—DEATH OF PASSENGER—ACTION—EVIDENCE.

In an action for the death of a passenger from the sinking of a boat, the conditions shortly after the accident afforded some evidence of the condition at the time.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.*]

18. EVIDENCE (§ 359*)—DOCUMENTS—PHOTOGRAPHS AND PICTURES.

Photographs and pictures are admissible in evidence when shown to be reasonably accurate

representations of the place or thing in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.*]

19. EVIDENCE (§ 380*)—PHOTOGRAPHS AND PICTURES—AUTHENTICATION.

Photographs and pictures offered in evidence may be shown to be correct representations by witnesses other than the persons who took them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1857; Dec. Dig. § 380.*]

20. CARRIERS (§ 288*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

Though a carrier is not an insurer of its passengers, it is not only required to thoroughly examine and test its vehicles, machinery, and all parts and appliances used in transporting passengers, but it is required to further thoroughly examine the vehicle and machinery from time to time to know whether they are deteriorating.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1168; Dec. Dig. § 288.*]

21. SHIPPING (§ 166*)—DEATH OF PASSENGER—ACTION—EVIDENCE.

When it is established that a passenger on a boat, while being carried as a passenger for hire, has been thrown into the water and drowned, without his fault, by the sinking of the boat or the breaking down of parts thereof, the law presumes negligence of the person operating the boat.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 535-552; Dec. Dig. § 166.*]

Appeal from Circuit Court, Hamilton County; Ira Christian, Judge.

Action by Nelson F. Scribner, administrator of the estate of Lora H. Whitson, deceased, against the Indiana Union Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James A. Van Osdol, C. C. Shirley, and Kane & Kane, for appellant. S. A. Hays and Shirts & Fertig, for appellee.

FELT, J. Suit by Nelson F. Scribner, administrator of the estate of Lora H. Whitson, deceased, against the appellant, Indiana Union Traction Company, for damages for alleged negligence of appellant. The suit was originally filed in Marion county, and upon change of venue was sent to Hancock county, and from there was venued to the Hamilton circuit court, where upon issues formed by a general denial to the complaint, after trial and verdict by jury, judgment was rendered for the appellee in the sum of \$5,000, from which this appeal is prayed. The errors assigned are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) error of the Marion circuit court in overruling the demurrer to the complaint; (3) error of the Hamilton circuit court in overruling appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict; and (4) error in overruling appellant's motion for a new trial.

The first and second assignments of error

are not discussed by appellant's counsel in their brief, and are therefore waived.

The record discloses that on the 7th day of August, 1905, the appellee's decedent and other excursionists from the city of Indianapolis took passage over the electric railway line of appellant to Broad Ripple, Ind.; that appellee asserts the appellant owned and controlled a certain boat, Sunshine, which it operated on White river as an inducement to excursionists, and on said date undertook to carry the decedent and about 175 other persons on said boat from Broad Ripple up White river, a distance of about three miles, and return; that the decedent paid his passage thereon, and while a passenger upon said boat the same became disabled and sank in the water, resulting in his death by drowning. It was alleged that the boat was old, rotten, unsafe, and incapable of carrying the number of passengers taken aboard on the fatal trip; that the same was negligently and carelessly managed by the servants and employes of appellee and became uncontrollable; that the hull of the boat became filled with water, and the deck was broken off and the decedent thereby thrown into the water; that decedent was about 29 years of age, in good health, earning from \$800 to \$1,000 a year, and left surviving him a widow and two children, 6 and 8 years of age respectively, who were dependent upon him. The appellee denied ownership or control of the vessel and sought to show that the accident was due to the conduct of the passengers in rushing to the side of the upper deck, causing the vessel to tip to one side by reason of which a chain was displaced upon the sprocket wheel, leaving the boat without motive power, and causing it to capsize.

The appellant has not set out the answers to the interrogatories in its brief, but the appellee has supplied the omission. The motion for a new trial alleges that the verdict is not sustained by the evidence, is contrary to law, and that the damages assessed are excessive. Other alleged errors are based upon the admission and exclusion of evidence, the giving of certain instructions and the refusal to give instructions requested by appellant. The appellant insists that the answers to the interrogatories show a failure of proof to establish that the appellant either owned or operated the boat at the time of the accident.

The answers to the interrogatories state, in substance, that there was no direct evidence that the board of directors of appellant authorized the purchase or operation of the boat. They show, however, that appellant's board of directors authorized the purchase of the boat by its general superintendent of transportation, one Mr. Baldwin, and afterwards rebuilt it and transferred its employes from service upon its cars on the Broad Ripple line to service upon the boat,

and continued them upon the pay roll of the company without re-employment or change of contract; that at the time of the accident employes of appellant were in charge of said boat as follows: Mr. Crockett, as engineer and captain, Mr. Metsker, as pilot, Mr. Davis, as purser, and Mr. McMahan, as local superintendent of transportation; that the other men were employed by Mr. McMahan with the approval of Mr. Baldwin, appellant's general superintendent of transportation; that there was no direct testimony that the directors knew that its employes and officers were engaged in operating said boat at the time of the accident, but that they did have notice that such was the case through the company's official, Mr. Baldwin; that all the money earned by the operation of the boat both before and on the day of the accident, and the money earned by the operation of appellant's cars on the Broad Ripple line, was by its employé placed in the same bag and deposited together in the bank to the credit of appellant; that the directors of appellant in the spring of 1905, and thereafter to the time of the accident, knew that its employes were operating said boat, and both before and at the time of said accident the persons so operating said boat represented to the public that they were operating the same on behalf of the appellant, and such representations were also made by the employes and officers of appellant operating cars on its line passing through Broad Ripple; that at the time of the accident Mr. Baldwin, the general superintendent of transportation, knew that the boat upon which appellee's decedent took passage was being operated for and on behalf of appellant by its employes aforesaid. The evidence further shows that the employes on said boat were paid by appellant and that the captain of the boat wore the uniform of appellant.

Answers to interrogatories and the general verdict must be in irreconcilable conflict before the former will control the latter. Courts indulge every reasonable presumption in favor of the general verdict, and nothing is presumed in favor of the special finding by interrogatories. The antagonism between the general verdict and interrogatories must be apparent upon the face of the record beyond the possibility of its removal by any evidence legitimately admissible under the issues. However, if the answers to the interrogatories exclude every conclusion that will authorize a recovery by the party in whose favor the general verdict is rendered, then judgment should not be rendered upon the general verdict but upon the answers to the interrogatories.

Applying the well-established rules above stated to the facts shown by the answers to the interrogatories, we think it a reasonable presumption, fully warranted by the facts shown by the answers to the interrogatories, that the directors and officers of appellant

had such knowledge and information about the operation of the boat in question by its employes before and at the time of the accident as to at least amount to a ratification of their acts in so doing. *Flynn et al. v. Des Moines & St. L. Ry. Co.*, 63 Iowa, 490, 19 N. W. 312-316; *Kneeland v. Gilman*, 24 Wis. 39; *Bennett v. Millville Imp. Co.*, 67 N. J. Law, 320, 51 Atl. 706.

The finding that there was no direct evidence showing that appellant owned the boat or that its board of directors authorized its purchase or operation, is by no means the equivalent of saying that there is no legitimate evidence from which both ownership and control may have been rightfully found by the jury. The jury having some evidence of the purchase of the boat by the general superintendent of transportation of appellant, that it was rebuilt, operated and controlled by employes of appellant, and that the earnings of the boat and for some time before the accident were received and retained by appellant, had the right to draw from such facts, which the evidence tended to prove, any inference or conclusion that might reasonably be drawn therefrom. It is affirmatively shown that the money earned from the operation of the boat before and at the time of the accident was received and retained by appellant.

Officers of a corporation are presumed to do their duty and to be acquainted with the business of their company, and in the light of this presumption the jury was fully warranted in concluding that they knew the source of the revenue received by appellant. If they knew the source of the money, and retained it, this would certainly amount to a ratification of the means employed to procure it, and is in the nature of an estoppel, operating against the company when it seeks to repudiate the authority by which the boat was controlled and operated in its behalf. 2 *Thompson on Corporations* (2d Ed.) §§ 1960-1994; *Railway Co. v. Keokuk & H. B. Co.*, 131 U. S. 371-385, 9 Sup. Ct. 770, 33 L. Ed. 157; *Fidelity Trust Co. v. Gas Co.*, 118 Ky. 588, 81 S. W. 927, 111 Am. St. Rep. 302, 325, notes and cases cited. It has been held in such situation that a ratification may be shown by conduct, and that no formal vote or resolution by the board of directors is necessary to that end; that such conduct may consist either in affirmation or in a failure to act, that is, in passive acquiescence; that it may be the conduct either of a managing agent having authority, or of the board of directors, and that when a ratification has thus taken place it is equivalent to antecedent authority and estops the corporation from subsequently disavowing the act so ratified. *Thompson on Corporations*, vol. 2 (2d Ed.) § 2015, and authorities cited. *Everett et al. v. U. S.*, 6 Port. (Ala.) 166, 30 Am. Dec. 534.

Where the officers of a corporation have knowledge of the transaction and the com-

pany receives and retains the benefit of it without objection, the unauthorized act is thereby ratified, and the corporation is estopped to afterwards repudiate it. Under such circumstances it is called upon to exercise its option, and may affirm or disaffirm, in whole but not in part. It cannot disaffirm so much of the unauthorized act as is onerous while retaining that which is beneficial. *Thompson on Corporations*, vol. 2 (2d Ed.) §§ 2020, 2030, 2035, and authorities cited; *White Water Valley Canal Co. v. Hawkins*, 4 Ind. 474; *Marion Trust Co. v. Crescent Loan, etc., Co.*, 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; *Peck v. Doran & Wright Co.*, 57 Hun, 843, 10 N. Y. Supp. 401; *Perkins v. Portland, etc.*, 47 Me. 573, 74 Am. Dec. 507; *Commonwealth v. W. T. Co.*, 3 Pick. (Mass.) 327; *Love v. Export Storage Co.*, 143 Fed. 1, 74 C. C. A. 155.

Furthermore, the questions of ownership, control, and operation of the boat were so related to appellant that it was within its power to supply definite information on the subject. Where a party has it within his power to produce witnesses, presumably favorably disposed toward him, to explain a transaction, or answer a controverted question, and fails so to do, the presumption is that the testimony, if produced, would be unfavorable to him. The situation of appellant makes this rule applicable here, and tends strongly to support the finding of the jury. *Lawrence Bank of Pittsburgh v. Raney & Berger, etc., Co.*, 77 Md. 321, 26 Atl. 119; *Lee v. State*, 156 Ind. 541-548, 60 N. E. 299; *Wimer et al. v. Smith et al.*, 22 Or. 469, 30 Pac. 416; *Central Stock & Grain Exchange v. Board of Trade of Chicago*, 196 Ill. 396, 63 N. E. 740-744.

The answers to the interrogatories are not in serious conflict with the general verdict, but on the whole strongly support it. We find no failure of proof tending to establish each of the material facts in issue. The answers to the interrogatories show that Mr. Baldwin, the appellant's general superintendent of transportation, purchased the boat by authority of the directors of appellant; that he rebuilt it at the cost of appellant, and not only knew of, but authorized its operation by appellant's employes. Notice to the agent of a corporation relating to any matter of which he has the control and management, is notice to the corporation. *I. I. & I. Ry. Co. v. Snyder, Adm'r*, 140 Ind. 647-660, 39 N. E. 912; *P. F. W. & C. Ry. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111. The motion for judgment on the interrogatories was properly overruled. *L. E. & W. Ry. Co. v. Fike*, 35 Ind. App. 554, 74 N. E. 636; *McCoy v. Kokomo R. & L. Co.*, 158 Ind. 662, 64 N. E. 92; *Ft. Wayne Trac. Co. v. Hardendorf*, 164 Ind. 403, 72 N. E. 593; *Gleason v. McGinnis*, 30 Ind. App. 4, 65 N. E. 191; *Heintz v. Mueller*, 27 Ind. App. 42, 59 N. E. 414; *Williams v. Chapman*, 160 Ind. 130, 66

N. E. 460; *C. H. & I. Ry. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *La Follette v. Higgins*, 129 Ind. 412, 28 N. E. 768.

The motion for the new trial was based on numerous alleged errors in ruling upon the admission of evidence. Several objections are based upon the testimony of one Fred Alexander. His testimony showed that on July 20th, before the fatality to appellee's decedent on August 7, 1905, the witness as captain of the Uniform Rank was chairman of a committee having charge of an excursion from Noblesville to Broad Ripple. His testimony shows that at Broad Ripple he had a conversation with one W. H. Labb, who had local control of the amusements on the ground, on the subject of the Knights sharing in the proceeds of the amusements for the day, including the boat *Sunshine*. The witness was asked: "Q. What is the fact as to making arrangements with Mr. Labb for the Knights to share in the proceeds of the amusements for that day?" Appellant objected on the ground that it was immaterial what arrangements were made with the Knights to share in the proceeds, which objection was overruled and the witness answered: "A. Our committee made arrangements with Mr. Labb for our organization to receive a certain per cent. of all moneys taken in on the different amusements and concessions of the Park. Q. When you arrived at Broad Ripple on the excursion on that day, I will ask you what you learned as to the steamer *Sunshine* having been included in that arrangement, or otherwise? (Objection on the ground that it was hearsay; that it was not shown that any one connected with the excursion had any relation to appellant or any authority to act for it. The objection was overruled.) A. When our excursion of 700 people arrived on the grounds I went directly to Mr. Labb to make a contract with him to place members of our company in front of each of the concessions to assist in all the business of the concessions. Q. What arrangements did you make with Mr. Labb with reference to the boat *Sunshine*? (Objection that it calls for hearsay evidence. Overruled.) A. Mr. Labb agreed to make arrangements with the representative of the Union Traction Company by which we were to receive a percentage of the fares paid on the boat. We were informed that they would not give us that per cent." After further questions showing that Mr. Labb called Mr. Baldwin up by telephone at the office of the appellant in Anderson, Ind., the witness was asked: "Q. What did Mr. Labb say to Mr. Baldwin? (Appellant objected on the ground that there was no evidence that he was talking to Mr. Baldwin or that either Mr. Baldwin or Mr. Labb represented appellant in the management of the boat, or that the company had authorized any one to engage in the excursion business using the boat *Sunshine* at the time mentioned in the complaint,

or at the time mentioned by the witness. The court overruled the objection, and the witness answered.) A. Mr. Labb told Mr. Baldwin that we had 700 people down there, and we were going to boycott the boat and not allow our people to ride on the boat unless we got our percentage out of it. Then Mr. Labb called me to the phone and I talked to Mr. Baldwin. Q. What did you say to him? (Objection the same as last above stated. Overruled.) A. I told Mr. Baldwin there was a misunderstanding as regarding our commission on the boat; that we were going to boycott the steamer Sunshine unless arrangements were made by which we would get our percentage; that we would not allow our people to ride on the boat. Then Mr. Baldwin called to the phone this other gentleman who was with me, whose name I did not know, and talked to him. Q. What did Mr. Baldwin say in answer to him, if anything? A. Well, he called him to the phone and after a conversation, which, of course, I could only hear one side, this gentleman turned around and said to me, 'We have to give the Union Traction Company 40 per cent. of the gross receipts of the boat, and I am instructed by Mr. Baldwin that 20 per cent. will go to you.'

Mr. Fred W. Pearson testified on direct examination over appellant's objection, about his efforts to communicate with appellant over the telephone several hours after the accident, and his conversation by phone with J. S. Starkey as follows: "Q. Did it give the name of the office that the number was located? A. Yes, said Indiana Union Traction office. Q. How many efforts did you make to call up the office before you got an answer from any one purporting to represent the company? A. Three times. Q. Who did you get finally? A. J. S. Starkey. Q. Did you have a conversation with Mr. Starkey? A. Yes, sir; I did. Q. Tell the jury what he said to you and you said to him in regard to the boat. (To this question appellant interposed the objection that it was not shown that Mr. Starkey had any authority to speak for appellant, and that any conversation could not tend to show that the Indiana Union Traction Company was engaged in operating the boat Sunshine on the day of the accident to appellee's decedent, and because the testimony was hearsay, and there was not sufficient identification of the person alleged to be talking for appellant. Objection was overruled, and the witness answered.) A. I asked him if his company owned the boat Sunshine, and told him that there had been a body lost, and I thought they ought to furnish some assistance, and he wanted to know what assistance I wanted. I told him ropes, cart hooks, an ax, saw, and two or three men, if possible, and a driver. He said he would come out, for me to meet him at the car, and I said to him, 'How will I know you?' and he said, 'You will know me all right; I have a mole either on or near my

nose.' I went to the cars every thirty minutes, but no one came. (Appellant moved to strike out the answer for the reasons stated in the objection, which motion was overruled.) Q. Did Mr. Starkey come out at all? A. Yes. Q. Did he assist in any way? A. Yes, he helped to carry the body to the boathouse. Q. What time was that? A. About 3 o'clock. Q. What did Mr. Starkey say to you when he came out? A. Told me who he was. Q. What is the fact as to whether you found the mole on his face as he described it? A. I think I did." Further objection was made to the testimony of one William Bacon on the subject of bailing out water from the hull of the vessel after the accident, and to the testimony of one Sam Jones, on the subject of how the water got into the boat.

The appellee offered in evidence some photographs of the boat taken after the accident and after a part of the boat had been moved across the river, also a newspaper cut showing the condition of the boat shortly after the accident. All of which were admitted over appellant's objection.

One of the objections urged to the testimony of Mr. Alexander and others is that the persons communicated with were not shown to have authority to represent or speak for appellant. The general rule is that the declarations, admissions, or acts of an agent are evidence against his principal only when they are made as to a business matter within the scope of his agency, and which is being transacted at the time. The rule also requires the agency to be proven before the declarations of the agent are admissible, but if after the declarations have been received in evidence, the agency is sufficiently proven, the error becomes harmless. In such case it is in effect the order of proof and not the proof itself that is subject to criticism. *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235. This rule is applicable here, for there was evidence showing the relation of Mr. Baldwin to the appellant at the time and before the accident sufficient to admit proof on the theory that he had authority to represent the company. Indeed, his position was shown to be such as to give him a wide range of authority for appellant on all matters of transportation and in relation to the boat Sunshine.

The conversations of the witness Alexander with W. H. Labb were in their nature preliminary to the conversations of both Alexander and Labb over the telephone with Mr. Baldwin, and were not objectionable, but even if objectionable as hearsay, certainly were harmless. The objection that it was immaterial what arrangements were made about the use of the boat, and the proceeds from its use, with other persons and at another time, was not made to the question calling for the conversation over the telephone with Mr. Baldwin, but to a previous question asked Mr. Alexander calling for the fact of making arrangements with Mr. Labb for the

Knights to share in the proceeds of the amusements of the day—July 20, 1905.

We have held that the objection to the showing of the agency of Mr. Baldwin is not well taken. The objection to his identity cannot be sustained in view of the evidence showing how and where he was called over the telephone, and his relations to appellant and the particular business inquired about. The further objection that there was no showing that Mr. Baldwin or any one else had authority to engage in the excursion business for appellant, at the time of the accident or that the time mentioned by the witness, is not tenable. The evidence of Mr. Baldwin's agency was sufficient to warrant the admission of the conversation with him about the boat and the proceeds from its use, independent of what may or may not have been proven about authority to run excursions.

It will be observed that no objection is urged to the conversation to Labb and Alexander over the telephone with Mr. Baldwin on the ground that the conversation related to another time and a different transaction than that under investigation at the trial. But even if such objections had been urged we doubt if they could be sustained, as the proof showed the transaction inquired about occurred only 17 days before the fatality now under consideration, and that the same employes were operating the boat and receiving the proceeds from its use for appellant then as on August 7th, when the boat capsized and sank. There are numerous instances where similar or collateral acts and transactions may be given in evidence as tending to show notice, knowledge, and the like. Volume 1, Wigmore on Evidence, §§ 301, 302; volume 1, Elliott on Evidence, §§ 165, 175, 185; City of Delphi v. Lowery, Adm'r, 74 Ind. 520, 39 Am. Rep. 98; P. F. W. & C. Ry. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111.

The tendency of Mr. Alexander's testimony giving the conversation with Mr. Baldwin was to show that appellant controlled and operated the boat. If it was a fact that appellant operated and controlled the boat on July 20th, and did not on August 7th, or if it at no time operated and controlled it, or if Mr. Baldwin and Mr. Starkey were not agents of appellant, or were not talked to over the telephone as claimed by the witnesses, appellant had ample means and opportunity of enlightening the jury on these subjects by calling Mr. Baldwin and Mr. Starkey as witnesses, and by bringing in its directors and officers to disprove such claims. This appellant failed to do. Having power and opportunity to produce the witnesses, presumably favorable to it, to explain the situation or disprove the testimony offered to show its control and operation of the boat, its failure to do so raises the presumption that the testimony, if produced, would be unfavorable to appellant. Yula v. N. Y., etc., Co., 39 Misc. Rep. 59, 78 N. Y. Supp. 770;

Lee v. State, supra; 16 Cyc. pp. 1062, 1063, 1064, and cases cited.

This doctrine does not change the rule requiring proof of material facts, but where there is some proof tending to establish such facts, it is a reasonable and salutary rule that may be considered in weighing the testimony. It is peculiarly applicable to corporations that of necessity transact business through agents and officers, who are naturally favorable to them, and may by a policy of evasion or omission, seek to win by the weakness and limitations of their adversaries. This is their legal right, and complaint need not be made that corporations resort to such policies. But, on the other hand, courts are seeking for the truth through the forms, and by the rules of law, and parties litigant cannot complain of the reasonable application of any rule of law that aids the court in attaining the end in view.

What we have said about the objections to the testimony of Mr. Alexander is in the main applicable to the testimony of Mr. Pearson. His conversation over the telephone claimed to be with Mr. J. S. Starkey in the office of appellant and shortly after the accident, was confirmed by subsequent personal conversations, and related to appellant furnishing assistance to recover decedent's body, and to his coming to Broad Ripple to assist in that work. Considering the other testimony on the subject of the control and management of the boat, this evidence was harmless, for it was only remotely, if at all, connected with that subject, and the other parts of the conversation could not in any way have influenced the jury. The answers to the interrogatories show conclusively that the jury reached its conclusion on the subject of the control and management of the boat from the other evidence on the subject, and confirms the view that this evidence did not harm appellant. Furthermore, where there is material competent evidence to prove a fact, the admission of incompetent and immaterial evidence tending to prove such fact is not reversible error. Louisville Ry. Co. v. Miller, 141 Ind. 533-561, 37 N. E. 343; Snell v. Maddox et al., 20 Ind. App. 172, 49 N. E. 856; Hauck et al. v. M. W. Mfg. Co., 26 Ind. App. 513, 60 N. E. 162; Naugle et al. v. State ex rel. Burton, 101 Ind. 284.

The objections to the testimony of the witnesses, Bacon and Jones, go rather to the weight than to the competency of the evidence. The changed conditions and the time of their observations were not such as to make their evidence inadmissible. The conditions shortly after the accident afforded some evidence of the conditions at the time it occurred. Hopkins v. Boyd, 18 Ind. App. 63-79, 47 N. E. 480.

The objections to the admissibility of Exhibits E, F, and G, which were photographs, and of H, which was a newspaper cut, showing the boat at the time and shortly after

the accident, cannot be sustained. Photographs and pictures are admissible in evidence when shown to be reasonably accurate representations of the place or thing in question. *City of Huntington v. Lusch*, 33 Ind. App. 476-482, 70 N. E. 402; 9 Enc. of Evidence, page 776. They may be shown to be correct representations by witnesses other than the persons who took them. 9 Enc. of Evidence, p. 777.

The appellant complains of the giving of certain instructions by the court at the request of appellee, and especially of Nos. 4 and 9, which are as follows: "No. 4. The law not only requires the carrier of passengers to thoroughly examine and test its vehicles, machinery, and all parts and appliances thereof used in transporting passengers, but such carrier is also required to further thoroughly examine said vehicle and machinery from time to time thereafter in order to know whether such vehicles and machinery are deteriorating by wear and tear." "No. 9. When the fact has been established that a passenger on a boat while being carried as a passenger for hire, has been thrown into the water and drowned, without his fault, by the sinking of the boat by the breaking down of parts thereof, the law will presume negligence on the part of the person operating the boat unless the evidence shows there was none."

Instruction No. 4 is not objectionable for the reasons urged. It correctly states the law applicable to the facts of this case. The court in numerous instruments told the jury appellant is not an insurer of its passengers. *L. N. A. & C. Ry. Co. v. Snyder*, 117 Ind. 435-437, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60; *C., H. & D. Ry. Co. v. McMullen*, Ad'm, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67.

Instruction No. 9 was the application to the facts of this particular case of a well-recognized rule of law. It was not, as appellant contends, a statement that every accident to the vehicle carrying passengers, gives rise to the presumption of negligence in favor of the injured passenger.

In the case of *Terre Haute, etc., Ry. Co. v. Sheeks*, 155 Ind. on page 95, 56 N. E. 441, our Supreme Court, in speaking of this rule said: "While the burden is upon the passenger suing to maintain the affirmative of the issue, still, under such circumstances, the mere happening of the accident is at least prima facie evidence of the negligence upon the part of the company or carrier, and it will be incumbent upon the latter to produce evidence which will excuse the prima facie failure of duty on its part; or, in other words, it has the burden of proving, in order to rebut the presumption of negligence,

under the circumstances, that the accident could not have been avoided by the exercise of the highest practical care and diligence." This rule does not change the general burden of proof, but simply provides that when a passenger is aboard a vehicle over which he has no control, and is injured without any fault of his own by the negligence of the carrier in using defective and insufficient means of transportation, the happening of the accident resulting in an injury, when proven, amounts to prima facie evidence of negligence on the part of the carrier, and makes it incumbent upon it to produce evidence to overcome the prima facie case thus established. *P. C. & St. L. R. R. Co. v. Williams*, 74 Ind. 462; *M. & O. R. P. Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *L. N. & C. R. R. Co. v. Thompson*, Ad'm, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; *Knoefel v. Atkins*, 40 Ind. App. 428-435, 81 N. E. 600; *P., C., C. & St. L. Co. v. Higgs*, 165 Ind. 694-707, 76 N. E. 299, 4 L. R. A. (N. S.) 1081.

Instruction No. 1 given at the request of the appellee, simply told the jury that where a passenger has been injured by the negligence of the carrier, such carrier cannot be relieved from the responsibility of its negligence by showing that the injury occurred while the carrier was doing business not authorized by its charter.

No. 2, of which complaint is made, stated to the jury the conditions under which appellee's decedent might be considered a passenger of appellant, and left the jury to determine the facts from the evidence, and then stated that, if such facts were proven, appellant was bound to use due care in carrying the passenger.

These instructions are not objectionable, and when considered in connection with the other instructions given, state the law correctly as applied to the facts of this case.

The appellant also complained of the refusal of the court to give instructions No. 1 and No. 2 tendered by it. It is sufficient to say that in so far as these instructions were applicable to the facts of the case, instruction No. 4 tendered by appellant and given by the court stated the law fully upon the identical propositions presented in No. 1 and No. 2 refused.

We have read all the instructions given and refused, and under the well-recognized rules for considering instructions, which we deem it unnecessary to repeat here, find no error in either the giving or the refusal of instructions.

There is no available error shown by the record.

Judgment affirmed.

(47 Ind. App. 123)

RICHEY v. CLEVELAND, C., C. & ST. L. RY. CO. (No. 7,428.)

(Appellate Court of Indiana. Feb. 15, 1911.)

1. APPEAL AND ERROR (§ 760*)—BRIEF—REFERENCE TO RECORD.

There was a substantial compliance with the Appellate Court rule requiring briefs to refer to the record by pages and lines and pointing out the errors on which appellant relies, so as to raise on appeal the propriety of sustaining a demurrer to the second paragraph of the complaint, where, though the brief does not refer to the page and lines of the transcript where the second paragraph of the complaint could be found at the place in the brief where it was set out under the heading "Statement of the Record," immediately preceding such heading and on the same page under the heading "Errors Relied on for Reversal," the brief stated that the court erred in sustaining a demurrer to the second paragraph of the complaint, beginning at page 9, line 1.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3095; Dec. Dig. § 760.*]

2. APPEAL AND ERROR (§ 761*)—BRIEF—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where but one error is relied upon for reversal, the Appellate Court will assume that all the authorities cited bear upon such error, so that appellant's brief need not contain a separate heading of each error relied upon under the head of "Points and Authorities."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3096; Dec. Dig. § 761.*]

3. MASTER AND SERVANT (§ 259*)—INJURIES TO SERVANT—SUFFICIENCY OF COMPLAINT—EMPLOYEE'S LIABILITY ACT.

Employer's Liability Act (Laws 1893, c. 130) § 1, subd. 2, provides that every railroad or other corporation shall be liable for injuries to employes, where such injuries result from the negligence of any person in the service of such corporation to whose orders the injured employe was bound to and did conform to, when injured. *Held*, that the complaint must allege facts showing that plaintiff was employed by a railroad corporation; that the one giving the order was also an employe; that plaintiff was bound to comply with such order; that it was a special order, not as broad as the general scope of the employment, and either that it was given negligently, or, if not, that, while plaintiff was where he was required to be in performing his duties thereunder, he was injured through a negligent act or omission of the person giving the order.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 840-843; Dec. Dig. § 259.*]

4. MASTER AND SERVANT (§ 182*)—EMPLOYEE'S LIABILITY—ORDERS OF FOREMAN—SPECIAL ORDERS.

Under Employer's Liability Act (Laws 1893, c. 130) § 1, subd. 2, making railroad corporations liable for injuries to employes resulting from the negligence of one in the service of the corporation to whose orders the injured employe was bound to and did conform, an employe cannot recover for injuries caused by negligence of his foreman if he is engaged in the general duties of his employment when injured, and not under any special order, and a section hand who was ordered to quit unloading ties, load the tools on a hand car, and take the car to a point three miles distant for the purpose of surfacing tracks, was engaged in performing a special order of the foreman while riding on the hand car so as to entitle him to recover against the railroad company for injuries

caused by the negligence of the foreman in suddenly stopping the car, throwing such employe off.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

5. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—ACTIONS—NEGLIGENCE.

While plaintiff, a section hand, was riding on the hand car with his foreman and the rest of a gang to a certain point, the foreman, who had exclusive authority to operate the brakes, without warning to plaintiff, suddenly threw his whole weight on the brakes instantly reducing the speed of the car from 12 miles an hour to 3 miles an hour, throwing plaintiff upon the track and permitting the car to run over him. *Held*, that the section foreman was guilty of negligence in operating the hand car.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 274; Dec. Dig. § 137.*]

6. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION OF STATUTES.

The courts should construe a statute so as to hold it constitutional if possible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. COURTS (§ 97*)—RULES OF DECISION—DECISIONS OF FEDERAL COURTS.

A decision of the United States Supreme Court is binding upon the state courts upon the question of whether it is necessary, to prevent a section of the employer's liability law (Laws 1893, c. 130) from violating Const. U. S. Amend. 14, to construe it so as to exclude from its benefit all railroad employes except those whose occupations expose them to danger incident to the operation of trains.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 831; Dec. Dig. § 97.*]

8. COURTS (§ 220*)—JURISDICTION—APPELLATE COURTS.

The Appellate Court does not have jurisdiction to pass upon constitutional questions; only the Supreme Court having that power.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 586, 587; Dec. Dig. § 220.*]

9. COURTS (§ 220*)—JURISDICTION—APPELLATE COURTS—CONSTITUTIONAL QUESTIONS—SETTLED QUESTIONS.

Where a constitutional question has been repeatedly decided by the Supreme Court, so that it may be regarded as settled, it is not considered as presented for decision so as to deprive the Appellate Court of jurisdiction of an appeal, though the question be thereafter raised.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 586, 587; Dec. Dig. § 220.*]

10. COURTS (§ 91*)—PRECEDENTS—AS CONTROLLING.

The Appellate Court cannot overrule or disregard a decision of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

Appeal from Circuit Court, Bartholomew County; M. Hacker, Judge.

Action by Walter C. Richey against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for defendant on demurrer to the complaint, plaintiff appeals. Case transferred to Supreme Court.

Hord & Adams, for appellant. Carter & Morrison, for appellee.

LAIRY, J. The appellant filed a complaint in the court below in two paragraphs. He afterwards dismissed the first paragraph, and a demurrer for want of facts sufficient to constitute a cause of action was sustained to the second paragraph. The appellant refused to amend or plead further, and judgment was rendered against him. From this judgment, he appeals to this court, and assigns as error the ruling of the trial court in sustaining the demurrer to the second paragraph of his complaint.

This paragraph of complaint is as follows: "The plaintiff, Walter C. Richey, for second and further paragraph of amended complaint, and by way of further amended cause of action against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation, says: That the defendant is now, and has been continuously for more than 10 years last past, a corporation owning and operating a line of steam railroad and engaged in the business of a common carrier of passengers and freight, and which line of railroad passes through the county of Shelby and state of Indiana. On the 27th day of March, A. D. 1905, the plaintiff was an employé in the service of the defendant, doing common labor as a section hand in repairing and maintaining the railroad tracks of the defendant and doing other varied service on said section, which was and is about three miles long, extending from the town of Waldron in said county, in a northwesterly direction, to what is known as 'Wheeler creek,' over which the defendant maintained a bridge called 'Wheeler Bridge,' which was known as the west end of said section, which is located west of the village of Prescott upon the defendant's line of railroad, which section, with the hand car, tools, implements, and the employés, were under the control, supervision, and subject to the orders of an employé of said defendant known as a 'section foreman,' and at said time this plaintiff and other section hands laboring for the defendant were under the control and subject to the orders of said section foreman who were engaged in the same common service and in the same department of service of said defendant under the orders of said section foreman, who at said time was a coemployé and fellow servant with this plaintiff and the other employés on said section. That said section foreman during all of said time in performing the service of said corporation was then and there acting and duly authorized so to do in the place of, and performing the duties of, said corporation in that behalf as its duly authorized agent. That upon said day, and for a long time previous thereto, this plaintiff was under the absolute control and subject to the orders and direction of said section foreman in performing his work and labor upon said section. Upon the day aforesaid, and a long time previous thereto, the defendant owned a machine com-

monly called and known as a hand car, which was then, and for a long time before said time had been, in the possession and under the exclusive control of said section foreman, and which was used by the defendant under the supervision and control of said section foreman for said defendant, for the purpose of transporting said section foreman and said section hands under his control and subject to his order along the line of said section for the purpose of performing the duties of said corporation, and also for the purpose of carrying and transporting tools, implements, lifting jacks, cross-ties, railroad iron, spikes, dirt, iron rails, gravel, and other material in repairing and maintaining the roadbed of said corporation and for performing other duties pertaining thereto. Said hand car was a large and heavy machine with iron wheels that was propelled by an appliance attached thereto that was operated by hand, and propelled by employés of said company with handle bars. That said machine and car was also equipped with a brake for checking and stopping the speed of said car. That upon said day the plaintiff, with other sectionmen, who were employés of said defendant, were unloading cross-ties and cars of defendant at the town of Waldron, on said section, when said section foreman gave this plaintiff and the other employés working on said section a specific and special order to desist from said work and load upon said hand car their shovels, picks, lifting jack, and other tools belonging to the defendant, and specifically ordered and directed that this plaintiff and said employés working upon said section (which order and direction he was authorized to give) to get upon said hand car and proceed with him thereon to the west end of said section at said Wheeler Creek Bridge, to make repairs upon said roadbed of said defendant by surfacing the same. That while traveling and proceeding under said order and direction of said section foreman who had charge of and management of the brakes, and the management of said car by virtue of the authority vested in him by the defendant so to do, and while traveling upon said hand car subject to said orders of said section foreman to perform the duties required of them, the said hand car, while running at a high rate of speed, to wit, at the rate of 12 miles per hour, over said defendant's road, and said car was being propelled as aforesaid by this plaintiff, and the said employés under the order and direction of said section foreman who was then present upon said car ordering and directing its movement, and who was the only person authorized to operate or apply the brakes on said hand car, and who was the only person who had any authority to control and direct the movements and operations of said car, which was then heavily loaded with implements, tools, and said section foreman, and other employés on said section, and, while so running said hand

car at a high rate of speed on a downgrade, the said section foreman carelessly and negligently and with great force, without any notice to this plaintiff, suddenly applied the brakes to said car when there was no necessity therefor at a point more than one mile from their destination, unexpected to this plaintiff and the other employes of said car, whereby said car was quickly, suddenly, and violently checked and reduced from a speed of 12 miles per hour to a speed of 3 miles per hour almost instantly by the said section foreman negligently and carelessly jumping upon and throwing his entire weight upon said brakes, he, the said section foreman, then and there being a large and heavy man, by reason of which negligent conduct this plaintiff was thrown forward off of said car to the ground upon said railway bed, and his body coming in violent contact with the ground, his head striking one of the iron rails on said track, and the car passing over his left leg, foot, and ankle, and crushing the bones of the leg, foot, and ankle, and lacerated and tore the tendons, ligaments, muscles, and blood vessels of said leg, foot, and ankle, and, by reason of said injuries and negligence of said section foreman and this defendant, he was cut, bruised, wounded, and injured about the head, back, arms, and other parts of his body, so that he is permanently injured, and will be a cripple for life. At the time aforesaid when he was so injured, he was obeying and conforming to the special and direct orders and directions of said section foreman, who then and there had competent authority in said behalf from said defendant to order and direct him, and said section foreman, at the said time, was his superior in authority upon said section, and said section foreman, this plaintiff, and the other employes upon said section at said time were engaged in the same common service in the said department of the defendant as fellow servants, performing the duties and labors of said corporation. This plaintiff further avers: That at the time he received said injuries, and at the time of the negligent acts of said section foreman and defendant, he, the plaintiff, was an employe in the service of said defendant, and, at the time of receiving said injury and during the negligent conduct of said section foreman and at all of said times, the plaintiff exercised due care and diligence to prevent said injury, and during all of said time he was free from fault or negligence contributing in any degree to his injury. That previous to said time he was physically strong and able to perform any kind of labor, and to earn \$36 per month, but since said time he has not been able to perform common labor, and will not be able again to do so. That he has suffered great pain and anguish, and will continue to suffer greatly from said injuries as long as he shall live. That he has incurred a liability for, and has paid for, medicine,

nursing, physicians' services, care and attention to be healed, the sum of \$100. Wherefore he says that he is damaged in the sum of \$10,000, for which he demands judgment and for all other proper relief."

The point is made by appellee that the brief of appellant raises no question for decision by reason of the fact that it does not comply with rule 22 of this court in two particulars. It is true that appellant does not refer to the page and lines of the transcript where the second paragraph of complaint may be found at the place in his brief where the complaint is set out under the heading entitled, "Statement of the Record"; but immediately preceding this heading, and on the same page of the brief, under the head of "Errors Relied on for Reversal," it is stated that the court erred in sustaining the demurrer to the second paragraph of complaint, beginning at page 9 at line 1. The other objection to the brief is that it does not, under the head of "Points and Authorities," contain a separate heading of each error relied upon. As there is but one error relied on for reversal in this case, the court will understand that all authorities cited refer to this error. There is a substantial compliance with the rule in the preparation of the brief.

This complaint is drawn under the employer's liability act (Laws 1893, c. 130). There are some unnecessary averments in the complaint, which render its theory somewhat doubtful; but, from an examination of the whole complaint, our judgment is that it proceeds upon the theory that there is a liability under subdivision 2 of this act. This subdivision, read in connection with the former part of the section, is as follows: "That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injuries suffered by employes while in its service, the employe so injured being in the exercise of due care and diligence in the following cases: * * * Second. Where such injuries resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employe, at the time of the injury, was bound to conform, and did conform."

In order to state a cause of action under this subdivision of the statute, it is necessary that the complaint should state facts which show: First, that the plaintiff was employed by a corporation engaged in the operation of railroads; second, that the person giving the order or direction was employed by such railroad company, and that the person injured was bound to comply with such order, and did so comply; third, that the order was a special order, not as broad as the general scope of the employment; fourth, either (a) that the order given was a negligent order, or (b), in the event said order was not negligently given, that, while plaintiff was performing his duty in carrying

out said order, and while he was in a place where he was required to be in the performance of his duty, under said order, he was injured through some negligent act or omission of the party giving the order or direction.

The first position taken by appellee is that the foreman was not negligent in giving the order set out in the complaint. It is not necessary that the order should have been a negligent one, provided it appears that the person injured was obeying the order, and, while so engaged in the performance of his duty thereunder, he was injured by the negligent act or omission of the person giving it. *Indianapolis Gas Co. v. Shumack*, 23 Ind. App. 87, 54 N. E. 414; *Muncie Pulp Co. v. Davis*, 162 Ind. 561, 70 N. E. 875.

The order given by the section foreman, as alleged in the complaint, was that the plaintiff should stop unloading ties at Waldron, load the tools on a hand car, and proceed with his foreman and the other sectionmen, upon said hand car, to Wheeler creek, a point about three miles distant, for the purpose of surfacing the track. It is claimed by appellee that this was not a special order or direction within the meaning of the statute, and that therefore the company would not be liable for the negligence of the section foreman, resulting in injury to the plaintiff, while he was so engaged in the performance of the duties imposed by said order.

The statute does not make the company liable for all acts of negligence by a foreman whose duty it is to give orders, so, if a person working under such foreman is injured through the negligent acts or omissions of said foreman, he cannot recover, unless it appears that, at the time he was so injured, he was engaged in some special work, which he had been ordered or directed to perform by a foreman. If he is engaged in the general duties of his employment, and not acting under any special orders from a foreman, he cannot recover for injuries caused by the negligence of the foreman. *Indianapolis St. Railway Co. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721; *Grand Rapids, etc., Ry. Co. v. Pettit*, 27 Ind. App. 120, 60 N. E. 1000; *Snowden v. Baynes*, 24 Q. B. D. 568.

The question then arises: Was the order given to the plaintiff to quit unloading ties at Waldron, to load the tools on the hand car, and to get upon said car, with the foreman and the other sectionmen, and proceed to a point about three miles distant, for the purpose of surfacing the track, such a special order as gave to the plaintiff a right of recovery against his employer for injuries caused through the negligence of the section foreman, while he was so on said car and upon his way to Wheeler creek?

A proposition very similar to this was presented and decided by the Supreme Court of this state, in the case of *Thacker v. Chicago, etc., Ry. Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792. In that case it was alleged

that McGill, section foreman, ordered said extra gang of men, including appellant, to go on hand cars over appellee's tracks to meet a gravel train for the purpose of unloading gravel from the cars of said train; that appellant, in obedience to the orders of said McGill, in company with eight others of said extra gang, got on one hand car, and McGill and the others of said extra gang got on another hand car, and started to meet said gravel train; that appellant was bound to conform, and did conform, to said order of McGill, section foreman, in going on said hand car, to meet said gravel train. It was further alleged in the complaint, in that case, that while the plaintiff was so riding on said hand car, in obedience to said order, that the section foreman negligently gave a signal to the person in charge of the brake, directing him to stop the hand car suddenly without any warning to plaintiff, and that, by reason of said hand car being so suddenly stopped, plaintiff was thrown from the car and injured. This complaint was held sufficient to state a cause of action, under subdivision 2 above quoted. This conclusion could not have been reached by the court in any other way than by holding the order given by McGill, the section foreman, to the plaintiff, to get on the car and go over the track of appellee to meet a gravel train, was a special order, and that, while the plaintiff was so engaged, the company was liable for any injuries inflicted upon him through the negligent act or omission of the section foreman. This case seems to us to be decisive upon this question, and we therefore hold that the plaintiff at the time he was proceeding on said hand car, as alleged in the complaint, from Waldron to Wheeler creek, was in the execution of a special order given him by the section foreman, to whose orders he was bound to conform, and was conforming at the time he received his injury.

The other averments of the complaint are sufficient to show negligence of the section foreman in the operation of said hand car, which resulted in the injury to the plaintiff complained of.

It is averred in the complaint that the section foreman was in charge of the brakes of said hand car, and that he was the only person who had authority in the management and control and operation of the car, and the only one who had authority to stop said car or set said brakes; that, while they were a considerable distance from the place of their destination, said section foreman, without any warning to the plaintiff, suddenly threw his whole weight on the brake, and thereby reduced the speed of the car almost instantly from 12 miles per hour to 3 miles per hour; and that by reason of the speed being so reduced, without any warning to the plaintiff, said plaintiff was thrown from the car to the track, and the car passed over him, inflicting the injuries complained of.

The complaint does not state a cause of

action at common law. We are called upon to decide whether or not it states a cause of action under subdivision No. 2 of the employer's liability act. From what we have said, it will be seen that we are of the opinion that it does state a cause of action under subdivision No. 2 of the statute under consideration in case that statute can be held to apply to that branch of railway service in which appellant was employed at the time he received the injury of which he complains. It plainly appears from the averments of the complaint that appellant was employed as a section hand; that he was not engaged in the train service of his employer; but that his injury did not result from a danger incident to the operation of trains on the railroad operated by appellee, unless we hold that a hand car is a train within the meaning of the decisions of the Supreme Court, to which we will later refer. This we cannot do, as the dangers incident to the operation of a hand car are in no way similar to the dangers incident to the operation of trains of freight or passenger cars drawn by locomotive engines. As we view the complaint, it is good, provided the statute under consideration is held to apply to an employé of a railroad company engaged as a section hand, who is injured in the operation of a hand car, without coming in contact with any train; but, if the statute does not apply in such a case, the complaint is clearly insufficient, and the trial court committed no error in sustaining the demurrer. In passing upon the sufficiency of this complaint, it is therefore necessary for this court to place a construction on this statute. The statute by its terms provides: "That every railroad or other corporation except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employé while in its service * * * in the following cases." The words used in the statute would seem to make it applicable to every employé while in the service of the corporation, regardless of the branch of service in which he is employed or the character of his employment. The Supreme Court of this state has recently held, however, that to give the statute a construction as broad as its words indicate would render the act violative of the fourteenth amendment to the federal Constitution, in that it would deny to railroad corporations the equal protection of the law, in its capacity of an employer of labor. It being the duty of the court to so construe the statute as to hold it constitutional, if possible, it was held that the statute should be construed as designed exclusively for the benefit of those employés who are, in the course of their employment, exposed to the particular dangers incident to the use and operation of railroad trains and engines, and whose injuries are caused thereby. *Indianapolis Traction Co. v. Kin-*

ney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711.

In the earlier case of *Indianapolis Street Railway Company v. Kane*, supra, a judgment against the appellant was sustained. The judgment was founded upon a complaint based upon the second subdivision of the statute under consideration, and it appeared from the averments of the complaint that appellee at the time he was injured was engaged in repairing a bridge, and that his injury resulted from the negligence of the road foreman, and was not caused by any hazard incident to the use and operation of a train. The complaint in that case was held sufficient, and the case was not overruled or even referred to in the later case of *Indianapolis Co. v. Kinney*, heretofore cited in this opinion.

The same question was again before the Supreme Court, in the case of *Cleveland, etc., Ry. Co. v. Foland*, 91 N. E. 594. In that case the court followed the case of *Indianapolis Traction Co. v. Kinney*, but did not overrule or refer to the case of *Indianapolis St. Railway v. Kane*. In the opinion of the court rendered on petition for rehearing (92 N. E. 165), it is stated that the question of nonliability under the employer's liability act was not raised in the case of *Indianapolis St. Ry. Co. v. Kane*, either upon the record or the briefs. The opinion of the court in the case last referred to does not show that this question was not raised, and there is nothing in the opinion to indicate that the question was not passed upon. The complaint was held sufficient, and the decision is not put upon the ground that the question of nonliability under the employer's liability act was not raised. This can be learned only from an examination of the opinion rendered on rehearing in the case of *Cleveland, etc., Ry. Co. v. Foland*, supra.

Since the decisions of our own Supreme Court above referred to were announced, the Supreme Court of the United States has decided that a construction of the statute under consideration which allows its benefits to all employés in the service of a railroad corporation does not offend against the equal protection clause of the fourteenth amendment to the federal Constitution. In *Louisville & Nashville Ry. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, at page 680, 54 L. Ed. 921, the question was directly presented. The appellee, a carpenter, was injured while employed in the construction of a coal tippie at Howell, Ind., through the negligence of his foreman. He brought his action in the state of Kentucky, and pleaded the Indiana statute now under consideration. He obtained judgment, and the case was affirmed by the Court of Appeals of the state of Kentucky, and the case finally reached the Supreme Court of the United States, where it was again affirmed. The court in its opinion says: "It is, beyond doubt, foreclosed

that the Indiana statute does not offend against the equal protection clause of the fourteenth amendment, because it subjects railroad employes to a different rule as to the doctrine of fellow servant from that which prevails as to other employments in that state. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Pittsburgh, C., C. & St. L. R. Co. v. Ross*, 212 U. S. 560, 29 Sup. Ct. 688, 53 L. Ed. 562. But, while conceding this, the argument is that classification of railroad employes for the purpose of the doctrine of fellow servant can only, consistently with equality and uniformity, embrace such employes when exposed to dangers peculiarly resulting from the operation of a railroad, thus affording ground for distinguishing them for the purpose of classification from coemployes not subject to like hazards or employes engaged in their occupations. The argument is thus stated: 'Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employes incident to railroad hazards, but it does insist that, to make this a constitutional exercise of legislative power, the liability of railroads must be made to depend upon the character of the employment, and not upon the character of the employer.' Thus stated, the argument tends to confuse the question for decision, since there is no contention that the statute as construed bases any classification upon some supposed distinction in the person of the employer. The idea evidently intended to be expressed by the argument is that although, speaking in a general sense, it be true that the hazards arising from the operation of railroads are such that a classification of railroad employes is justified, yet, in operating railroads, some employes are subject to risks peculiar to such operation, and others to risks which, however serious they may be, are not, in the proper sense, risks arising from the fact that the employes are engaged in railroad work, the legislative authority in classifying may not confound the two by considering in a generic sense the nature and character of the work performed by railroad employes collectively considered, but must consider and separately provide for the distinctions occasioned by the varying nature and character of the duties which railroad operatives may be called upon to discharge. In other words, reduced to its ultimate analysis, the contention comes to this: That, by the operation of the equal protection clause of the fourteenth amendment, the states are prohibited from exerting their legitimate police powers upon grounds of the generic distinction obtaining between persons and things, however apparent such distinction may be, but, on the contrary, must legislate upon the basis of a minute consideration of the distinctions which may arise from accidental circumstances as to the

persons and things coming within the general class provided for. When the proposition is thus accurately fixed, it necessarily results that in effect it denies the existence of the power to classify, and hence must rest upon the assumption that the equal protection clause of the fourteenth amendment has a scope and effect upon the lawful authority of the states, contrary to the doctrine maintained by this court, without deviation. This follows, since the necessary consequences of the argument is to virtually challenge the legislative power to classify, and the numerous decisions upholding that authority. To this destructive end, it is apparent the argument must come, since it assumes that, however completely a classification may be justified by general considerations, such classification may not be made if inequalities be detected as to some persons embraced within the general class by a critical analysis of the relation of the persons or things otherwise embraced within the general class. A brief reference to some of the cases dealing with the power of a state to classify will make the error of the contention apparent." And again (218 U. S. 36, 30 Sup. Ct., at page 682 [54 L. Ed. 921]) the court says: "While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employes sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in Indiana (*Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. [N. S.] 711, and *Cleveland, C., C. & St. L. R. Co. v. Foland* [decided April 20, 1910] 91 N. E. 594) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution, and the fourteenth amendment, unequivocally held that the statute must be construed as restricted to employes engaged in train service."

The decisions of the Supreme Court of the United States upon questions involving the construction of the federal Constitution have been held to be binding upon the courts of the several states. *State v. Oudahy Packing Co.*, 33 Mont. 179, 82 Pac. 833, 114 Am. St. Rep. 804; *Ballard et al. v. Wiltshire*, 28 Ind. 841; *Larrabee v. Talbott*, 5 Gill (Md.) 426, 46 Am. Dec. 637.

The decisions of the federal court are also binding upon a state court where the question involved is whether or not a statute of the state violates a provision of the federal Constitution. It must necessarily follow that such a decision is binding upon the courts of this state upon the question of whether or not it is necessary, in order to save the

statute under consideration from offending against the fourteenth amendment of the federal Constitution, to so construe it as to exclude from its benefits all employes of railroad corporations except those whose occupations expose them to danger incident to the use and operation of trains and whose injuries result therefrom. *State v. Cudahy Packing Co.*, supra; *State, etc., v. Hernando Ins. Co.*, 97 Tenn. 85, 38 S. W. 721.

We have said this much for the purpose of showing the unsettled state of the law upon this question. This case was transferred to this court from the Supreme Court. This court has no jurisdiction to pass upon constitutional questions; that power being vested by statute in the Supreme Court. The transfer was probably made in pursuance of the doctrine announced by the Supreme Court to the effect that, where a constitutional question has been repeatedly decided by the Supreme Court, it is regarded as settled and no longer open for decision, and that in such case, even though the constitutional question is raised, it cannot be regarded as presented for decision, and the jurisdiction is in this court. *Pittsburgh, etc., Ry. Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212; *Pittsburgh, etc., Ry. Co. v. Peck*, 172 Ind. 19, 87 N. E. 644.

Where a case is so transferred, we presume that this court is expected either to ignore the constitutional question or to follow the decision of the Supreme Court upon that question. We cannot in this case ignore the question unless we shut our eyes to the averments of the complaint, which clearly show that the appellant was not so employed as to expose him to the dangers incident to the operation of trains, and that his injury did not result therefrom. The question of the sufficiency of the complaint is directly presented to this court for decision, and, while the particular defect under consideration is not pointed out in the brief of appellee, the defect is so apparent that it cannot be overlooked. We have the decisions of the Supreme Court above referred to in mind, and, even though they are not cited by appellee in his brief, we cannot ignore them in passing upon the sufficiency of the complaint.

We recognize the binding force of the decision of the Supreme Court of the United States upon the question under consideration, and our judgment is in accord with the reasons advanced by that court in its opinion from which we have quoted. Those reasons apply with equal force when the statute under consideration is considered with reference to article 1, section 23, of our state Constitution. This court has no jurisdiction to decide a constitutional question, neither has it any power to overrule or disregard a decision of the Supreme Court of this state. We cannot ignore the constitu-

tional question presented in this case, and we cannot conscientiously follow and give our assent to the holdings of our Supreme Court upon this question in the decisions to which we have heretofore referred. In view of what we have said, we cannot regard the law as so firmly settled in this state as to preclude all further controversy upon the subject. We regard it as important that the Supreme Court of this state should pass upon this question again at its earliest opportunity, considering it in the light of the recent decision of the federal Supreme Court herein cited, to the end that lawyers and litigants may be relieved of all uncertainty as to the law upon this subject.

We therefore respectfully request that the Supreme Court of this state take over this case, and decide it, and that the case of *Indianapolis Traction Company v. Kinney, and Cleveland, etc., Ry. Co. v. Foland*, be overruled, and that the case of *Indianapolis Street Railway Co. v. Kane* be followed, and the rule of the law therein announced established.

We think that this case demonstrates the necessity that the Supreme Court should take and retain jurisdiction of all cases in which a constitutional question is involved and presented, whether said question has been previously decided by that court or not. This was suggested by Montgomery, C. J., in his concurring opinion in the case of *Pittsburgh Ry. Co. v. Peck*, 172 Ind. 578, 88 N. E. 939. We therefore further request that the case of *Pittsburgh, etc., Ry. Co. v. Rogers*, 168 Ind. 483, 81 N. E. 212, and the later cases decided upon the authority of that case, be overruled.

This case is transferred to the Supreme Court, under the provisions of section 1429, Burns' Ann. St. 1908.

MYERS, C. J., and HOTTEL, FELT, ADAMS, and IBACH, JJ., concur.

(48 Ind. A. 248)

WINONA & W. RY. CO. v. ROUSSEAU.¹
(No. 6,848.)

(Appellate Court of Indiana, Division No. 1.
Feb. 14, 1911.)

1. CARRIERS (§ 314*)—INJURIES TO STREET CAR PASSENGERS—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car, which alleges that a signal to stop was given, that the motorman slowed down and almost stopped the car, that plaintiff, believing that the car was going to stop to discharge passengers, started to get off, and that the motorman negligently started the car with a jerk, throwing plaintiff from the car, sufficiently alleges that the place was a usual stopping place.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1273-1280; Dec. Dig. § 314.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
1 Transfer denied.

2. CARRIERS (§ 314*)—INJURIES TO STREET CAR PASSENGERS—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to a street car passenger while alighting, which alleges that the motorman, after slowing the car down in obedience to a signal to stop, negligently, without warning, applied power, and moved the car forward with a sudden jerk, throwing plaintiff from the car, charges as the proximate cause of the injury the negligent application of power to the car to move it with a sudden jerk, so that the reason of the motorman's act in applying the power is but one element of the negligence charged.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1273-1280; Dec. Dig. § 314.*]

3. CARRIERS (§ 284*)—PASSENGERS—LIABILITY.

A carrier of passengers is as a general rule liable only for the negligent acts of itself and servants, and not for the acts of strangers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1128-1135; Dec. Dig. § 284.*]

4. CARRIERS (§ 318*)—STREET CAR PASSENGERS—INJURIES—NEGLIGENCE—EVIDENCE.

In an action for injuries to a street car passenger while alighting, caused by the sudden starting of the car after it had slowed down, evidence held to justify the inference that the motorman's act in slowing down the car was such as to charge him with knowledge that passengers might on account thereof place themselves in a position to be injured by any sudden movement of the car, and that he was required before suddenly moving his car to look to see the situation of the passengers, and that his sudden starting of the car on a signal given by a passenger, without looking to learn of the position of passengers, was actionable negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1314; Dec. Dig. § 318.*]

5. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—EVIDENCE—SUFFICIENCY.

To justify a finding of actionable negligence by a motorman in suddenly starting his car with a jerk, so as to throw off a passenger attempting to alight, it is only necessary that the evidence affirmatively establishes circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the motorman might have taken.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1314; Dec. Dig. § 318.*]

6. APPEAL AND ERROR (§ 930*)—REVIEW—GENERAL VERDICT—PRESUMPTIONS.

Where the verdict is general, every inference fairly deducible from the evidence is presumed in its favor on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3753-3761; Dec. Dig. § 930.*]

7. TRIAL (§ 359*)—GENERAL VERDICT—SPECIAL VERDICT—CONFLICT.

The answers to special interrogatories will prevail over the general verdict only where they are in irreconcilable conflict with the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857-860; Dec. Dig. § 359.*]

On petition for rehearing. Overruled.

For former opinion, see 93 N. E. 34.

HOTTEL, J. Counsel for appellant in their petition for rehearing urge with much earnestness that the court failed to consider in the original opinion rendered in this case some questions which they deem vital and

controlling. We therefore supplement that opinion with a consideration of those questions.

Counsel first insist that neither of the several paragraphs of complaint state facts sufficient. The only objection urged in the petition for rehearing to either of the several paragraphs of complaint is that neither paragraph contains an allegation "that the place at which appellee desired to alight was a usual stopping place on the appellant's railroad." To sustain their contention that this is a necessary allegation in each of the paragraphs of complaint, counsel have cited two cases, one of which relates to an injury to a passenger received in alighting from a steam railroad, on account of there being no platform at the point where the train stopped, and the plaintiff was injured in stepping to the ground while the train was standing still, and the other case cited was a case where the passenger was ejected from the train. So it will be seen that the theory of the complaint in each of those cases was entirely different from the theory of the several paragraphs of complaint in the case at bar; but, even if it were conceded that such an allegation were necessary in a suit like the one at bar, if brought against a steam railroad, it would not follow that such an allegation is necessary where the suit is against an electric street railroad. The manner of operating steam railways is so different from the manner of operating electric street railways that the rules of law obtaining in the first do not always apply to the latter. The steam roads usually have a schedule time upon which they run and operate their trains, and have fixed places for stopping to discharge and receive passengers, so that there was reason for the application of the rule contended for by counsel in the particular cases cited; but upon electric street railways, where the manner of operating the car is in a large measure by signal, and the places of receiving and discharging passengers, and the stopping and starting of the car for such purpose all depend, to a great extent, upon the signal, the reason for the rule ceases, and, this being true, the rule itself ceases. The complaint does allege that a signal to stop was given, and that, in obedience thereto, the motorman slowed the car down, and did almost or quite stop the same, and that the appellee, believing that the car was going to stop to discharge passengers at that point, got up in her seat preparatory to getting off, etc. For the purposes of an electric street railway, this allegation was the equivalent of the allegation contended for by counsel, which, in the cases cited, applies to steam railroads, and we think made the several paragraphs of complaint entirely sufficient in this regard. *Anderson v. Citizens' St. R. Co.*, 12 Ind. App. 194, 38 N. E. 1109.

The one question, however, which counsel in their brief on petition for rehearing most strongly emphasize and urge is one relating to "the proximate cause of the injury" as disclosed by the evidence. They insist that the uncontradicted evidence shows (we quote from their brief) "that the signal was given to the motorman to stop the car; that the plaintiff arose to her feet for the purpose of alighting before the car had stopped, and that a passenger on the car and a stranger to the company gave the signal to go ahead; that thereupon, in obedience to the signal, the motorman applied the power, and that the starting of the car caused the plaintiff to fall, from which fall she received the injury complained of." Counsel then add: "It seems to us that the giving of the signal to go ahead was the proximate cause of the car starting. * * * No reference whatever is made in the opinion to the fact that a stranger gave the signal to proceed. The whole gist of the case, as far as the evidence is concerned, is wrapped up in this one subject. * * * We cannot agree with counsel in their conclusion that under the evidence the whole gist of the case is wrapped up in the one question that a stranger to the company, a passenger on its car, gave the signal to go ahead. In considering the evidence, we must not lose sight of the negligence charged in the complaint as the proximate cause of appellee's injury. We quote from the first paragraph of the complaint: "That said motorman, without giving any notice of warning, then and there *carelessly and negligently so applied power to said car as to cause it to move forward with a sudden jerk*, by means of which jerk and on account of said negligence of said motorman this plaintiff was thrown from said car," etc. The negligent act here charged as being the proximate cause of the injury is the carelessly and negligently applying the power by the motorman so as to cause the car to move forward with a sudden jerk. It is not only the moving forward of the car or the increasing the speed that enters into and characterizes the negligence charged, but the time, manner, and circumstances of the moving of the car all enter into and give character and quality to this act in determining whether or not it constituted negligence. So that the cause or the reason for the motorman starting or increasing the speed of the car is but one element entering into the question of the negligence charged and is not the whole gist of the case, as appellant's counsel contend.

We know that as a general rule "a common carrier of passengers is only liable for the negligent acts of itself and servants. It is not liable for the acts of strangers." But, under the evidence in this case, this rule is not necessarily controlling. The evidence upon the question of signals, who gave them, when and where they were given, and how

many were given, is conflicting. The conductor and other witnesses testified that the intersection of Lake and Centre streets just after the car passed the curve, where it was claimed the signals were given and the car was slowing down, was regarded as a regular stopping place. There were a number of passengers on the car, among them appellee, who desired to get off at this point. The conductor himself testified, in substance, that, after leaving Buffalo street, he had been requested by a passenger to stop the car on Lake street, and that pursuant to that request, midway between Buffalo and Lake streets, he gave the motorman the signal to stop the car at said point on Lake street, that he noticed when he got around the curve that the motorman was not going to stop, and that he, the conductor, was going to give him another signal to stop, but saw a passenger, Jack Shoup, get up and pull the bell once, which was the stop signal; and that he did not give the signal again himself as he thought the one given by the passenger Shoup would stop the car; that the car then slowed down, and he thought it was going to stop, when he saw another passenger, Mr. Gray, give the bell two rings, which was the go-ahead signal; and that the car then increased its speed and about this time the plaintiff was thrown off, and he (the conductor) gave the bell three rings which he says was the emergency signal, and meant: "Stop car at once." The witness Gray testified that after the car turned south on Lake street, and when it reached the usual stopping place, he said to the conductor, "Ain't you going to stop?" and that the conductor then pulled the rope and signaled the motorman to stop, and that the car then began to slow up, but not slow enough to suit him (Gray), and he again said to the conductor, "Why don't you stop?" and that he (Gray) then "jumped to pull the rope and pulled it three or four times * * * hard and fast." The witness Shoup testified to giving the stop signal; other witnesses also testified to hearing some of these signals, but we have quoted enough of the evidence to indicate that this evidence was conflicting, and showed a conflict and confusion of signals, and an effort on the part of the conductor and passengers as well to get the car to stop in the first instance. There was evidence also showing that the partition in the front of the car between the passengers and the motorman was glass, except about three feet of the lower part thereof; that the motorman by looking back could see the passengers in the car; that, when the car slowed down, appellee got up from her seat preparatory to getting off; that the car then increased its speed, and started up suddenly with a jerk, and threw appellee off.

It seems to us that the above statement of the evidence is sufficient to show clearly that the question of negligence in this case did

not depend wholly upon the question whether or not the signal to start the car, after it had slowed down, was given by a stranger, and that, even if it did, the question was one of fact to be determined by the jury, and not one of law to be determined by the court. The conductor himself admits that he gave one of the signals to stop the car, and the witness Gray testified that the conductor gave the stop signal immediately before the car slowed down. The car did slow down to make the stop, and the jury, under the evidence, had a right to infer that the go-ahead signal was never given by any one after the car slowed down, because the conductor says that the passenger Gray gave the go-ahead signal of two bells, while Gray himself says that he gave the bell three or four hard, fast jerks, which signal, if it meant anything, under the proof, meant an emergency, and to stop the car at once. The jury had a right to infer, also, that the motorman's action in slowing down the car was such as to have charged him with knowledge that passengers on the car might, on account of this act, have placed themselves in a position to be injured by any sudden movement of the car. The evidence warranted the further inference by the jury that there was such a conflict or confusion of signals given that the motorman should have known that there was something wrong, and that the high degree of care, caution, and prudence which the law imposes upon those operating such cars in the matter of looking after the safety of passengers required that the motorman, before applying the power so as to suddenly move his car, should look to see the situation of the passengers in the rear. The car was an open one in front, so that the motorman could see the passengers in the car and their position and situation by looking, and while it is true that, generally speaking, his duties require his attention in front and at the sides of his car, yet circumstances and conditions may arise that would require him to look also at the situation in the rear. *Bessenger v. Metropolitan St. Ry. Co.*, 79 App. Div. 32, 79 N. Y. Supp. 1017; *Gregorio v. N. Y. City Ry. Co.*, 49 Misc. Rep. 249, 97 N. Y. Supp. 373.

The real question under the issues tendered by the complaint was: "Did the appellant by and through its agents in charge of its car at the time plaintiff was injured, in the operation and movement of the same, exercise that high degree of care, caution, and prudence which the law imposes in such cases, or did they carelessly and negligently apply the power and cause the car to start with a jerk at a time when plaintiff was standing preparatory to getting off the car, and thereby cause her injury as charged in her complaint?" In the determination of this question, the jury were not bound to consider only, and be controlled entirely by, the one question of whether or not a stranger gave the motorman the signal to go ahead, but such question was to be deter-

mined from all the facts and circumstances of the case developed by the proof, and, under the proof above indicated, the law does not permit us to disturb the conclusion reached by the jury. It is only necessary that "the evidence may affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant might have taken." *Wabash, etc., R. Co. v. Locke, Adm'r*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193; *Louisville, etc., R. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774. The case at bar is entirely different from the case of *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509, relied upon by counsel. That is a case where a separate, intervening responsible agent cut off the line of causation from the original negligence and this agency, together with the negligence of the injured party, was the sole proximate cause of the injury. Neither is the case of *Sirk v. Marion Ry. Co.*, 11 Ind. App. 680, 39 N. E. 421, relied upon by counsel, directly in point. In that case there was a special verdict, and the court in discussing the same uses the following language: "So far as appears from the verdict, appellant in no other way informed the appellee of her desire to leave the car at Twenty-Sixth street than by the signal given by herself to the motorman in pursuance of which he slowed up and came to almost a stop, when she gave another signal, intended by her, indeed, as a stopping signal, but which may well have been the regular signal to start up the car. If it was, there was no negligence in the motorman's obeying it, *unless he knew, or by the exercise of due care might have known, that appellant was not yet off, but was in a position of danger should he start up the car. Nothing of this kind is found.*" The above language immediately precedes the language quoted by counsel in their brief for rehearing. There the special verdict failed to show that the motorman "knew, or by the exercise of due care might have known, that appellant was not yet off, but was in a position of danger should he start up the car." In the case at bar the verdict is a general verdict, and every inference fairly deducible from the evidence is presumed in its favor. There was some evidence from which the jury might have inferred the very facts above quoted which the jury in the 11 Ind. App. 680, 39 N. E. 421, case, supra, failed to find in their special verdict.

Counsel also contend that the court erred in refusing to give certain instructions tendered by appellant. These instructions refused and argued by appellant in their brief for rehearing were based upon the theory that if the signals given the motorman to stop and start the car were given by strangers, and that the motorman acted upon them and increased the speed of the car without knowing that appellee was standing, and that appellee was thereby injured, there

could be no recovery, thereby precluding the possibility of a recovery on account of the negligent manner of increasing the speed of the car with such suddenness as to throw a standing passenger from the car, and leaving out of account also the consideration by the jury of all other circumstances that might tend to prove negligence on the part of the conductor or motorman in connection with the starting of the car, or that might show a lack of that high degree of care, caution, and prudence on their part which the law imposes in such cases. *Crump v. Davis*, 33 Ind. App. 90, 70 N. E. 886; *Louisville, etc., R. Co. v. Snyder*, 117 Ind. 435, 20 N. E. 284, 8 L. R. A. 434, 10 Am. St. Rep. 60; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. 434.

For the reasons above expressed, in discussing this same question in considering the evidence, and in view of the authorities cited, supra, we think the court committed no error in refusing these instructions.

Counsel also object to instruction No. 7 given by the court at the request of the appellant. This instruction states the law in accord with our views of this case, as above expressed.

Counsel next insist that in the original opinion the motion for judgment on the answers to interrogatories was treated as waived by appellants, when in fact it was not. It is only when the answers to special interrogatories are in irreconcilable conflict with the general verdict that they prevail against it. *Farmer, etc., Co. v. Jackman*, 35 Ind. App. 1, 73 N. E. 730; *Wabash R. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *City of Mishawaka v. Kirby*, 32 Ind. App. 233, 66 N. E. 481. We have examined the answers to interrogatories with care, and find no such irreconcilable conflict between them and the general verdict. We have tried to consider with care the questions presented by counsel in their petition for rehearing, and find no ground in the petition that warrants the granting of the same.

Petition for rehearing overruled.

(47 Ind. App. 217)

PRINCETON COAL MINING CO. v. LAWRENCE. (No. 7,170).¹

(Appellate Court of Indiana, Division No. 2. Feb. 24, 1911.)

1. MINES AND MINERALS (§ 86*)—REGULATION OF MINES—STATUTES.

Acts 1907, c. 204, §§ 12, 21, authorizing the inspector of mines to order the sprinkling of any coal mine, and making it unlawful for any person to omit such sprinkling, and declaring that the act shall be cumulative of other acts on the subject of coal mining, and repealing laws in conflict therewith, is not cumulative of Acts 1905, c. 50, § 11, providing that roadways or entries of any mine, which are so dry that the air becomes charged with dust, must be sprinkled; and the act of 1905 is re-

pealed by the act of 1907, provided the latter act is valid.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 216-221; Dec. Dig. § 86.*]

2. COURTS (§ 220*)—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Under Burns' Ann. St. 1908, § 1892, requiring appeals to the Supreme Court in cases involving the constitutionality of a statute, the Appellate Court must transfer an appeal to the Supreme Court where appellee in good faith duly presents the question of the constitutionality of a statute not passed on by the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 575-588; Dec. Dig. § 220.*]

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by Josie Lawrence against the Princeton Coal Mining Company. From a judgment for plaintiff, defendant appeals. Transferred to Supreme Court.

Embree & Embree, for appellant. J. M. & S. L. Vandever and J. W. Brady, for appellee.

ADAMS, J. Appellee brought this action under section 27 of the coal mining act, approved February 28, 1905 (Acts 1905, pp. 65, 80), as amended by the act of 1907 (Acts 1907, p. 253), to recover damages occasioned by the death of her husband, Solomon Lawrence, through the alleged negligence of appellant.

The complaint upon which the cause was tried is in one paragraph, and shows that Solomon Lawrence was a shot firer in appellant's coal mine; that on the 8th day of January, 1908, while in the line of his duties and while using due care and caution, he was instantly killed. The particular negligence charged is that at the time of the death of said Lawrence, and for six months prior thereto, the entries of appellant's mine were so dry that the air became charged with coal dust, and that the appellant carelessly and negligently and with full knowledge thereof permitted and allowed in all of said entries large quantities of fine, dry, dangerous, and explosive coal dust to accumulate, and willfully and negligently omitted and neglected to regularly and thoroughly sprinkle said entries; that the shot fired by said Lawrence did not blast the coal, but was discharged through the outer opening of the hole in which said shot was placed, and that fire was discharged into the air, resulting in an explosion of the coal dust, and by such explosion said Lawrence was killed. Many other facts are set out in the complaint, but there is no averment that notice was ever given by the inspector of mines to appellant to sprinkle the mine in which deceased worked. The sufficiency of the complaint is questioned by demurrer. Other errors are assigned, but need not be considered in this opinion.

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes Transferred to Supreme Court, 95 N. E. 423. Rehearing denied, 96 N. E. 357.

The right to recover in this case clearly depends upon the act of February 28, 1905, and the complaint states a cause of action under that act. Section 11 of said act provides in part: "In case the roadways or entries of any mine are so dry that the air becomes charged with dust, such roadways or entries shall be regularly and thoroughly sprinkled. And it shall be the duty of the inspector to see that this provision is carried out." It is contended by the appellant that the part of the act of 1905, *supra*, which relates to the sprinkling of mines, was repealed by section 12 of the act of March 9, 1907 (Acts 1907, p. 351). This section reads: "The inspector of mines shall have power in his discretion to order the sprinkling of any coal mine or part of mine by notice in writing to the operator thereof, or person in charge of the same, and after receiving such notice it shall be unlawful for any person to act in violation thereof and to omit such sprinkling. Copies of any notices given hereunder shall be posted at the mine entrance by the inspector of mines." Section 21 of the act of 1907 declares that "the provisions of this act shall be cumulative of other laws upon the subject of coal mining; provided, however, that all laws or parts of laws in conflict herewith are hereby repealed."

The subject-matter considered by both acts, as shown by the titles, relates to the health and safety of persons employed in coal mines. The act of 1905 is not specific, in that the statute does not declare who shall perform the work of sprinkling, nor how the inspector shall proceed to enforce the terms of the act. The act of 1907 supplies both of these omissions by declaring that the operator shall sprinkle the mine in obedience to notice given by the inspector of mines, but that it rests in the discretion of the mine inspector to order the sprinkling of any mine, or part thereof.

We believe it clearly appears that section 12 of the act of 1907, *supra*, is not cumulative of that part of the act of 1905 relating to sprinkling. If, then, the act of 1907 is the only statute requiring the appellant to sprinkle its mine, the complaint under consideration is defective for failure to aver that appellant was notified in writing by the inspector of mines to sprinkle the mine in which the accident occurred.

The appellee, however, while not conceding that the later enactment repealed the former, does insist that section 12 of the act of 1907 (Acts 1907, p. 351) is unconstitutional, in that said act violates article 14 of the amendments to the Constitution of the United States by depriving persons of their liberty and property without due process of law, and denies equal protection of the law; that it likewise violates section 25 of the Bill of Rights of the state Constitution in this, that

the taking effect of the law is made to depend upon the state mine inspector; that this section further violates section 1 of article 4 of the Constitution of Indiana, in that it confers legislative power on the said mine inspector.

Section 1392, Burns' Ann. St. 1908, provides: "Hereafter all appeals in appealable cases in the following classes shall be taken directly to the Supreme Court, viz.: First, all cases in which there is in question and such question is duly presented, either the validity of a franchise or the validity of an ordinance of a municipal corporation, or the constitutionality of a statute, state or federal or the rights guaranteed by the state or federal Constitution. * * *"

The constitutionality of this section of the statute has not been passed upon by the Supreme Court of this state. The question has been "duly presented" by the appellee with every evidence of good faith.

As exclusive jurisdiction is vested in the Supreme Court, the cause is therefore transferred to that court.

(47 Ind. App. 184)

CINCINNATI, H. & D. RY. CO. v. MCCOLLUM. (No. 7,186.)

(Appellate Court of Indiana, Division No. 2, Feb. 21, 1911.)

1. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.

An error assigned is waived on appeal by the failure to discuss it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

2. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—SPECIAL VERDICT—GENERAL VERDICT.

A special verdict, in an action for injuries to a brakeman struck by an arm falling from a defective switch target, that the target had been in substantially the same condition for over six months, that brakeman operating the switch in the ordinary way would not observe that the target was loose, that the brakeman had operated the switch on previous occasions, that the condition of the switch target was not readily apparent to any one who looked at it, and that the brakeman was a man of ordinary intelligence prior to his injury, did not show that the brakeman assumed the risk of the defect on the ground that it was one which he would have discovered if he had given reasonable attention to his work, and the special verdict was not in irreconcilable conflict with the general verdict in his favor, and the latter must stand.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

3. APPEAL AND ERROR (§ 1031*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

The error in an instruction that, other things being equal, the weight of the evidence is on the side having the greater number of witnesses, must be presumed prejudicial, unless it clearly appears that the party complaining was not harmed thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4043; Dec. Dig. § 1031.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where the greater number of witnesses testified on material matters for the successful party than for the defeated party, the error in a charge that, other things being equal, the weight of the evidence was on the side having the greater number of witnesses, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 4219, 4221; Dec. Dig. § 1064.*]

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Action by Joseph M. McCollum, as guardian of Joseph W. Roebuck, a person of unsound mind, prosecuted after the latter's death by the former as administrator, against the Cincinnati, Hamilton & Dayton Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

John B. Elam, Jas. W. Fesler, and Harvey J. Elam, for appellant. J. B. Little, for appellee.

ADAMS, J. Joseph McCollum, as guardian of Joseph W. Roebuck, a person of unsound mind, filed his amended complaint in the court below against the appellant, the Cincinnati, Indianapolis & Western Railway Company, and the Chicago, Indianapolis & Louisville Railway Company to recover damages for personal injuries alleged to have been received by said Roebuck while in the employ of defendants as freight brakeman by being struck on the head by an arm which fell from a defective switch target. After this appeal was taken, Roebuck died, and Joseph M. McCollum, administrator of estate of Roebuck, was substituted as appellee herein. The negligence charged in the first paragraph is substantially that on September 26, 1904, and long prior thereto, the defendants and each of them had negligently failed to inspect and keep in repair said switch signal; that by reason of said negligence it had become unsafe and insecure, in that the bolts and rivets of said switch signal had rusted away and fallen out leaving it defective; that it was Roebuck's duty to operate said switch signal; that in the exercise of due care he did throw, turn, and operate the same; that because of the unsafe, unsound, and insecure condition of said switch signal it fell upon the plaintiff's (Roebuck's) head and injured him; that he had no knowledge of said unsafe condition. The second and third paragraphs do not differ materially from the first. The second charges a violation of a rule requiring inspection, and the third proceeds upon the theory of delegated supervision of such switch target. The cause was afterwards dismissed as to the Cincinnati, Indianapolis & Louisville Railway Company. Upon general issue formed, a trial was had by jury

and a general verdict returned in favor of appellee's ward and against appellant. With the general verdict the jury returned answers to interrogatories. At the close of plaintiff's evidence, the Cincinnati, Indianapolis & Western Railway Company successfully moved the court for a peremptory instruction in its favor. The appellant also moved the court for a peremptory instruction, which motion was overruled. Said motion was again renewed at the close of all the evidence with the same result. Over appellant's motion for judgment on the answers to interrogatories, and for a new trial, judgment was rendered on the verdict.

The errors assigned and relied upon for reversal are error of the court in overruling appellant's motion (1) for peremptory instruction, (2) for judgment on the answers to interrogatories, and (3) for a new trial.

The first alleged error is waived by failure to discuss.

The jury in their answers to interrogatories found that Roebuck was injured on September 26, 1904, at Glenwood, Ind.; that while he was operating a switch the switch target, weighing about 15 pounds, fell off and hit him on the head; that the target was fastened on with two rivets just before it fell; that the target had been in substantially the same condition for over six months; that the target would "flop around when the switch was turned and make a noise as it flopped"; that when operating the switch the head of a man six feet high would be three feet from the lower edge of the target; that another brakeman (Johnson) observed that the target was loose; that a brakeman operating the switch in an ordinary way would not observe that the target was loose; that Roebuck had not operated the switch three or four times before his injury on the day he was hurt; that he had operated it on previous occasions; that he was a freight brakeman on local freight, and had been so employed for several months; that his regular run was through Glenwood, Ind.; that brakemen on local freights through Glenwood frequently operated the switch that caused the injury; that the condition of the switch target was not readily apparent to any one who looked at it, because it was held in its proper place but was not securely fastened; that Roebuck was a man of ordinary intelligence prior to his injury; that he was a man of sound mind at the time of his injury; that he was about 6 feet tall and 35 years of age; that the injury to his head was the cause of his insanity. Counsel for appellant contend that appellant's motion for judgment on the answers to interrogatories should have been sustained because they show that the defect which caused the injury was one which the plaintiff would have discovered, if he had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

given reasonable attention to his work; that he thereby assumed the risk of that defect.

No irreconcilable conflict between the answers to interrogatories and the general verdict appears, and appellant's motion was properly overruled.

In support of appellant's motion for a new trial, it is argued, among other things, that the court erred in giving to the jury of its own motion, and, over appellant's objection, instruction No. 14. The objectionable part of said instruction reads as follows: "And, all other things being exactly equal in all respects, the witnesses being of equal intelligence and credibility and possessing equal opportunities of knowledge of the matters about which they testify and testifying with equal candor, intelligence, and fairness, the weight of the evidence as to any matter may be considered by you as to be on the side which has the greater number of witnesses in its favor thereon. But it does not necessarily follow that the weight of the evidence is on the side which has the greater number of witnesses. It does not depend upon the number of witnesses testifying one way or the other, but upon all the evidence in the case, whether direct or circumstantial; it is the evidence which is greater in weight and credibility."

It is not a safe practice for trial courts to instruct juries that the preponderance of the evidence in a cause can be determined by the number of witnesses testifying for or against any matter in issue. Such an instruction is, in a sense, an invitation to the jury to count the witnesses, and offers an easy method of resolving the difficult duty of weighing the evidence. It has been held in this state that such an instruction, where it is limited and qualified, and where it clearly appears that the jury was not misled, will be considered harmless. *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201; *Board Com'rs Jay County v. Brewington*, 74 Ind. 10. The instruction complained of in this case seems to be identical with the instruction given in the case of *Indianapolis St. R. Co. v. Schmidt*, supra, wherein it was held that, even if erroneous under the facts in that case, it was harmless. Since that decision, and since the trial below, the same instruction has again been considered in the case of *Warren Construction Co. v. Powell*, 173 Ind. 207, 214, 89 N. E. 857. In the last case the court held that "the court, by the instruction in question, declared to the jury an erroneous test for determining the preponderance of the evidence in the case." It was further held that under the evidence and the circumstances in that case it could not be said that the jury was not misled by the instruction in question to the prejudice of appellant, and a reversal must follow. Our conclusion, therefore, is that, unless it clearly appears that the appellant

was not harmed by giving the instruction complained of, the cause must be reversed. *Cleveland, etc., R. Co. v. Case* (Ind.) 91 N. E. 238, 241; *Porter v. State*, 173 Ind. 694, 704, 91 N. E. 340; *Hanes v. State*, 155 Ind. 112, 57 N. E. 704.

The record in this case shows that a greater number of witnesses testified at the trial, on material and important matters, in favor of appellee, than in favor of appellant. Under such conditions, this court cannot know that the instruction was harmless.

Other alleged errors are discussed by appellant; but, as they are not likely to arise at another trial, they are not considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings in accordance with this opinion.

(47 Ind. App. 165)

TABER et al. v. ZEHNER. (No. 6,919.)

(Appellate Court of Indiana, Division No. 1.
Feb. 17, 1911.)

1. EXECUTORS AND ADMINISTRATORS (§ 443*)
—CLAIMS AGAINST ESTATE—SUFFICIENCY.

The complaint in an action on a claim against an estate need only state facts showing a prima facie claim.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 443.*]

2. LIMITATION OF ACTIONS (§ 102*)—TRUSTS.
Limitations do not run against a claim based upon a trust.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 494; Dec. Dig. § 102.*]

3. TRUSTS (§§ 17, 18*)—CREATION—TRUSTS IN PERSONALTY.

A trust in personal property may be created by parol.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 17; Dec. Dig. §§ 17, 18.*]

4. TRUSTS (§ 25*)—CREATION.

No particular form of words is necessary to create a trust, the existence of the relation depending upon facts or circumstances showing an intention to create a trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 34; Dec. Dig. § 25.*]

5. EXECUTORS AND ADMINISTRATORS (§ 227*)
—CLAIMS AGAINST ESTATE—SUFFICIENCY OF CLAIMS.

A claim filed against an estate stated that claimant and her child were entitled to a certain legacy, and that she intrusted decedent, her nephew and a banker, in whose honesty and business ability she had great confidence, with the collection of such legacy, and that he collected it for claimant's use and benefit and with the exception of a part thereof never paid it to her, but retained it in his possession until his death; that on account of the confidential relationship between claimant and decedent, and of his superior knowledge in business affairs, and ability to loan and manage the fund, claimant permitted him to retain it, under an agreement that he would keep it loaned out, and that decedent, in retaining and accepting said fund, accepted said trust and agreed to account to claimant therefor, and that claimant at various times demanded a settlement of him, but he always deferred a settlement through a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plausible excuse until he died. *Held*, that the claim was sufficient to authorize proof to support it in an action thereon, within Burns' Ann. St. 1908, § 2828, requiring the holder of a claim against an estate to file a succinct and definite statement thereof.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 811; Dec. Dig. § 227.*]

6. LIMITATION OF ACTIONS (§ 102*)—CONSTRUCTIVE TRUSTS.

The facts stated in the claim showed such relationship between decedent and claimant as to make it unconscionable to permit decedent's representative to defeat the claim on account of lapse of time; in effect showing a constructive trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502; Dec. Dig. § 102.*]

7. EXECUTORS AND ADMINISTRATORS (§ 227*)—CLAIMS AGAINST ESTATE—ACTIONS—VARIANCE.

The fact that the proof does not establish a claim filed against an estate upon the precise theory stated in the claim will not prevent a recovery thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 227.*]

8. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover a sum against an estate, based upon a claim for money collected by decedent for claimant, for which he failed to account, evidence *held* to show that decedent did not make a full and fair accounting to claimant.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 221.*]

9. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS.

The appellate court must indulge in all presumptions in favor of the judgment, and consider only that part of the evidence most favorable to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. § 934.*]

10. TRUSTS (§ 103*)—CONSTRUCTIVE TRUSTS.

Claimant engaged her nephew, a banker and man of large business experience, to collect a legacy for her, she having little, if any, business experience, and being unable to read or write. The nephew collected the money, but never informed her of the amount of money due her on account of the legacy and never made a full and fair accounting for the amount collected, but by his influence over her and her reliance upon his honesty, he was enabled to conceal from her the facts showing the amount due, and appropriated part of the money to his own use. *Held*, that the facts raised a constructive trust by the nephew as to the money collected by him for claimant for which he failed to account.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 154; Dec. Dig. § 103.*]

11. LIMITATION OF ACTIONS (§ 102*)—TRUSTS—CONSTRUCTIVE TRUST.

Where one, by reason of his position or superior knowledge, overreaches another so as to deprive him of his right to money, equity has exclusive jurisdiction in granting relief on the ground of a constructive trust, so that the right to relief will not be barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 502; Dec. Dig. § 102.*]

Appeal from Circuit Court, Marshall County; Harry Bernetha, Judge.

Action by Nancy J. Zehner against Melissa J. Taber and another, administrators. From a judgment for plaintiff, defendants appeal. Affirmed.

G. W. Paul and W. B. Paul, for appellants. L. M. Lauer and E. C. Martindale, for appellee.

MYERS, C. J. On May 17, 1907, the appellee filed in the Marshall circuit court her amended verified claim against the estate of Thomas O. Taber, deceased, represented by the appellants as administrators. Thereafter a trial was had, and judgment rendered in favor of appellee for \$398.02.

From the claim, as filed, among other facts it appears that on January 10, 1894, appellee was the widow of one William A. Tichenor, deceased, whose estate was then pending for settlement in the state of Michigan; that she and one child, Cora Tichenor, were the sole heirs of her said husband, and were entitled to a certain legacy due her said husband from the estate of Levi Tillottson; that Thomas O. Taber, deceased, was a nephew of claimant, and a banker residing at Argos, Marshall county, Ind., and in whom she had great confidence as to his honest business ability and integrity, and on account of which she intrusted to him the collection of said legacy; that said Thomas O. Taber on March 15, 1894, and May 3, 1894, collected said money so due claimant amounting to \$1,940.40, and which he received for the use and benefit of claimant; that with the exception of \$700, said Thomas O. Taber never paid any of said money to this claimant or to any person for her use and benefit, and has during all that time retained said fund in his possession and had the same at the time of his death; "that on account of said confidential relations and relationship existing between said decedent and this claimant, and on account of the superior knowledge in business affairs, which said Taber possessed, and his ability to loan, manage, and control said fund, this claimant permitted him to retain the same, with the agreement and understanding that the said Taber would keep said fund loaned out and at interest, and manage and control said funds for her, and that the said Taber did retain and take control thereof and did loan out at least a part of said funds as heretofore set out, and said Taber in retaining and accepting said fund accepted said trust and agreed to account to claimant therefor; that claimant on divers times thereafter called upon said decedent for a settlement of their said trust matter, and at each of said times said Taber, through some plausible excuse, deferred such settlement and accounting until he was taken suddenly ill," and from which illness he died; that for the use and benefit of said claimant said Taber on March 15, 1894, received \$750,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and on May 3, 1894, \$1,190.20; that said administrators have refused to pay or settle said claim.

Appellants answered in four paragraphs: First, a general denial; second, six-year statute of limitations; third, payment; and, fourth, facts from which it appears that prior to the beginning of this action, and before the death of said Thomas O. Taber, all claims of claimant against him had been fully settled and compromised. A demurrer to the second and fourth paragraphs of answer were each overruled, to which ruling the plaintiff reserved an exception.

Appellants have assigned error that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in not carrying the plaintiff's demurrer to the second and fourth paragraphs of the defendant's answer back to the complaint, and in not sustaining said demurrer to the complaint; and that the court erred in overruling appellant's motion for a new trial.

The first and second assignments may be considered together. Counsel by these assignments presents the question, Do the facts stated in the claim filed present a demand barred by the statute of limitations? This being a claim against an estate, it is only necessary to state facts showing a prima facie claim. *Masters v. Jones*, 158 Ind. 647, 64 N. E. 213; *Stanley's Estate v. Pence*, 160 Ind. 637, 66 N. E. 51, 67 N. E. 441; *Woods, Executor, v. Matlock*, 19 Ind. App. 364, 48 N. E. 384; *Leimgruber, Adm'r, v. Leimgruber*, 172 Ind. 370, 86 N. E. 73, 88 N. E. 593. It appears that the claim originated in 1894, and counsel for appellee insist that the facts stated justify the conclusion that a direct and continuing trust was created, not cognizable at law, but one which was wholly within the jurisdiction of equity. If this be true, it is clear that appellee's claim was not barred by the statute, "for when such a trust is shown to exist there can be no limitation of time." *Hitchcock v. Cosper*, 164 Ind. 633, 73 N. E. 264. In this case the subject-matter of the action in question was personal property, and it has often been held that a trust in personal property may be created by parol. *Cowan et al., Executors, v. Henika*, 19 Ind. App. 40, 48 N. E. 809; *Woods, Executor, v. Matlock*, supra; *Stanley's Estate v. Pence*, supra.

It is elementary that no particular form of words is necessary in order to create a trust, so that each case usually depends upon its own facts and circumstances from which the intention of the parties to create a trust is to be determined. In this case, if we were to stop with the facts showing the employment by appellee of Thomas O. Taber to collect the money claimed by her from Levi Tillottson's estate, that he collected the money and failed to turn over a portion of it to the knowledge of appellee, we would not

have a case cognizable only by the court of equity, and the statute would begin to run from the time Taber received the money. *Sheaf v. Dodge*, 161 Ind. 270, 68 N. E. 202. The pleaded facts here show not only a blood relationship between the parties, but they also show their relationship to be confidential, and on the part of Taber superior knowledge and ability to loan, manage and control said money as an inducement for the parol agreement whereby Taber was to keep the money so belonging to the appellee, manage and control it for her; that in pursuance of said agreement he did keep it, loaned and managed it with the understanding that he should account to the appellee therefor; that he never did account for it or the accumulations thereon. These facts present an entirely different case from that considered in the case of *Hitchcock v. Cosper*, supra. Taber having agreed to keep and hold the money for the use and benefit of the appellee shows such a relationship between the parties as to make it unconscionable to permit his representatives, because of lapse of time only, to defeat appellee's claim otherwise justly due and owing to her. *Thornburg, Adm'r, v. Buck*, 13 Ind. App. 446, 41 N. E. 85. In view of our statute, section 2828, *Burns' Ann. St. 1908*, requiring the holder of a claim against an estate to "file a succinct and definite statement" thereof, we are satisfied that the facts set forth by appellee are sufficient to authorize proof in its support; the question for decision being whether appellee had a just and enforceable claim against the estate of Thomas O. Taber.

In substance, the evidence shows without contradiction that Thomas O. Taber, deceased, was a nephew of appellee, and in the year 1894 he received from the estate of Levi Tillottson, deceased, \$3,880.40, one-half of which belonged to the appellee; that he made said collection in pursuance of a contract of date December 1, 1893, between the appellee and himself, whereby he was to "bear his own expenses in costs of said collection," and as compensation therefor he was to receive one-third of the sum collected. The other half of said sum so collected belonged to Cora Tichenor, for whom said Taber was appointed guardian. On October 16, 1894, Taber filed in the Marshall circuit court a current report in said guardianship, from which it appears that he charged himself with \$1,940.20, and claimed credit for one-half of attorney's fees, \$148.71, and for his services as guardian in making said collection \$250.

From the foregoing facts it conclusively appears that said Taber collected for appellee \$1,940.20, and if it be conceded that he was entitled to one-third of said sum so collected for her, or \$646.73, and that appellee should reimburse said Taber for one-half of the attorney's fees, \$148.71, there would still be due appellee in May, 1894, \$1,144.76. Thomas O. Taber died December 23, 1906.

Among the private papers of Thomas O. Taber, and in his handwriting, was found a memorandum as follows:

"Argos, Indiana, May 4, 1894. Account of collection for Nancy J. Tichenor, widow of Wm. A. Tichenor, and Cora A. Tichenor, minor heir of the late Wm. Anson Tichenor, deceased, from Levi Tillottson, Ex., estate of Levi Tillottson deceased.

Total amount collected.....	\$3,880 40
Total expenses in suit, making col...	497 42

\$3,382 98

Cora A. Tichenor.....	\$1,601 49
Nancy J. Tichenor.....	895 45
T. O. Taber.....	796 04

\$ 3,382 98"

Among the entries in the individual bank ledger of the State Exchange Bank of Argos, Ind., of which bank in 1894 Taber was its cashier, these entries appear: "Nancy J. Tichenor. 1894. May 7th, by cash \$895.45; May 19th, to cash \$895.45." On May 15, 1894, the State Exchange Bank issued to appellee a certificate of deposit calling for \$890.45. On June 20, 1894, the same bank issued to appellee a certificate of deposit for \$190.45 and on June 27, 1894, the same bank issued another certificate to appellee for \$180; and on the part of the bank, the first certificate was signed by T. O. Taber, cashier, and the last two certificates by William Rallsback, its president. Each of these certificates was indorsed on the back by Nancy J. Tichenor. These certificates were explained by the president of the bank as follows: "The first certificate was returned to the bank, and \$700 of which was used in making a loan, and the balance is represented by the second certificate; the second certificate was returned, and the last certificate issued in its place for \$180, and \$10.45 paid to the appellee in cash. It also appears that a real estate mortgage, of date June 20, 1894, was given to secure a note of date June 16, 1894, due two years after date, for \$700, signed by one Swihart and payable to Nancy J. Tichenor; that this mortgage was satisfied June 20, 1896; that on June 17, 1896, a mortgage was executed by one Sarber to secure the payment of a note for \$600, due two years after date, payable to appellee; that said Taber negotiated said loan, and said last note and mortgage was prepared under his direction; that said Sarber had no dealings with the appellee prior to obtaining the money aforesaid; that the interest, as it became due, and the note when due was paid to appellee; that in the fall of 1896, according to the recollection of appellee's son-in-law who was a witness at the trial, said Taber admitted having \$600 or \$700 belonging to appellee, and exhibited to him certain items in his bank book to verify his statement; that this admission was made in explanation of a difference of opinion between appellee and Ta-

ber as to the amount of money in his hands belonging to the former; that in May, 1894, appellee being dissatisfied with the amount of money received from Taber, consulted an attorney from the town of Argos regarding the matter, and as a result of this consultation the attorney wrote to Taber asking him to call at his office and adjust the matter, but instead of going to the attorney's office, Mr. Taber with another gentleman went to the home of the appellee, who was then in ill health, and who could neither read nor write except write her own name, and there obtained her signature to a paper dated May 17, 1894, purporting to be a receipt for \$1,000 in full of her share of the money collected from the Levi Tillottson estate, and in full settlement of said collection between said Taber and herself, but there is no evidence that any money was paid upon that occasion. The gentleman who accompanied Taber on that occasion was present at the trial and testified that he saw no money paid.

The undisputed facts in this case present for our consideration a case different in many particulars from that presented by the facts as set forth in the claim filed. But her failure to establish the claim upon the precise theory outlined by the pleaded facts will not bar her right to recover. *Masters v. Jones, supra*; *Stanley's Estate v. Pence, supra*; *Woods, Executor, v. Mattlock, supra*.

It cannot be said that the claim states facts from which fraud can positively be inferred. But the facts as developed at the trial show that Taber was a man of large business experience, accustomed to dealing with men, evidently understood human nature, and a man in every way able to take care of himself in business matters. It is also perfectly plain that the appellee was a person having but little if any business experience, unaccustomed to business methods, unable to read or write, and helpless as compared with a person so well equipped as Mr. Taber to drive a good bargain. There is no evidence in the record tending to show that Mr. Taber ever rendered to appellee a statement of his doings with reference to the money received by him under his contract of December 1, 1893. There is no evidence showing that the appellee was ever informed or knew the amount of money due her from Taber on account of the collection made by him. At times there seems to have been some doubt in her mind as to whether she had received from Taber the amount of money to which she was entitled. This doubt appears to have readily yielded under the influence of Taber, for when she sought to have the matter adjusted through a representative, we find Taber calling upon her, rather than her attorney, who had invited him to his office for a conference regarding said collection. At that time he secured appellee's signature to an instrument purporting to show a full settlement of their mat-

ters by the payment of an amount much less than the true amount due. Looking to the contract of December 1, 1893, the private statement of the account between himself and the appellee of date May 4, 1894, and the transaction as exhibited by the books of the State Exchange Bank, together with his manifested interest in her welfare by looking after the loaning of her money, and whose judgment as to the security offered was apparently unquestioned, leads us to conclude that a full and fair accounting by Taber was never made to appellee. But by reason of his influence with her, and her reliance upon his honesty and fair treatment in the matter, he was enabled to conceal from her the facts as they really existed, thereby enabling him to retain and appropriate to his own use money justly belonging to her and in violation of a positive fiduciary obligation. All presumptions are to be indulged in favor of the judgment, and it is our duty to consider only that part of the evidence most favorable to the action of the lower court. While there is no evidence from which we can say that by agreement a trust was created, yet the evidence is such as to warrant a court of equity in taking cognizance of the matter, and prevent a failure of justice by declaring a trust relation between the parties whether they so intend or not. *Jackson v. Landers*, 134 Ind. 529, 34 N. E. 323; *Meredith v. Meredith*, 150 Ind. 299, 50 N. E. 29; *Wright v. Moody*, 116 Ind. 175, 18 N. E. 608. In the case of *Bonham v. Doyle*, 39 Ind. App. 438, 77 N. E. 860, it is said: "Whenever a fiduciary relation is shown to exist, either by actual averment or by the statement of relations, during the continuance of which confidence is necessarily reposed by one or a corresponding influence possessed by the other, the person availing himself of his position to obtain an advantage becomes in equity a trustee. *Huffman v. Huffman* (1906) 35 Ind. App. 643 [73 N. E. 1096]."

We are not unmindful of the rule that the statute of limitations will run against trusts where there is concurrent law and equity jurisdiction, but in cases where, as here, one party by acts or controlling influences overreaches another for such a length of time as the law will grant no relief, and relief must come, if at all, through a court of equity, then the case may be said to be one of exclusive equitable jurisdiction (19 A. & E. Ency. Law [2d Ed.] 242), and within the exception to the general rule that ignorance of one's rights is unavailing to stop the running of the statute. The exception arises in "cases of concealment of the cause of action or fraud on the part of the defendant, and in special cases where the ignorance of the plaintiff is due to no fault or negligence of his own, but to the peculiar circumstances of the case" (19 A. & E. Ency. Law [2d Ed.] 214).

Having concluded that Taber was a trustee, and appellee his cestui que trust, the case as here presented is not one within the statute of limitations.

Other questions presented and argued by counsel have been examined by us, but in view of the fact that a correct conclusion was reached in the court below, they are not of such importance as to be effective in overthrowing the judgment.

The attention of this court is called to the fact that since the submission of this cause the appellee has died. The judgment is therefore affirmed as of the date of the submission of this cause in this court.

(47 Ind. A. 141)

CHICAGO & E. I. R. CO. v. VESTER.
(No. 6,875.)

(Appellate Court of Indiana, Division No. 1.
Feb. 15, 1911.)

1. RAILROADS (§ 328*)—OPERATION—INJURIES AT CROSSINGS—CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

Where the view of the main track at a crossing was cut off except for a short distance, and one wishing to cross waited until a train had passed and then went upon the track and was struck by a part of the preceding train, which had broken loose and was following at a high rate of speed, he was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.*]

2. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT—CONCLUSIVENESS.

A verdict is conclusive unless the evidence is such as to compel a different opinion by the Appellate Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

3. RAILROADS (§ 345*)—OPERATION—INJURIES AT CROSSING—PLEADING.

In an action against a railroad company for negligently killing one crossing its tracks, in a municipality, the complaint set out that the injury was caused by the breaking of the train into two parts as a result of negligent construction and equipment and of negligent operation and of running at a greater rate of speed than allowed by the ordinances, and that the decedent was struck by the unattached part of the train because of defendant's negligence in permitting the train to break in two and run wild, and because of the high speed of both parts, and because both parts of the train were so negligently managed as to be out of control. *Held*, that this complaint proceeded upon the theory that both parts of the train were negligently managed both before and after separation, and hence evidence of negligent management of the separated section was admissible.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1113-1116; Dec. Dig. § 345.*]

4. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY OF PLEADING.

Where a complaint is only uncertain, the Appellate Court will adopt the theory of the parties and trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1056-1061; Dec. Dig. § 171.*]

5. RAILROADS (§ 317*)—OPERATION—INJURIES AT CROSSINGS—SPEED—VIOLATION OF ORDINANCES.

A municipal ordinance regulating the speed of trains has no application to the speed of a wild or separated section of train running without an engine, save to the extent the speed of the train is transmitted to it, and, while speed received from the engine in excess of the ordinance would show a violation, speed acquired afterward would not, though it might show negligence in the operation of the detached section.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1009-1012; Dec. Dig. § 317.*]

6. APPEAL AND ERROR (§ 930*)—REVIEW—VERDICTS—PRESUMPTIONS.

Every presumption is exercised in favor of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755-3761; Dec. Dig. § 930.*]

7. EVIDENCE (§ 75*)—PRESUMPTIONS—FAILURE TO INTRODUCE EVIDENCE.

Where an accident occurs through circumstances peculiarly within the knowledge of defendant, his failure to introduce evidence will warrant an inference of negligence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 95; Dec. Dig. § 75.*]

8. RAILROADS (§ 348*)—OPERATION—INJURIES AT CROSSING—EVIDENCE.

In an action against a railroad for killing plaintiff's intestate while crossing a track, evidence held to warrant the jury in finding that the accident arose out of defendant's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

9. DEATH (§ 86*)—ACTION FOR DEATH—NEXT OF KIN—MEASURE OF DAMAGES.

In an action for wrongful death for the benefit of the next of kin whom the deceased was under no obligation to support, the award of damages must be computed upon the benefits the next of kin could reasonably expect as judged from the past, and not what might be expected from the future.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108-119; Dec. Dig. § 86.*]

10. DEATH (§ 99*)—ACTION FOR DEATH—EXCESSIVE DAMAGES.

In an action by a widowed mother 54 years old for the death of an unmarried son 24 years old, who was her sole support, contributing about \$150 annually, an award of \$4,000 damages was excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

Appeal from Circuit Court, Fountain County; Jno. West, Judge.

Action by John G. Vester, as administrator of the estate of Bernard Polk, deceased, against the Chicago & Eastern Illinois Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Homer T. Dick, Lucas Nebeker, and E. H. Seneff, for appellant. Livengood & Bryant and Chas. R. Milford, for appellee.

HOTTEL, J. This is an action brought by John G. Vester, as administrator of the estate of Bernard Polk, deceased, against the appellant to recover damages on account of the death of said Polk resulting from being struck by one of appellant's trains, at a

point in the city of Attica, Ind., where a street of said city crosses appellant's railroad tracks. This action was brought by said administrator for the benefit of and to recover for Rosa A. Polk, the mother of said deceased, damages accruing to her by way of loss of contribution and support resulting from the death of her said son. The complaint was in five paragraphs. A demurrer was filed to each of the paragraphs, and was sustained as to the first and third paragraphs and overruled as to the second, fourth, and fifth, and exceptions given to the ruling on each paragraph. The case was then put at issue by a general denial. There was a trial by jury, answers to interrogatories, general verdict for appellee in the sum of \$4,000, motion for a new trial overruled, and exceptions, and judgment on the verdict, from which this appeal is taken.

The substance of the facts as to the time, place, surroundings, and circumstances of the injury, as set out in the complaint, and each of the paragraphs thereof, may be summarized as follows: The deceased, Polk, was injured at a crossing on appellant's railroad on Washington street in said city, which street runs east and west and is about 82½ feet wide; that Union street, in said city, runs north and south; that the appellant's road runs on Union street in said city from where it enters the city at the south to and beyond Washington street on a downgrade toward the north; that three of the appellant's tracks cross said Washington street, to wit, the main line being the center track, and a side track on the east 13½ feet from the main line or center track, and another side track on the west about 30 feet from the main track. The freighthouse is 87 feet south of Washington street and on the east side of all of said tracks.

(We now quote from appellant's brief:) "That in the afternoon of October 19, 1906, decedent had occasion to pass over said Washington street crossing from the east side of said Union street, with a wagon loaded with corn, drawn by a team of mules, to the grain elevator on said Washington street, west of said crossing. That, when he arrived at about the north line of Washington street, a train of freight cars was approaching the crossing from the south and on said main track, and he stopped about 16 feet north of the center of Washington street, with his team facing south, and waited there for said train to pass. A train of freight cars was standing on said east track, cut so as to leave a space about the center of said street of about 25 feet, the locomotive and one car being north of said space, and the balance of such train, 20 cars or more south of said opening, which train obscured his view of the main track, except as he could see through said opening at an angle of about 45 degrees. Said approaching train

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

gave the proper signals, and passed over said crossing at a rate of speed of more than 10 miles per hour, and about 20 miles per hour. That some time prior thereto said train had broken in two parts, the exact time and place of such parting being unknown, and, when the first portion of the train had passed about 300 feet, he started his team across the tracks, being unable to look south for a greater distance than 20 or 30 feet until his team was on the main track, on account of the obstruction by said freight train on said east track, some cars on said spur track, and said station. That he drove through said gap with due care, and saw and heard nothing indicating the approach of any other train, or any part of a train, and was struck and killed by said detached portion of said train. That no warning was given him of the approach of said detached portion of said train by any one and he had no knowledge that the same was approaching, and supposed that the entire train had passed."

While the allegations of negligence and its causative connection with the injury are not identical in the three paragraphs of complaint, yet we think, for the purposes of this opinion, that it is necessary to set out those contained in the fifth paragraph only. The allegations of the fifth paragraph, as to negligence and proximate cause, are as follows: "That said train was broken in two wholly on account of the negligence of the defendant as follows: (1) The careless and negligent construction and equipment of said train, and in and by the fact that the defendant negligently and carelessly used defective brakes, brake shoes, rods, beams, and connecting appliances, which, on account of their defective condition, did not hold the two parts of the train together, of which defective condition the defendant had knowledge at the time. (2) By and on account of the negligence of the defendant in and by the careless and negligent handling and operation and management and control of said train and each part thereof. (3) By reason of the defendant negligently and carelessly allowing and permitting said train and each part thereof to run past said crossing at such high rate of speed, namely, more than 10 miles an hour, and about 20 miles an hour, in violation of an ordinance of the said city of Attica, hereinafter set out. * * * " Also, the following: "That the decedent was struck by said detached part of said train and injured thereby as above described, wholly on account of the negligence of the defendant in this, to wit: First. By carelessly and negligently permitting said train to break in two and run wild, because of the defective and negligent equipment of said train, because of the negligent and careless handling of said train, and because of the unlawful and high rate of speed of the train and both parts thereof. Second. By carelessly and negligently managing and run-

ning said train and each part thereof, in that neither part was under the control of the defendant, so that it could be stopped and controlled when necessary and proper. Third. By carelessly, negligently, and unlawfully allowing and permitting said train, and each part thereof, to be run and to go within said city limits and past said Washington street as aforesaid, at said high and unlawful rate of speed, namely, more than 10 miles per hour, and about 20 miles per hour, and thus negligently allowing said detached part to strike and kill said Polk as aforesaid."

The first and only error argued is that "the court erred in overruling appellant's motion for a new trial." The grounds for new trial are: "(1) The damages assessed by the jury are excessive. (2) The verdict of the jury is not sustained by sufficient evidence. (3) The verdict of the jury is contrary to the evidence. (4) The verdict of the jury is contrary to law. (5) The assessment of the amount of recovery is erroneous, being too large."

Counsel first discuss the sufficiency of the evidence and say that the evidence affirmatively shows contributory negligence on the part of the deceased. It seems to us that the above statement of the facts set out in the complaint, which it is practically admitted the proof shows to be correct upon the subject of contributory negligence, is all that is necessary to show that the deceased acted as any prudent man might act similarly situated. In fact, appellant's counsel concede that the conditions were such that the deceased probably could not have seen in time to save his team; but that, if he had been looking and had exercised proper care, he could have escaped in time to prevent injury to himself. It is much easier from a position of safety to speculate upon what would have been prudent and considerate action than to form the opinion, and promptly act upon it, when the danger is present and the peril imminent. Under such circumstances, eminently prudent men might act entirely different. There is no better tribunal to judge of the prudence of the acts and conduct of a man so situated than a jury of 12 men. Their judgment and conclusion should be final, unless the facts and circumstances are such as to compel a different opinion by the appellate tribunal. The facts in the case at bar do not justify such a conclusion.

Counsel next discuss "defendant's negligence." Under this head, counsel concede that the complaint sufficiently charges negligence in the breaking of the train, in that it charges: "First, the use of defective appliances, with knowledge of such defects. Second, careless and negligent management of the train, and each part thereof. Third, negligently allowing the train, and each part thereof, to run past said crossing, in excess of 10 miles per hour, and thereby violating the speed ordinance of the city." But coun-

sel insist that these allegations all have reference "directly and exclusively to the cause of the break of the train," and must therefore "be limited to conditions or acts at or before the time of such break." They insist, therefore, that it is not the theory of either paragraph of the complaint that there was careless and negligent management of the separated or lost division of the train after the break, but that the theory of each paragraph upon this subject of negligent management of "each of the parts of the train" relates to the management prior to the break, and not after, and that therefore any evidence of negligent management or operation of the second division of the train after the break was a departure from the negligence charged and should not be considered in determining the sufficiency of the evidence to sustain the verdict. If counsel are right in their theory of the complaint, such evidence would have been subject to objection and should have been excluded. There is some ambiguity and uncertainty as to this theory of the complaint; but we think the allegations in the fifth paragraph, at least, are sufficient to indicate that the pleader was proceeding upon the theory that the separate parts of the train were negligently operated and managed, both before and after the separation. This theory seems to have been adopted by both appellant and appellee, and by the trial judge as well, at the trial of the cause, as indicated by the evidence and the interrogatories propounded by appellant's counsel. Where there is only uncertainty and ambiguity in the meaning or theory of a pleading, that theory will be adopted by this court which the parties and the trial court adopted at the trial. *Lake Erie, etc., Co. v. McFall*, 165 Ind. 574, 76 N. E. 400; *Southern R. Co. v. Jones*, 33 Ind. App. 333, 71 N. E. 275.

Counsel next insist that too much importance should not attach to the speed ordinance and the proof of a violation thereof, and in this connection insist that the city ordinance cannot be construed as applying to or affecting parts of a train, by accident, separated from the engine and front part of the train. Counsel for appellee, on the other hand, contend that the operation of the loose or separated part of the train, which collided with the deceased, in excess of the speed limit of the city ordinance, was in fact a violation of the ordinance and therefore negligence per se.

We think that the position of appellant's counsel upon this feature of the case is correct, subject, however, to some qualification and modification. We do not think that the city ordinance in question contemplates the controlling or regulation of the speed of part of a train separated by accident from the main part of the train, and, being itself without any engine, because such a regulation and control necessarily contemplates and implies permission or license to run or operate such

wild or loose sections of a train within the city limits, subject to the condition only that they be operated within the speed limits fixed by the ordinance. We do not think the city ordinance in question contemplated any such permission or license. Wild or separated sections of trains running without an engine are in themselves necessarily dangerous, and neither statutory town nor city regulation contemplate licensing or permitting their operation, or intend the regulation or control of their operation, except as their operation is necessarily connected with and controlled by the train, of which such detached section formed a part, and from which it became separated. To this extent we think the position of appellant's counsel should be qualified.

To apply the principle which we think applicable in such cases, we will take the case at bar. Any speed, which the loose or separated part of the train, which collided with and killed the deceased, acquired or had, as a result of the speed of the train from which it became separated, would, we think, be within the purview and control of the ordinance introduced in evidence governing the speed of trains; and, if such speed of such separated section so acquired and had was in excess of the speed provided by the ordinance, such fact would be evidence of a violation of the ordinance. On the other hand, any speed such loose or separated part of the train acquired of its own momentum, after the separation, and because of any incline in the grade of the track, would not be within the purview and control or regulation of the ordinance; but such speed might be evidence of bad management, and lack of prompt and efficient control by those in charge of such separated or loose part of the train, and, from such lack of prompt and efficient control of such loose part, the negligence of appellant might be inferred by the jury.

Under the evidence in this case, these questions were questions of fact for the jury, and their conclusion, under the rules of this court, which presumes everything in favor of that conclusion, rather than against it, will not be disturbed. We think the conclusions above expressed are in perfect harmony with the cases relied upon and cited both by appellee and appellant, viz.: *Ohio, etc., R. Co. v. McDaneld*, 5 Ind. App. 108, 31 N. E. 836; *Lang v. Mo. Pac. Ry.*, 115 Mo. App. 489, 91 S. W. 1012; *Shirk v. N. R. Co.*, 14 Ind. App. 126, 42 N. E. 656.

It is next contended that there was no evidence to warrant the jury in finding as they did, because there was no evidence proving, or tending to prove, any careless or negligent management of the train by appellant which caused its separation; that appellee in fact proved only the accident and the death resulting therefrom and no negligent act that caused the separation of the train: that the only justification or excuse for a finding for appellee on his own evidence is by invoking

the doctrine of "*res ipsa loquitur*," which doctrine they insist, and we think correctly, does not apply to this kind of a case.

Upon this branch of the case counsel for appellee, while not contending, as we gather from their argument, that this rule of *res ipsa loquitur* strictly applies to the case at bar, yet they do insist that proof by appellee that the separated portion of the train was running in excess of the speed limit fixed by the ordinance of the city of Attica was proof of negligence per se upon the part of the appellant, and in support of this contention counsel cite a line of authorities that, upon first blush, might seem to support their position. We think, however, that a careful examination of the cases cited will disclose a difference between the facts in those cases, and the facts in the case at bar. Among the cases relied upon by appellee's counsel is *Lang v. Mo. Pac. Ry. Co.*, supra. In that case it was contended by the railway company that the loose car which caused the collision "was set in motion by the engine, and then detached to travel forward, but was given slack to start it, and then gained headway by force of gravity, the track being downgrade towards the crossing," and that the car was not "*kicked or shunted*," as claimed by the injured party and alleged in his petition. Commenting upon this difference of views entertained and asserted by the respective parties, that court said: "In the view we take of the case, notwithstanding the allegation in the petition that the car was '*kicked or shunted*,' it was immaterial whether it was given headway by that operation, or was started in the manner claimed by the defendant. The means of propulsion used do not enter into the question of negligence. * * * This fact is admitted by counsel, and its negligence is thereby confessed."

We think, in view of the facts in that case, that the principle announced by the court was right, because, according to the views of either of opposing counsel, the negligence consisted in *knowingly and purposely* sending the loose car on its way over the crossing without any warning and without any means for its control. In such a case it would undoubtedly be negligence per se, as the court in that case held.

In the case at bar, the separated portion of the train was not by the appellant purposely and intentionally sent on its way, but its going in the manner in which it did was the result of accident, and herein lies the difference and distinction which calls into operation a rule different from that asserted in that case.

For the same reason, the case at bar is not controlled by the principle controlled in another line of cases cited by counsel for appellee, viz., the rule that obtains in the operation of one train so closely behind another that the signals and warnings that the

law requires are unavailing. In such cases the operation of each of such trains in such manner is voluntary on the part of the agents of the railroad company, and each train is within the control of those operating the same, and there is no element of accident that puts the movement of the rear train beyond the control of those operating it. In such cases the act of moving the trains in such close proximity is very properly, we think, held to be evidence of negligence per se, as held in the case of *Chicago & Eastern R. R. Co. v. Boggs*, 101 Ind. 523, 51 Am. Rep. 761. *Ohio & Miss. Ry. Co. v. McDaniel*, supra, and other cases cited by appellee. The facts in those cases are entirely different from the facts in the case at bar. We think that upon this phase of the case counsel for appellant have stated the rule applicable in this class of cases with fairness, when they say in their brief: "There are two conditions, under which the law authorized a finding of facts constituting negligence without evidence (of actual negligence), and only two. * * * The other condition, however, is one which relates to this kind of case. * * * The case of *Indianapolis Street Ry. Co. v. Darnell*, 82 Ind. App. 687, 68 N. E. 609, was one of a crossing accident and injury, and the doctrine was there announced that the jury may infer the negligence, not from the accident, but from the silence of defendant, and its failure to introduce evidence. This doctrine is not that a presumption has arisen or exists which the defendant is required to rebut, but that, having better opportunity of knowing the facts relating to the occurrence than plaintiff has, it ought to introduce evidence concerning the affair, whether plaintiff has established, by his evidence, any of the negligence or not. This doctrine seems to proceed upon the idea that, under the circumstances making it difficult for plaintiff to prove his charges of negligence, the defendant owes the duty of furnishing material, which may be adopted and used as the basis for a conclusion as to negligence."

The law applicable to this case being as laid down above, we pass to the question of whether or not the evidence shows that appellant's negligent and careless management and operation of its train was the cause of its separation and decedent's consequent death.

There were witnesses who testified to the strength of the coupler, and that an extraordinary jerk or strain was necessarily required to break it. From this and other evidence the jury had the right to infer that the break was due to negligent operation of the train, either at the time of or before the separation, and, the appellant's agents being the only persons in charge of the operation and management of the train, this negligence was attributable to appellant. It is only necessary that "the evidence must affirmatively establish circumstances from which the inference fairly

arises that the accident resulted from the want of some precaution which the defendant ought to have taken." *L. N. A. & C. Ry. Co. v. Schmidt*, 134 Ind. 18, at page 22, 33 N. E. 774, at page 776, quoting from the case of *Wabash, etc., R. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193. While the evidence was meager, we think there was enough to prevent our disturbing the verdict on this ground for new trial.

Counsel next discuss the answers of the jury to interrogatories. It is not their contention, as we gather it from their argument, that these answers conflict with the general verdict; but they insist, in effect, that there are several answers that are wholly unsupported by any evidence, and that the answers, as a whole, indicate that the jury entirely ignored and disregarded the evidence offered by appellant, and manifested a disposition to find facts, whether supported by the evidence or not, that would strengthen and uphold their general verdict in favor of appellee, and that for this reason the general verdict should not be allowed to stand.

If counsel are right in their contention as to what the answers to the interrogatories disclose, they have in their favor authority of weight that supports their contention as to what the duty of this court is in such a case. In the case of *Chicago, St. L. & P. R. R. Co. v. Kennington*, 123 Ind. 409, 410, 24 N. E. 137, the Supreme Court say: "If it were found that answers to interrogatories were inconsistent with each other, and were not supported by the evidence, the fact might be influential in inducing the court to grant a new trial in order to prevent a failure of justice. It is possible that a case might arise in which there would be such a manifest repugnancy between answers to interrogatories as to indicate a disposition on the part of the jury to distort the evidence in order to make a case favorable to one party or the other. Where answers to interrogatories, fairly put, make such a purpose clearly apparent, there are authorities of great weight which hold it to be the duty of the court to set the verdict aside and award a new trial. *Burns v. North Chicago Rolling Mill Co.*, 60 Wis. 541 [19 N. W. 380]; *Mitchell v. Brown*, 88 N. O. 156; *Sloss v. Allman*, 64 Cal. 47 [30 Pac. 574]. We should unhesitatingly adopt this view in a proper case."

We have examined and considered the interrogatories and answers thereto in the case at bar with care, and we hardly feel warranted in saying that any material interrogatory is wholly unsupported by fact or inference properly deducible from some fact or facts proven; and, while the answers to one or two taken in connection with the evidence indicate that the jury were inclined to ignore and not consider the evidence of appellant's witnesses, yet we do not feel justified in holding that the answers of the jury in and of themselves manifestly indicate a disposition on the part of the jury to distort

the evidence in order to support their general verdict or make a case favorable to appellee.

Counsel next insist that the damages assessed were excessive. The verdict was \$4,000. The proof showed Rosa Polk, the widowed mother of the deceased, for whose benefit the action was brought, to have been 54 years of age, with an expectancy of 18.28 years when her son was killed. The son was 24 years of age when killed, with an expectancy of between 39 and 40 years. The mother testified that her son had contributed to her support; that "since my husband's death Bernard (the deceased) has been my sole support. The estimate of \$150 a year is about as near as I can tell you." The son was a good, industrious, and faithful son with no bad habits.

This statement of the evidence presents the facts relative to the contributions of the deceased to his mother existing at the time of his death as favorable to appellee as the evidence warrants. At the time of the death of her son, Mrs. Polk could have purchased an annuity of \$150 a year for less than \$2,000. Under such a state of facts, is the amount of this verdict excessive, and is it so excessive as to strike this court as being so upon first blush?

In case of *L. & N. R. Co. v. Kemper*, 153 Ind. 613, at page 630, 53 N. E. 931, at page 936, the Supreme Court quote upon this subject with approval the words of Chancellor Kent, as follows: "Unless the damages are so outrageous as to strike every one with the enormity and injustice of them, so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption, the court cannot consistently with the precedents interfere with the verdict. It is not enough to say that, in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries." To the same effect are the following cases: *C., C. & St. L. R. Co. v. Hadley*, 40 Ind. App. 731, 82 N. E. 1025, at page 1030, 16 L. R. A. (N. S.) 527; *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504; *Cremery, etc., Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 609; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Lee v. State*, 156 Ind. 541, 60 N. E. 299.

The case at bar, upon the subject of the measure of damages, is somewhat different from one brought by an administrator for the benefit of the widow and children of deceased. The case of *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509, 513, 34 N. E. 314, is similar to the one at bar, and in that case the Supreme Court says: "In assessing damages resulting to the wife, children, or next of kin, the ability of the deceased to have provided for the support and education of those dependent upon him, the number and degree of kindred mentioned in the statute,

and their dependence upon him for support, are important considerations. Although it is not necessary to the maintenance of the action for the next of kin that the deceased should have been under a legal obligation to render them support, it is nevertheless of consequence that their relation and situation should be shown with a view of affording a basis upon which to determine the amount of pecuniary loss sustained. * * * But it must be plain, upon a moment's reflection, that the measure of damages in a case like this must be different. Here the deceased was under no legal obligation to support the next of kin for whose benefit this suit is prosecuted. In the course of nature, it is not probable that they would have survived him and thus become his heirs; nor can we presume that he would not have married. Their pecuniary loss, therefore, is not such as would have been sustained by a widow and children."

In *Cleveland Co. v. Drumm*, 32 Ind. App. 547, at page 549, 70 N. E. 286, at page 287, this court said: "The assessment of damages in such case 'must proceed, not merely upon the pecuniary ability of the deceased, but rather upon the anticipations of pecuniary benefit which the surviving next of kin are shown to have had reasonable ground to indulge.' *Delbold v. Sharp*, 19 Ind. App. 474 [49 N. E. 837]; *Commercial Club v. Hilliker*, 20 Ind. App. 239 [50 N. E. 578]; *Wabash R. Co. v. Cregan*, 23 Ind. App. 1 [54 N. E. 767]; *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509 [34 N. E. 314]."

Again, in *Commercial Club v. Hilliker*, supra, at pages 243 and 244 of 20 Ind. App., at page 580 of 50 N. E., this court says: "In an action for death by wrongful act, the question is one solely of pecuniary loss. Damages for the bereavement, for pain, or by way of solatium are not recoverable. It being true that the damages in cases like this are limited to the pecuniary loss sustained by the next of kin of the deceased, and there being no legal obligations resting upon the deceased to contribute to such next of kin, damages will not be presumed, but must be affirmatively proved. *Armour v. Ozischki*, 59 Ill. App. 17; *Delbold v. Sharp*, 19 Ind. App. 474 [49 N. E. 837]." This is a strong case in appellant's favor upon this ground of his motion for new trial. The court further says in this same opinion, at page 245 of 20 Ind. App., at page 580 of 50 N. E.: "Upon the facts as found in this case, the verdict for \$2,750 strikes us at 'first blush' as being excessive. The only evidence upon the subject is to the effect that the deceased's earnings were contributed to the mother and were worth to her the sum of \$2.50 per week. It was found by the jury that the mother's expectancy of life was a fraction over 28 years. Now if we concede that deceased would, during the whole life of her mother, contribute \$2.50 per week, or approximately \$125 per year for 28 years,

we also know that \$2,083.32 will purchase an annuity of \$125 upon the life of a person of the age of the mother of deceased. Even this would not be a fair way to arrive at the amount of damage done by the wrongful killing of deceased, because the amount of money which would purchase an annuity during the expectancy of life of the next of kin of deceased equal to the annual contribution to their support by deceased would be an excessive judgment. It would necessarily be cut down and greatly lessened by the contingencies, which this case presents."

Under the authorities, supra, it seems well settled that damages in a case of this kind are limited not merely to the pecuniary loss resulting to the next of kin on account of the death of the deceased, but, "where the deceased was under no legal obligation to support the next of kin for whose benefit this suit is brought, that the assessment of damages must proceed * * * rather upon the anticipations of pecuniary benefit which the surviving next of kin are shown to have had reasonable ground to indulge." Counsel for appellee admit, in effect, that this is so; but they insist that under the proof, taking into account the age of the deceased, his habits for sobriety, industry, and economy, and his disposition and habits in the way of assisting and contributing to his mother, the jury had a right to infer that his future earnings, had he lived, would have been greater, and his contributions to his mother larger, and that these matters were all facts to be considered by the jury. But here we are entering the field of speculation, and, on the other hand, it might be said with equal reason that life is uncertain and sickness or death might have overtaken the son, or the mother might have died, or the son married and reared a family of his own, and that necessity might, in the future, have compelled him to lessen his contributions or withhold them altogether; so that the safer rule for both parties, it seems to us, is that the amount of the damages should be predicated upon the conditions existing and the contributions being made by the deceased at the time of and prior to his death, as shown by the evidence in the case. We think the authorities supra support this view of the case.

The case at bar presents a state of facts which might very naturally appeal to the sympathy of the juror to such an extent that his verdict might be thereby improperly influenced. We believe the verdict is excessive, and considering the meagerness of the evidence upon which it is predicated, the answers to interrogatories, some of which may fairly be said to indicate a disposition upon the part of the jury to ignore and disregard the testimony of the appellant's witnesses, the conclusion is irresistible that the jury permitted their sympathy, or some influence other than the evidence and the law, to at least influence, if not control, them, and

that the excessive amount of this verdict is the result of such influence. In such a case justice demands that a new trial should be granted by this court.

Judgment reversed, with instructions to the court below to grant a new trial.

(47 Ind. App. 587)

CONNECTICUT MUT. LIFE INS. CO. v. KING. (No. 7,153.)¹

(Appellate Court of Indiana. Feb. 16, 1911.)

1. INSURANCE (§ 645*)—LIFE INSURANCE—RECOVERY.

There can be no recovery on a contract of life insurance unless it is pleaded and proved that insured is dead.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 645.*]

2. PLEADING (§ 8*)—LIFE INSURANCE—COMPLAINT—SUFFICIENCY.

A complaint in an action on a life policy begun over 30 years after the disappearance of insured, which alleges that insured disappeared in February, 1867, that he has not been seen or heard of since, and that in February, 1867, by virtue of the premises and in presumption of law, insured died, fails to alleged insured's death under the rule that facts, and not presumptions, or conclusions, or the evidence of facts, must be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½; Dec. Dig. § 8.*]

3. DEATH (§ 2*)—ABSENTEES (§ 6*)—PRESUMPTIONS—STATUTES.

The purpose of Burns' Ann. St. 1908, § 2747, providing that where any resident shall have absented himself from his usual place of residence, and gone to parts unknown, for five years, the court may take jurisdiction over his estate as if he were dead, is to abrogate the common-law rule of presumption of death after seven years, and to enable persons in interest to administer on the estate of a person who has been absent for five years, but it does not abrogate the common-law presumption, except in the matter of estates of absentees, and then only by complying with the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.* Absentees, Cent. Dig. §§ 12, 13; Dec. Dig. § 6.*]

4. DEATH (§ 2*)—PRESUMPTIONS—STATUTES.

Burns' Ann. St. 1908, § 2748, providing that the presumption of death of any person who has absented himself from his usual place of residence and gone to parts unknown, or who has not been heard of for five years, shall relate back to the time of the first disappearance, and that a party entitled to the proceeds of a policy on the life of "such absentee" where the five years expired prior to the act need not make other proof of death than disappearance of insured for five years, enacted by Act March 10, 1883 (Laws 1883, c. 137), entitled "An act to supplement the act providing for the management and disposal of the estates of absent persons," embodied in section 2747, has a limited application, and does not include a claim on a life policy based on the fact that insured left his usual place of abode in February, 1867, while the premium of his policy had been paid to November of that year, and it cannot be presumed that insured died prior to the lapsing of the policy for failure to pay annual premiums after November, 1867.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 1-3; Dec. Dig. § 2.*]

5. STATUTES (§ 239*)—DEROGATION OF COMMON LAW—CONSTRUCTION.

A statute in derogation of the common law must be strictly construed, and the court may not read into it anything that its words do not fairly import.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. § 239.*]

6. STATUTES (§ 206*)—CONSTRUCTION—VALIDITY.

The court, in construing a statute, must give force and effect to all its provisions whenever it can be done, and it is not permissible to adopt a construction which will render it invalid when another construction may be adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

7. DEATH (§ 2*)—PRESUMPTIONS.

The presumption of life continues until it is overcome by the presumption of death, which by the common law arises after seven years of unexplained absence, but there is no presumption as to the time of death within the seven years, and in the absence of proof an absentee is presumed to be living for seven years from the time of his disappearance.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 2.*]

Appeal from Circuit Court, Monroe County; Jas. B. Wilson, Judge.

Action by Elizabeth V. King against the Connecticut Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

Remy & Berryhill and Miers & Corr, for appellant. J. E. Henley and Duncan & Batman, for appellee.

ADAMS, J. Appellee recovered judgment against the appellant on a policy of life insurance issued on the life of her then husband Presley T. Buckner on November 23, 1865, in which she was made beneficiary.

The complaint is in one paragraph, and after formal allegations setting forth the nature and organization of appellant and the execution of the policy sued on alleges that, on November 23, 1865, appellee was the wife of said Buckner and so continued as his wife until the said Buckner absented himself from the city of Bloomington, Monroe county, Ind., in the month of February, 1867; that this plaintiff many years after said Buckner absented himself intermarried with one King, and that she is now the widow of said King; "that during the month of February, 1867, the said Presley T. Buckner departed from the city of Bloomington, in the county of Monroe, state of Indiana, where he had hitherto resided with his family and which had for a long time prior thereto, to wit, 10 years, been his home, and went to the city of New Orleans, in the state of Louisiana, upon private business, and from thence hitherto has never been seen or heard of; that at the time he absented himself, as aforesaid, his usual place of residence was in the city of Bloomington, Monroe county, Ind.; that at the time said Presley T. Buck-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹Rehearing denied.

ner absented himself from his usual place as aforesaid the policy of insurance was in full force and effect, and that the premium thereon had been paid to the defendant up to the 23d day of November, 1867; that the last time the said Presley T. Buckner was seen was in the month of February, 1867, in the city of New Orleans, in the state of Louisiana, and that no person has seen or heard of him from that time to the present day. Plaintiff further alleges that in said month of February, 1867, by virtue of the premises and in presumption of law, the said Presley T. Buckner died, which fact the defendant well knew." It is further averred that appellee had no knowledge of the existence of said policy of insurance until September, 1904; that appellee then caused appellant to be notified of the disappearance of said Buckner, and furnished appellant with proof of the death of said Buckner, in presumption of law; that appellant, prior to the commencement of this action, denied any liability upon said policy of insurance, and has refused to pay plaintiff the amount of said policy on the ground that no liability existed against the appellant thereon; that insured and appellee each duly performed all the conditions of said policy of insurance on their part to be performed by the provisions, and that no part of said policy has been paid. A copy of the policy is made a part of the complaint.

Appellant answered by general denial and 10 paragraphs of special answer. A demurrer was overruled as to the second, fifth, sixth, and eleventh paragraphs, and sustained as to the third, fourth, seventh, eighth, ninth, and tenth paragraphs, and appellee replied by general denial and three paragraphs of special reply. The second paragraph of reply was directed to the second and eleventh paragraphs, and the third to the sixth paragraph of answer. Upon the issues thus formed the cause was tried by the court, and by request a special finding of facts was made, and conclusions of law stated thereon. Appellant's motion for venire de novo and for a new trial were overruled, and judgment rendered for appellee.

The first error assigned and relied upon for reversal is the overruling of appellant's demurrer to the complaint. Numerous other errors are assigned, but, under the conclusion reached, the consideration of such errors would serve no purpose. The controlling question, we think, relates to the law which governs the presumption of death in a case of this kind.

The suit being upon a contract of insurance on the life of Presley T. Buckner, there can be no recovery, unless it is charged in the complaint and shown by the proof that Buckner is dead. Nowhere in the complaint is there a direct allegation of death. After setting out the fact of the disappearance of Buckner, and the further fact that he had not been seen or heard of since February, 1867, it is then averred "that in said month

of February, 1867, by virtue of the premises and in presumption of law the said Presley T. Buckner died." The averment of presumptive death is insufficient; facts, and not presumptions, conclusions, or the evidence of facts, must be pleaded. 12 Ency. Pl. & Prac. 1022; Jackson School Township Tp. v. Farlow, 75 Ind. 118; Indiana, etc., R. Co. v. Adamson, 114 Ind. 282, 15 N. E. 5.

Appellant makes further objection to the complaint that the statute under which a recovery is sought does not apply to the case here presented. The statute in question reads thus: "The presumption of death, recited in the first section of the said act above entitled as amended, in the case of any person who, since the passage of said act and the amendment above recited, has absented himself from his usual place of residence and gone to parts unknown, or who has not been heard of for the period of five years, shall relate back to the time of the first disappearance of such absentee; and it shall be presumed and taken by all courts that such absentee was dead on the first day of his disappearance: Provided, however, that this section shall not apply to any suit now pending, neither shall a party holding or entitled to the proceeds of any policy of insurance upon the life of such absentee, where the five years have expired prior to the passage and taking effect of this act, and whose duty it is to make proof of the death of such absentee, be required, when such proof is not prohibited by the contract with the insurer, to make other proof of death than the fact of the disappearance of the insured for five years continuously." Section 2748, Burns' Ann. St. 1908.

The act referred to in section 2748, supra, is the first section of the act approved March 5, 1859 (Laws 1859, c. 4), as amended by the act of March 9, 1861 (Laws 1861, c. 52), being section 2747, Burns' Ann. St. 1908, and is as follows: "When any resident of this state shall have absented himself from his usual place of residence, and gone to parts unknown, for the space of five years, leaving property, real or personal, without having made any sufficient provision for the management of the same, and when, in such case, at any time, it shall be made to appear to the satisfaction of the court having probate jurisdiction in the county where such person last resided or where such property is situated, by complaint and proof,—after thirty days' notice, to such person by publication in a newspaper of general circulation, published at the capital of the state, and also in a paper published in such county, if there be any, that such property is suffering waste for want of proper care, or that the family of such person are in need of the use and proceeds of such property for their support or education, or that the sale of any such property or part thereof shall be necessary for the payment of his debts, it shall be presumed and taken by such court

that such person is dead, and the court shall have jurisdiction over the estate of such person in the same manner and to the same extent as if dead, and shall appoint an administrator of his estate, who shall have all the powers and rights over such estate, and be subject to all the liabilities and duties in relation thereto that appertain to administrators of decedents' estates."

The evident purpose of the amended act of 1861 was to abrogate the common-law rule of presumption of death after seven years, and to enable parties in interest to administer upon the estate of a person who has been absent from his usual place of residence and gone to parts unknown for five years. This act did not abrogate the common-law presumption, except in the matter of estates of absentees, and then only by complying with the terms and provisions of the statute.

The act of March 10, 1883 (Laws 1883, c. 137; section 2748, Burns' Ann. St. 1908), as shown by its title was an act supplemental to the amended act of 1861, supra. The title to the supplemental act reads: "An act supplemental to an act entitled 'An act to provide for the management and disposal of the estates of persons who have absented themselves from their usual places of residence and gone to parts unknown' approved March 5, 1859, and as amended by an act entitled 'An act to amend the first section of an act to provide for the management and disposal of the estates of persons who have absented themselves from their usual places of residence and gone to parts unknown,' approved March 5, 1859, approved March 9, 1861 (and being sections 2232, 2233, 2234, 2235, and 2236 of the Revised Statutes of 1881); so as to fix the time when the presumption of death takes effect, and how proof of death upon policies of insurance on the lives of such absentees may be made."

It will be noted that the additional matter included in the supplemental act provides that where any person has absented himself and has not been heard of for five years, the presumption of death relates back to the time of first disappearance; that it shall be presumed that such absentee was dead on the first day of his disappearance and shall be so taken by all courts. By proviso, actions pending were excepted, and that a party holding or entitled to the proceeds of a policy of insurance upon the life of such absentee and whose duty it is to make proof of death of such absentee, shall not be required to make other proof of death than the fact of the disappearance of insured for five years continuously. "Such absentee" designated in the proviso is clearly the absentee whose estate is being administered, or sought to be administered, and the proviso is intended to cover and include policies of insurance, the proceeds of which would constitute a part of the estate. There is no reason for assuming that the purpose of the proviso

was to change the common-law presumption of death, except in estate matters. The statute, being in derogation of the common law, must be strictly construed, and we are not permitted to read into the act in question anything that its words do not fairly import. The title to the amended act of 1861, supra, relates to the management or disposal of the estates of persons who have gone to parts unknown. The act of March 10, 1883, is supplemental to said amended act. It is said in the case of *McCleary v. Babcock*, 169 Ind. 228, at page 238, 82 N. E. 453, at page 457: "We have seen that new matter, which, if it had been embodied in the original act, would have been embraced within the subject expressed in the title, may be subsequently incorporated into such original act by a supplemental or amendatory act; and this may be done without title, beyond a statement clearly identifying the original act to which the new proposition is to become supplemental, since the validity of the new matter must be determined by the title of the original act." If, therefore, the new matter included in the proviso to the supplemental act did not and was not intended to limit it to the settlement of estates of absentees, then such new matter would be invalid. Such a construction, under the rules, is not permissible, as it is the duty of the court in construing a statute to give force and effect to all the provisions whenever it can be done. *State v. Weller*, 171 Ind. 53, 56, 85 N. E. 761; *State ex rel. v. Board, etc.*, 170 Ind. 595, 601, 85 N. E. 513.

The conclusion therefore follows that the statute in question has a limited application, and cannot include the case made by the complaint of appellee. The limitations of the act are recognized in the case of *Fleetwood v. Brown*, 109 Ind. 567, 569, 9 N. E. 352, 353, where it is said: "Jesse Fleetwood has been absent and unheard of for such a length of time that for some purposes he was presumed to be dead"—citing the supplemental act of March 10, 1883. It also follows that in a case not connected with the settlements of estates of absentees the common-law rule as to the presumption of death still obtains.

Presumption of death as well as presumptions of life are indulged in the absence of other proof. The presumption of life is strong, and continues until it is overcome by the presumption of death, which arises after seven years of unexplained absence; but there is no presumption as to the time of death within the seven years. In the absence of proof the absentee is presumed to be living for seven years from the time of his disappearance. *Lawson, Presumptive Evidence*, 255; *Schaub v. Griffin*, 84 Md. 557; 36 Atl. 443; *Re Mutual Benefit Co.*, 174 Pa. 1, 34 Atl. 283, 52 Am. St. Rep. 814; 2 *Best, Evidence*, § 408.

The case at bar has no relation to the settlement of the estate of Buckner. The contract of insurance was in the first in-

stance a contract between the appellant as insurer and the appellee as beneficiary. The estate of Buckner could have no possible interest in it. The complaint shows that the premiums were paid up to November 23, 1867. Under the law applicable to this case Buckner was presumed to be living for more than six years after November, 1867, as the complaint charged that he was never heard of after February, 1867. By the terms of the policy set out in the complaint, upon failure to pay the annual premiums, the contract became void except that the assured might at the end of two years elect to discontinue paying, and in such event, her contract would be a continuing nonforfeiting policy to the extent of one-tenth of the amount of the policy for each yearly payment made. There was no averment of such election, and it otherwise appearing from the complaint that the contract was forfeited for nonpayment, no cause of action was stated.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

MYERS, C. J., and HOTTEL, FELT, LAIRY, and IBACH, JJ., concur.

(47 Ind. A. 181)

TRIMBLE v. TRIMBLE et al. (No. 6,969.)
(Appellate Court of Indiana, Division No. 1.
Feb. 17, 1911.)

HUSBAND AND WIFE (§ 283*)—SEPARATE MAINTENANCE.

Burns' Ann. St. 1908, § 7871, provides that, when the allegations of a wife's complaint in an action for support have been found to be true, the court may make such orders and allowances in the nature of alimony out of the husband's estate as may seem just and for the best interests of the wife and children. Section 1083 provides that in actions for divorce the court shall make such decrees for alimony as the circumstances render proper. *Held*, that where in a wife's suit for support, in which the husband appeared and answered, the court found the allegations of the complaint to be true, an award of \$600 to the wife against her husband personally cannot be said to be contrary to law.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.*]

Appeal from Circuit Court, Fulton County; Harry Bernetha, Judge.

Action by Nora Marie Trimble against John J. Trimble and another. From a judgment for plaintiff, defendant John J. Trimble appeals. Affirmed.

E. C. Martindale, for appellant. Pliny W. Bartholomew and Jackson & Sample, for appellee.

MYERS, C. J. Appellee Trimble brought this action against the appellant, her husband, and one J. Howard Reed, alleging that her said husband had abandoned her and failed to provide for herself and their infant child, and praying an order of court com-

PELLING the appellant to contribute to the support of herself and child.

The complaint is based upon section 12, Acts Sp. Sess. 1881, p. 529; section 7870, Burns' Ann. St. 1908. Appellant answered the complaint by a general denial. The issues thus formed were tried by the court, resulting in a finding and judgment against the defendant Trimble, and in favor of plaintiff for \$600, and a finding in favor of the defendant J. Howard Reed, and against the plaintiff. Appellant's motion for a new trial was overruled, and this ruling is assigned as error. In support of the motion for a new trial, it is insisted that the decision of the court was contrary to law. The finding of the court amounts to a general finding in favor of the appellee. *Kelley v. Bell*, 172 Ind. 590, 88 N. E. 53; *Terre Haute, etc., R. Co. v. State*, 159 Ind. 463, 480, 65 N. E. 401.

The question presented involves the authority of the court to make the order against the defendant John Trimble to pay the plaintiff in the nature of alimony \$600 for the support of herself and child, and to render judgment against said defendant for said amount. Section 13, Acts Sp. Sess. 1881, p. 530. Section 7871, Burns' Ann. St. 1908, provides that: "Whenever the process has been served or publication made, as in civil cases, the court shall hear and determine said cause, and if the facts stated in the complaint are found to be true, the court may make such orders and allowances in the nature of alimony out of the husband's estate as may seem just and equitable and for the best interests of such wife and children; and the court may also order the real estate or personal property of such husband or both, or any part thereof, to be sold to the highest bidder for cash or on time, upon such terms and in such manner * * * as the court may direct." Section 1083, Burns' Ann. St. 1908, provides: "The court shall make such decrees for alimony, in all cases contemplated by this act (an act regulating the granting of divorces, etc.), as the circumstances of the case shall render just and proper; and such decrees for alimony, heretofore made or hereafter made, shall be valid against the husband, whether asked for in the petition or given by the judge on default." Under this section of the statute, a personal judgment for alimony would not be questioned where the defendant is personally summoned or the court has jurisdiction of his person. In the case before us the defendant was personally served with process, appeared to the action, and answered the complaint. There is no question but that the trial court had jurisdiction of the person and subject-matter of the action. It has been held that the amount of alimony to be allowed is largely within the discretion of the court, due consideration

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

being given to the financial condition of the husband and his income. *Yost v. Yost*, 141 Ind. 584, 41 N. E. 11; *Stutsman v. Stutsman*, 80 Ind. App. 645, 68 N. E. 908; *Hedrick v. Hedrick*, 128 Ind. 522, 28 N. E. 768; *Gussman v. Gussman*, 140 Ind. 433, 39 N. E. 918.

Considering the alimony statute in connection with the statute (section 7871, supra), directing what the court shall do upon the hearing of a cause like the one here presented, in case the facts stated in the complaint are found to be true, it follows that the decision and judgment of the court was not contrary to law, but expressly authorized by law. We are referred to the case of *Stanbrough v. Stanbrough*, 60 Ind. 275. That case was grounded upon an act approved March 7, 1857 (Acts 1857, p. 94), the purpose of which was to authorize the sale of property for the relief and support of married women when deserted by their husbands, and of children when deserted by their parents. While the act under which the plaintiff here proceeded is entitled "An act concerning husband and wife," the sections of that act applicable to the case under consideration are entirely different from the one under consideration in the case of *Stanbrough v. Stanbrough*, supra. That case is therefore not in point. We therefore conclude that the reasons given for reversing the judgment in this case are insufficient.

Judgment affirmed.

(47 Ind. App. 214)

SEBIENSKIE et al. v. DOWNEY et al.
(No. 7,100.)

(Appellate Court of Indiana, Division No. 1.
Feb. 24, 1911.)

**1. PLEADING (§ 193*)—COMPLAINT—DEMUR-
RER.**

A complaint stating facts entitling plaintiff to a part of the relief demanded is good against demurrer for want of facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 439; Dec. Dig. § 193.*]

**2. EJECTMENT (§ 64*)—CERTAINTY—DESCRIP-
TION OF LAND.**

The complaint, in an action to recover land described as a certain part of a certain quarter section, excepting five acres in the southeast quarter thereof, is not so indefinite as to the five acres excepted, but that an officer with the aid of a surveyor may determine what land is included in the judgment for the land sought to be recovered, and so execute the order of the court.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164; Dec. Dig. § 64.*]

Appeal from Circuit Court, Lake County;
W. C. McMahan, Judge.

Action by Robert F. Downey and others against Albert Sebienske and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Barr & Wheeler, for appellants. Johannes Kopelke, for appellees.

MYERS, C. J. Appellees brought this action against the appellants for possession of certain land in Lake county, Ind., and to quiet their title to the same. The complaint was in three paragraphs. A demurrer to each paragraph was overruled. Trial and judgment for appellees, quieting their title, and in ejectment.

Appellants herein insist that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling appellants' demurrer to each paragraph of the complaint. Under these assignments of error, but one question is presented for our consideration: Does the complaint contain a sufficiently definite description of the real estate to be good as against a demurrer for want of facts?

The real estate is described in the complaint as follows: The W. $\frac{1}{2}$ of lot 3 north of the "Indian Boundary Line," and the W. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ south of the "Indian Boundary Line" (excepting therefrom 5 acres in the southeast quarter thereof), all in section 32, township 37 N., range 7 W. of the second principal meridian, in Lake county, Ind., comprising the W. $\frac{1}{2}$ of the N. W. fractional $\frac{1}{4}$ of said section 32, the west line of which is located at a point $8\frac{3}{10}$ feet west of the N. W. corner of a certain dwelling occupied by these defendants as a residence, located on said lot 3. It will be observed that two tracts of land are in question, one north of the "Indian Boundary Line," and the other south of said line. There is no objection lodged against the first description, and the complaint is conceded to be good as to that tract. And as the complaint states facts entitling plaintiff to a part of the relief demanded, it must be held good as against a demurrer for want of facts. *Indianapolis, etc., Trac. Co. v. Brennan* (Ind.) 90 N. E. 65; *United States, etc., Co. v. Harris*, 142 Ind. 228, 40 N. E. 1072, 41 N. E. 451; *Linder v. Smith*, 181 Ind. 147, 30 N. E. 1073; *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788; *Indianapolis, etc., Trac. Co. v. Henderson*, 39 Ind. App. 324, 79 N. E. 539.

At the beginning of the trial of this cause the defendants in open court disclaimed any interest whatever in the land south of the "Indian Boundary Line," so that any fault in the description of this land did not concern or affect these appellants. However, in this court, appellants insist they are entitled to the benefit of the ruling of the lower court on their demurrer. Looking to their contention in this regard, we find the only defect pointed out in the description of the land south of the "Indian Boundary Line" is that the 5-acre exception is not definitely described. We believe that by the aid of a surveyor the sheriff could have determined just what land in this tract was included in the judgment, and if from the description the land can be identified it will be sufficient. In the

case of *Collins v. Dresslar*, 133 Ind. 290, 32 N. E. 883, it is said: "Some rules governing in the description of lands have become so well settled and generally admitted as to be regarded as legal maxims. It is a settled rule that that is sufficiently certain which can be made certain. A description of real estate is sufficient when the sheriff, with the assistance of a surveyor, can find the real estate and determine its boundaries."

In the case of *Cunningham v. McCollum*, 98 Ind. 38, the court considered the case of *Brown v. Anderson*, 90 Ind. 93, and as to what that case holds said: "It was held that the description was sufficient, if the land could be identified by the sheriff, with the assistance of a surveyor, aided by one having knowledge of the former location of an ancient fence. Where land or a house is known by a certain name, it may be well described by that name, as the house called 'the Black Swan,' the farm called 'White Acre,' the 'Manor of Dale,' etc."

We firmly adhere to the rule that the complaint must describe the premises in question with such certainty that an officer may execute the order of the court and put the claimant in possession. *Reid v. Klien*, 138 Ind. 484, 37 N. E. 967; *Reid v. Mitchell*, 95 Ind. 397.

The complaint before us, measured by the rules herein referred to, meets this requirement, and there was no error in overruling the demurrer. Judgment affirmed.

(48 Ind. A. 173)

WELLINGER et al. v. CRAWFORD. (No. 8,791.)¹

(Appellate Court of Indiana, Division No. 2. Feb. 17, 1911.)

BROKERS (§ 82*)—ACTION FOR COMMISSION—COMPLAINT.

In an action by a broker for commissions, the complaint alleged that plaintiff had a contract for the exclusive sale of lands for a specified time, and that the owner had sold it without his consent before the time had expired, but did not aver that by the alleged breach of contract plaintiff was prevented from purchasing the property or selling it to another within the stipulated time, or that he would otherwise have bought it or sold it to another, or that he was thereby prevented from earning a commission. *Held*, that the complaint was insufficient on the theory of a breach of contract and a right to damage resulting therefrom.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 101; Dec. Dig. § 82.*]

On petition for rehearing. Petition overruled.

For former opinion, see 89 N. E. 892.

M. Z. Stannard, for appellants. E. C. Hughes, for appellee.

LAIRY, J. Appellee makes the point in his petition for rehearing that this court in its original opinion does not accurately state the substance of the complaint. Appellants

state that the complaint does not aver, as stated in the original opinion, that appellee was unable to find a purchaser for the premises, willing to pay \$5,000, and that, after appellants received information from appellee that he was unable to find a purchaser for the premises at the price named, the appellants agreed to waive the provisions in said contract that the lands should be sold for \$5,000; but that the complaint, on this subject, states that appellee did attempt to sell said land for said \$5,000, and did spend much time and money in an effort to sell said lands at said price, that the best offer he could obtain for said land was \$4,500, which offer was made by Clarence and Gertrude Spencer, that plaintiff thereupon advised defendants that \$4,500 was the best offer he had so far obtained for said land, and advised that a better offer might be obtained later on, etc.

Considering the complaint as a whole, we think that the substance of its material averments was properly stated in the original opinion. The complaint was construed by the court upon the theory that it was based upon the contract and sought a recovery of commissions earned under said contract. So construed, the complaint could not be sufficient unless it showed that appellee had performed the contract on his part by obtaining a purchaser for the property in accordance with its terms. The complaint discloses that the land was sold for \$4,500, and, in order to show that this was a compliance with the contract, the complaint makes the following averments: "That thereupon, and after receiving said information from said plaintiff, the said defendants agreed to waive, and did waive, the provision in said contract that said land should be sold for \$5,000, and agreed to let said price stand in said contract at \$4,500, and agreed to accept the said sum of \$4,500 for said real estate." The original opinion correctly holds that such a condition in a contract, required under the statute of frauds to be in writing, cannot be waived or modified by parol. *City of Michigan City v. Leeds*, 24 Ind. App. 271, 55 N. E. 799; *Carpenter v. Galloway*, 73 Ind. 418; *Goss v. Nugent*, 5 Barn. & Ad. 58; *Browne on Statute of Frauds* (4th Ed.) § 411.

Appellee urges that his complaint shows that he had a contract which gave him the exclusive right to sell the real estate described therein for \$5,000 at any time before January 1, 1906, and appellant sold the premises for \$4,500 on the 25th day of February, 1905, without the consent of appellee. These averments would tend to show a breach of the contract by appellant. If appellant conveyed the land to another before the time covered by the option of appellee had expired, and thereby disabled himself from performing the contract on his part, this would amount to a breach of the contract and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹ Transfer denied.

would give rise to an action in favor of appellee for such breach. To be good upon the theory of a breach of contract, the complaint should aver facts which show that, by reason of said breach, appellant prevented the appellee from purchasing the property himself or selling it to another within the time provided in said contract and in accordance with its terms, and that appellee was thereby prevented from earning the commission provided in the contract. It is not averred in the complaint that appellee could and would have purchased the premises himself, or that he could have sold it to another at the price and within the time specified in the contract. It does not therefore appear from any averment of the complaint that appellee was damaged by said breach, as it does not appear that appellee could have earned the commission even though appellant had not broken his contract by conveying the land. The complaint does not proceed upon the theory of a breach of the contract and seek to recover damages resulting therefrom, and, if it did, it would be clearly insufficient upon that theory for the reasons stated.

The complaint clearly seeks to enforce the written contract as modified. It is insufficient upon this theory for the reasons stated in the original opinion.

The petition for rehearing is overruled.

(300 N. Y. 287.)

**FULTON COUNTY GAS & ELECTRIC CO.
v. HUDSON RIVER TELEPHONE CO.**

(Court of Appeals of New York. Jan. 3, 1911.)

1. PLEADING (§ 146*)—COUNTERCLAIM.

Under Code Civ. Proc. §§ 501, 509, defining a "counterclaim," and providing that, where defendant deems himself entitled to an affirmative judgment by reason of a counterclaim, he must demand judgment in his answer, the facts alleged as a counterclaim must be sufficient to constitute a perfect cause of action in favor of defendant and against plaintiff, to sustain judgment against plaintiff which defendant thereby seeks and must demand, and the facts must be alleged as a counterclaim or they will be deemed a mere defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294-296; Dec. Dig. § 146.*]

2. PLEADING (§ 138*)—COUNTERCLAIM.

Under Code Civ. Proc. §§ 495, 500, 501, 503, 504, 514, 529, 720, 739, 974, authorizing a counterclaim verified, as an independent pleading subject to demurrer for insufficiency to constitute a cause of action, and requiring an answer by reply, and providing for the mode of trial of an issue of fact arising under a counterclaim, and giving defendant the right to any provisional remedy as in an action by him, and for judgment on the counterclaim, etc., a counterclaim passes beyond the range of merely answering or defending against or being responsive to the complaint, and an answer alleging a counterclaim is both an answer and a complaint, and in so far as it is a complaint it sets forth a cause of action in favor of defendant against plaintiff, and is without the line of pleading started by the plaintiff.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 138.*]

3. PLEADING (§ 217*)—DEMURRER—RULINGS.

A counterclaim is not a pleading in the action within the rule that a demurrer searches all the pleadings prior to itself for the first fault, so that on the trial of the issues created by the demurrer judgment must be given against the party who committed the first fault, and the court on demurrer to a counterclaim will not pass on the sufficiency of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 540-548; Dec. Dig. § 217.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5409-5411; vol. 8, p. 7756.]

4. INDEMNITY (§ 14*)—CONCLUSIVENESS—ESTOPPEL.

The estoppel of a judgment against two defendants for negligent injury is mutual as between them, and the defendant paying the judgment must, in an action against the other defendant for indemnity, accept the transaction in its entirety and may not deny the facts on which the judgment was recovered, and the other defendant may not relieve itself from liability by presenting a new defense to the original action.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

5. JUDGMENT (§ 668*)—CONCLUSIVENESS—PARTIES CONCLUDED.

A judgment rendered jurisdictionally and unimpeached for fraud is conclusive as to the questions litigated and decided on the parties thereto, and a party relying on the judgment is relieved from the burden of proving the facts therein determined, and an adverse party is barred from disproving such facts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181-1183, 1188-1189; Dec. Dig. § 668.*]

6. JUDGMENT (§ 675*)—CONCLUSIVENESS.

By notice and opportunity to defend, the person notified becomes a party to the action so as to be concluded in any subsequent litigation between the same parties as to all questions determined in the action, which are material to the right of recovery in the subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. § 675.*]

7. INDEMNITY (§ 14*)—CONCLUSIVENESS.

Where defendant and codefendant, in an action for negligent injury, each had an opportunity to defend itself and the other against all liability to plaintiff, a judgment for plaintiff against defendant and codefendant was conclusive proof that defendant was legally liable to plaintiff on the ground adjudicated in the action, and, where the facts through which defendant paying the judgment demanded indemnity from codefendant were not litigated in the action, they might be litigated in an action by defendant against the codefendant for indemnity.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

8. SET-OFF AND COUNTERCLAIM (§ 29*)—"ARISING OUT OF THE TRANSACTION SET FORTH IN THE COMPLAINT"—"CONNECTED WITH THE SUBJECT OF THE ACTION."

In an action for the amount of a judgment against plaintiff and defendant for negligent injury to a third person, paid by plaintiff, a counterclaim for an amount paid by defendant in settlement of actions by others growing out of the same accident does not "arise out of the transaction set forth in the complaint" as a foundation of plaintiff's claim, and is not "connected with the subject of the action."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

within Code Civ. Proc. § 501, authorizing a counterclaim in either of such cases.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49-51; Dec. Dig. § 29.*

For other definitions, see Words and Phrases, vol. 2, pp. 1432-1434; vol. 8, p. 7612.]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the Fulton County Gas & Electric Company against the Hudson River Telephone Company. From an order and judgment of the Appellate Division (130 App. Div. 343, 114 N. Y. Supp. 642), reversing an interlocutory judgment overruling a demurrer to each of two separate counterclaims in the amended answer; defendant by permission appeals on certified questions. Affirmed, and questions answered in part.

See, also, 181 App. Div. 919, 115 N. Y. Supp. 1121.

John A. Delehanty, for appellant. Fred Linus Carroll, for respondent.

COLLIN, J. The action is to recover the sums expended by plaintiff in paying in full the judgment recovered against the plaintiff and defendant herein, in an action against them jointly in which Nathan W. Horning was plaintiff; also, the sum expended by plaintiff for the services and disbursements of its attorneys and counsel and otherwise in defending said Horning action, those sums aggregating, as alleged, \$20,923.47. The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled said demurrer with leave to defendant to answer. The amended answer of defendant, served under said leave, set forth, in addition to denials and defenses, two counterclaims to each of which the plaintiff demurred upon the two grounds that: (1) The counterclaim was not of the character specified in section 501 of the Code of Civil Procedure; (2) the counterclaim did not state facts sufficient to constitute a cause of action. The Special Term rendered a judgment overruling the demurrers to the counterclaims, which the Appellate Division reversed, and the defendant has appealed to this court, under leave of the Appellate Division, which has certified four questions for determination:

"First. Does it appear on the face of the complaint that it does not state facts sufficient to constitute a cause of action?

"Second. Does it appear on the face of the counterclaim set forth in paragraph numbered seventeenth of the defendant's amended answer: (1) That said counterclaim is not of the character specified in section 501 of the Code of Civil Procedure; (2) that said counterclaim does not state facts sufficient to constitute a cause of action?

"Third. Does it appear on the face of the

counterclaim set forth in paragraph numbered eighteenth of the defendant's amended answer; (1) That said counterclaim is not of the character specified in section 501 of the Code of Civil Procedure; (2) that said counterclaim does not state facts sufficient to constitute a cause of action?

"Fourth. Is the interlocutory judgment in this case, overruling the demurrer to the plaintiff's complaint on the ground of insufficiency, the law of the case as to the sufficiency of the complaint?"

The questions designated "First" and "Fourth" assume that we are permitted, under the demurrer of plaintiff to the counterclaim, to determine whether or not the complaint is defective in substance. The learned counsel for the defendant takes and supports with authorities the same position. Those authorities rest their conclusion upon two grounds: The one, a demurrer searches all the pleadings prior to itself for the first fault in pleading, and, upon the trial of the issues created by the demurrer, judgment is to be given against the party who committed that first fault; the other, a counterclaim is a pleading in the action and to the complaint and is subject to the rule that a demurrer reaches back to the first defective pleading. The second ground cannot be sustained. A counterclaim is a statutory remedy. The Code of Procedure created it in an amendment of 1852 of subdivision 2 of section 149 thereof. Such subdivision continued unchanged until it was repealed in 1877, in consequence of the enactment of section 500 of the Code of Civil Procedure. The Code of Procedure in its section 150 contained provisions now represented by section 501 of the Code of Civil Procedure. Under the provisions of the Code of Civil Procedure, which prescribe the fabric and regulate the exercise of a counterclaim, the facts alleged as a counterclaim must be sufficient to constitute a perfect cause of action in favor of the defendant and against the plaintiff and to sustain the judgment against the plaintiff which the defendant thereby seeks and must demand. Sections 501, 509. They must be alleged as a counterclaim in order that they shall not be deemed a mere defense. *Bates v. Rosekrans*, 37 N. Y. 409. They may be verified as an independent pleading where the complaint is not verified. Section 527. They may be demurred to upon the ground that they are not sufficient to constitute a cause of action (section 495) and must be answered by a reply in the substance and form of the answer to a complaint, if defendant shall not have, through default of plaintiff, the judgment he demands. Sections 514, 515. The mode of trial of an issue of fact arising upon a counterclaim is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim

and demanding the same judgment (section 974), and the right of the defendant to any provisional remedy is the same as in an action brought by him against the plaintiff for the said cause of action; and for the purpose of applying therefor the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim is deemed the complaint (section 720). Where a plaintiff under his complaint and a defendant under his counterclaim establish equal demands, the judgment must be in favor of defendant; where unequal demands, the judgment must be in favor of the party establishing the greater demand for the excess; where the defendant defeats the plaintiff's demand and establishes his counterclaim, judgment must be rendered for the defendant accordingly; and where the defendant, in an action upon contract, where the complaint demands judgment for a sum of money only, admits the claim of plaintiff, and sets up a counterclaim, amounting to less than plaintiff's claim, the plaintiff, upon filing an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. Sections 503, 504, 514. The plaintiff may, if the counterclaim exceeds his claim, make an offer of judgment against himself, upon which, if accepted by defendant, the clerk must enter the judgment offered. Section 739. Those provisions avouch that a counterclaim passes far beyond the range of merely answering or defending against or being responsive to the complaint. It may and frequently does admit the entire complaint and stand as the sole litigation between the parties. The answer alleging it is, in effect, both answer and complaint, and in so far as it is a complaint, in so far as it thrusts into the pending action a cause of action in defendant's favor against the plaintiff, it is without the line of pleading started by the complaint, and which, upon demurrer, may be followed back in order that judgment shall be rendered against the party who committed the first fault. It is just that he who does not so plead as to invite an issue cannot compel his adversary to so plead as to accept it, but it is not just that he should be compelled to accept and defend as a cause of action against him that which is not a cause of action and fails, through insufficiency of substance, to charge him with liability. The wisdom of this conclusion may be variously illustrated. It would not be orderly or proper that a defendant might, because of the insufficiency of the complaint, proceed against the demurring plaintiff upon plaintiff's indorsement of a promissory note held by defendant, payment of which had not been demanded, and which had not been protested; or upon a counterclaim wholly inadmissible under section 501 of the Code of Civil Procedure. For the reasons stated, we decline to pass upon the sufficiency of

the complaint and to answer the questions designated "First" and "Fourth."

Turning now to the first subdivision of the question designated "Second." Section 501 of the Code of Civil Procedure provides that the cause of action, which an answer may contain as a counterclaim, must tend in some way to diminish or defeat the plaintiff's recovery and must be: "(1) A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. (2) In an action on contract, any other cause of action on contract, existing at the commencement of the action." We state here, without discussion, the obvious fact that the complaint does not set forth a contract as the foundation of plaintiff's claim. The question, therefore, is: Does the counterclaim arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or is it connected with the subject of the action? The complaint alleges that in July, 1903, each defendant maintained upon a street of Johnstown, N. Y., a line of wires; those of the defendant being telephone wires strung over and across those of the plaintiff which were electric lighting wires. On July 6, 1903, a building to which wires of defendant were attached was burned, and one or more of said wires sagging came into contact with plaintiff's wires at their crossing upon said street so that an electric current was transferred from plaintiff's to defendant's wires and thereby transmitted to the place, where, by reason of the burning of the building, they had fallen to the ground, and Nathan W. Horning came in contact with them thus charged with electricity and was seriously injured. Plaintiff's line was in materials and workmanship properly constructed. Defendant's wires were insecurely attached to the buildings which supported them, were faulty in materials, were inadequately inspected, and at the time of the occurrence were idle and in their position in disobedience to the municipal authorities—of which facts the plaintiff had not, and by any reasonable inspection of its own lines or wires could not have, acquired knowledge. The injuries to said Horning resulted solely from the negligent acts and omissions of defendant in the construction and maintenance of its wires. In August, 1903, said Horning sued these parties jointly to recover his damages from said injuries. They separately defended, but Horning recovered a judgment against them, which the Appellate Division and this court, upon appeals, affirmed, and the judgments were collected wholly and entirely from the plaintiff here. By reason of the construction and condition of defendant's wires and the injuries to said Horning and his consequent action, plaintiff was unjustly and inequitably compelled to pay out the moneys aggregating said sum of \$20,923.47

and is entitled to be indemnified in this action by said defendant and demands a judgment directing defendant to indemnify plaintiff by paying said total amount. The counterclaim in question admits the existence of defendant's wires, their crossing of the said street, their uses, the burning of the building, and the consequent falling of said wires charged with electricity through contact with wires underneath them, extending along the said street, the contact between said Horning and said wires and his serious injuries thereby, the suit of Horning, the appeals and judgments, substantially as alleged in the complaint. It alleged that its line of wires was of approved materials and construction; the plaintiff conducted along said street by its wires high tension currents of electricity of voltage far in excess of the capacity of its wires, likely to cause the death of any human being coming in contact therewith, and negligently maintained in divers specified particulars its line; the said negligence of this plaintiff in the construction, maintenance, and operation of its lines was the primary and proximate cause of the injuries sustained by Horning; the allegations in the complaint concerning the defendant and its alleged negligence and plaintiff's alleged freedom from negligence are substantially the same as the allegations in the pleadings in the action of Horning against these parties and were litigated in that action, in which it was determined that the plaintiff here was liable to said Horning solely because of its own fault and neglect; at the time while and the place where Horning was in contact with the wire Paul Behrendt was in contact with said wire or Horning, or with both, and thereby was seriously injured; in August, 1908, Behrendt sued these parties jointly to recover his damages from said injury, upon facts and issues substantially the same as those involved in the Horning action; the attorneys for the respective parties to the two actions were the same; after the entry of the judgment of the trial court and before the final determination in the Horning action the plaintiff here agreed with said Behrendt for the settlement of his claim in the event that this court affirmed the Horning judgment, and the defendant here thereafter became a party to such agreement, which recited that the two actions were claimed to have arisen out of substantially the same occurrences, and a liability in the one would probably be found to exist in the other, and provided that in the event of said affirmance Behrendt's damages should be fixed at \$750 against each defendant separately; each of the parties paid said sum, and thereby said action was settled and discontinued, and plaintiff released from all claim for damages sustained by Behrendt; defendant paid said sum solely "on account of damages caused by negligence for which the plaintiff was primarily liable, wholly responsible, and resulting directly

from and in consequence of conditions created entirely by the affirmative wrongful acts of this plaintiff hereinbefore more particularly set forth and described."

The claim of the plaintiff is that the defendant is liable to and must pay it \$20,923.47. The transaction set forth in the complaint as the foundation of that claim is the payment by plaintiff, through the coercion of the process and judgments of the courts, of that sum; the commencement by Horning of his action and the pleadings, proceedings, and judgments therein; the facts which under the pleadings, the proof, and the submission to the jury underlie the judgments and such other and additional facts, consistent with those upon which the judgments are founded, if existing, as make the defendant liable to the plaintiff. While it is true that the complaint does not state what the facts were upon which the jury in the Horning action rendered its verdict, or what the additional facts which compel the defendant to indemnify the plaintiff are, yet, manifestly, the foundation of plaintiff's claim is that it paid the sums under the compulsion of that action against it and this defendant, and the judgments therein which are set forth in the complaint and its right to indemnity therefor from the defendant. The plaintiff must in this action accept that transaction in its entirety. The facts upon which the judgment in the Horning action was recovered are an essential and ineradicable part thereof, which the plaintiff may not deny, contradict, abandon, or supplant with other facts. Obviously, the defendant may not, upon the trial of this action relieve itself from liability to the plaintiff by proving and obtaining from the jury its verdict that Horning was guilty of contributory negligence, and, therefore, not entitled to and should not have been paid by plaintiff any sum as damage; or that the plaintiff in this action was free from any negligence or obligation through which it could have become liable to Horning. The estoppel of the judgment in the Horning action is mutual as between these parties, the defendants therein. If this defendant is by that judgment concluded on the question of Horning's damages and this plaintiff's liability, this plaintiff is concluded thereby as to the ground of its liability as found by the verdict of the jury and is not permitted to free itself from such verdict and the ground thereof or reopen the issues litigated and adjudicated in the action in which the judgment was rendered. Sound public policy requires that different judicial decisions shall not be made on the same state of facts, and that a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the

facts therein determined. The plaintiff and defendant were parties to the judgment recovered against them by Horning. Each had the opportunity in that action to defend itself and the other against all liability to Horning. A notice from either to the other to assume in its behalf the defense of that action would have been superfluous and inoperative upon their rights and liabilities as between themselves; and the principle is well settled that, by notice and opportunity to defend an action, the party notified becomes a party thereto, so as to be concluded in any subsequent litigation between the same parties as to all questions determined in the action which are material to the right of recovery in the second action, and the judgment in the first action is conclusive upon the defendant in the first action in the character of plaintiff in the second action, as to the facts thereby determined. Therefore, if it appears that the judgment in the Horning action was based upon a finding of fact fatal to the recovery in this action, it cannot be maintained. The judgment in the Horning action is conclusive proof that the plaintiff in this action was legally liable to Horning upon the ground adjudicated in that action, if a ground were adjudicated, in the amount of the verdict therein. The record therein may disclose a state of facts showing that the defendant is or is not liable over to the plaintiff. It may disclose that the facts through which the plaintiff demands the indemnity from the defendant were not litigated therein, and, if they were not, they may be litigated in this action through evidence not produced thereat; and, if it is not clear from the record therein upon what ground damages were recovered against the plaintiff here, parol evidence is admissible to show what questions were actually litigated and decided.

The soundness of our reasoning and conclusions is sustained by authorities (*Oceanic S. N. Co. v. Compania Trans. Espanola*, 134 N. Y. 461, 81 N. E. 987, 30 Am. St. Rep. 685; *Mayor, etc., of N. Y. v. Brady*, 151 N. Y. 611, 45 N. E. 1122; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422; *Mayor,*

etc., of Troy, v. Troy & L. R. R. Co., 49 N. Y. 857; *Prescott v. Le Conte*, 83 App. Div. 482, 82 N. Y. Supp. 411, affirmed 178 N. Y. 585, 70 N. E. 1108), and is confirmed by the decisions of other jurisdictions (*Boston & M. R. R. Co. v. Sargent*, 70 N. H. 299, 47 Atl. 605; *Boston & M. R. R. Co. v. Brackett*, 71 N. H. 494, 53 Atl. 304; *Washington Gas L. Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.) It is plain and certain, without further discussion, that the counterclaim under consideration did not arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim. Nor is it connected with the subject of the action, which is the right of the plaintiff to be indemnified and the obligation or duty of the defendant to indemnify it. *Dinan v. Coneys*, 143 N. Y. 544, 38 N. E. 715; *Glen & H. Manfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *People v. Dennison*, 84 N. Y. 272; *Ter Kulle v. Marsland*, 81 Hun, 420, 31 N. Y. Supp. 5.

The question in the first subdivision of the question designated "Second" should be answered in the affirmative. The counterclaim set forth in paragraph numbered eighteenth of the defendant's answer is identical in substance with that in paragraph numbered seventeenth, except therein William C. Case was the person injured. Our reasoning requires, therefore, that the question in the first subdivision of the question designated "Third" should be answered in the affirmative. As the answers indicated in this opinion dispose of this appeal, it becomes unnecessary to further discuss or answer the questions in the second subdivision of each of the questions designated "Second" and "Third." The order appealed from should be affirmed, with costs to plaintiff. The questions constituting the first subdivision of each of the questions designated "Second" and "Third" are answered in the affirmative. The other questions are not answered.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

Order affirmed, etc.

(176 Ind. 190)

WOESSNER et al. v. BULLOCK. (No. 21,783.)¹

(Supreme Court of Indiana. Feb. 23, 1911.)

1. STATUTES (§ 5*)—LEGISLATURE—POWER AT SPECIAL SESSION.

The power of the Legislature when convened in special session by proclamation of the Governor, as authorized by Const. art. 4, § 9, is not limited to any particular subject of legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 4; Dec. Dig. § 5.*]

2. CONSTITUTIONAL LAW (§ 16*)—CONSTRUCTION.

The court in construing a constitutional provision, the meaning of which is ambiguous, may examine the proceedings of the constitutional convention to aid in the interpretation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. § 16.*]

3. STATUTES (§ 35*)—LEGISLATURE—ENACTMENT OF LAWS—"NEXT SESSION."

The words "at its next session," in Const. art. 5, § 14, authorizing the Legislature to pass bills over the Governor's veto, and providing that, when the Governor within five days after the adjournment of the Legislature vetoes a bill and files it in the office of the Secretary of State, the latter shall lay the same before the Legislature "at its next session" as if it had been returned by the Governor, mean the first session following, whether regular or special, and a bill vetoed by the Governor after the adjournment of the Legislature must be acted on at the following special session, and the action of the Legislature in acting on it at the regular session following the special session and passing it over the Governor's veto is ineffectual.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 38; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4804, 4805.]

4. STATUTES (§ 30*)—LEGISLATURE—ENACTMENT OF LAWS.

Where the Governor within five days after the adjournment of the Legislature filed a bill with his objections thereto in the office of the Secretary of State, he thereby prevented the bill from becoming a law, unless at the next session of the Legislature it shall be approved by a majority of the members of each House, and the failure of the Secretary of State, in the absence of any collusion with the Governor, to lay a bill, vetoed by the Governor within five days after the adjournment of the Legislature, before the Legislature at its next session, does not make the bill a law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 32; Dec. Dig. § 30.*]

5. CONSTITUTIONAL LAW (§ 14*)—CONSTRUCTION.

The court in construing a constitutional provision may not substitute for the clear language of the Constitution its own notions of what the provisions should have been.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 11; Dec. Dig. § 14.*]

6. EVIDENCE (§ 33*)—JUDICIAL NOTICE—PROCEEDINGS OF LEGISLATURE.

Where the enrolled bill on file in the office of the Secretary of State with the Acts of the Legislature of 1909 is signed by the presiding officers of the Legislature of 1907, and shows on its face that it was not signed by the Governor, but was passed notwithstanding his objections by each House in 1909 as authenticated by the presiding officers of that Legislature, the court must take judicial notice of the

fact that the bill was passed by the Legislature of 1907, and presented to the Governor, who within the prescribed time filed it in the office of the Secretary of State with his objections thereto, and that it was not acted on by the extra session held in 1908, so that the court must adjudge that the bill did not become a law because not acted on at the special session.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 47; Dec. Dig. § 33.*]

Jordan, J., dissenting.

Appeal from Circuit Court, Marion County; Chas. Remster, Judge.

Action by Henry W. Bullock against Jacob Woessner and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Holtzman & Coleman, Willis Nusbaum, Miller & Dowling, and Edw. B. Raub, for appellant. Henry W. Bullock, for appellee.

MORRIS, J. Appellant Woessner, sheriff of Marion county, on March 20, 1909, filed in the office of the auditor of Marion county a claim for allowance by the board of commissioners for having committed a number of prisoners to the jail and also for having discharged a number of prisoners therefrom. His claim was filed pursuant to the provisions of the act of February 11, 1909 (Acts 1909, p. 8). This act, among other things, provides that: "The sheriffs * * * shall tax and charge the following fees to be paid by the county, except as hereinafter provided. Such amounts to be designated 'sheriff's fees,' which shall be the property of and belong to the sheriffs. * * * For every person committed to jail, twenty-five cents. For discharging each prisoner from jail, twenty-five cent." These fees are commonly known as sheriff's "in and out" fees. Appellee Bullock, a taxpayer, filed his complaint in the Marion circuit court against Woessner, the board of commissioners, the auditor, and the treasurer of the county to enjoin the allowance and payment of the claim. In his complaint he avers that Woessner's claim is founded on the provisions of the above act of 1909, and that this act is invalid because it was not passed by the General Assembly in conformity with the provisions of section 14, art. 5, of the Constitution of Indiana; that the bill for the act was passed by the General Assembly of 1907, and on the last day of the session was presented to the Governor, who, within five days thereafter, filed the same with the Secretary of State with his objections thereto; that thereafter on September 18, 1908, the General Assembly met in extra session on the call of the Governor, but this bill was not laid before the General Assembly during that session by the Secretary of State, neither was it called for by the General Assembly, nor was any action taken on it; that the General Assembly met in regular session January 7, 1909, on which day the Secretary of State laid the same before it, which passed the bill over the Gov-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ernor's objections thereto, on February 11, 1909. Each of the defendants filed a demurrer to the complaint for want of facts, which demurrers were overruled, and, defendants declining to plead further, judgment was rendered in favor of plaintiff, enjoining the allowance and payment of any portion of appellant's claim. From that judgment, Woessner appeals to this court, and assigns as error the ruling of the lower court in overruling his demurrer to the complaint.

But one question is involved in this appeal. If the act of 1909 was passed by the General Assembly in accordance with the provisions of section 14, art. 5, of our Constitution, the circuit court erred; otherwise, the judgment should be affirmed.

Section 14, art. 5, of our Constitution reads as follows: "Every bill which shall have passed the General Assembly shall be presented to the Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the House in which it shall have originated, which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the Governor's objections, to the other House, by which it shall likewise be reconsidered; and if approved by a majority of all the members elected to that House, it shall be a law. If any bill shall not be returned by the Governor within three days, Sunday excepted, after it shall have been presented to him, it shall be a law without his signature, unless the general adjournment shall prevent its return, in which case it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State, who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. But no bill shall be presented to the Governor within two days next previous to the final adjournment of the General Assembly."

The phrase "at its next session" means the first session following, whether it be a regular or special one. The provisions of our Constitution with reference to regular and special sessions are found in article 4, § 9. The power of the General Assembly to legislate on any subject when convened in special session is not limited by the Constitution. Const. Ind. art. 4, § 9; Cooley, Const. Lim. (7th Ed.) 222; Morford v. Unger, 8 Iowa, 82; People ex rel. Carter v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836. Had it been intended by the framers of the Constitution to limit the consideration of bills disapproved by the Governor to regular sessions, we should, naturally, expect such intention to be expressed by providing for such consideration by the next regular session, or

by the next Assembly, rather than the "next session." People, etc., v. Rice, supra. If the meaning of a constitutional provision is doubtful, courts may examine the proceedings of the convention which framed the provision, to aid in its interpretation. A consideration of pages 1447 and 1448, vol. 2, Debates Indiana Constitutional Convention, reveals the fact that the members of the convention understood that the words "next session" meant either a called or regular one. Counsel for appellant do not assert that this construction is erroneous, but contend that under the facts in this cause, when the Secretary of State failed to lay the bill, with the Governor's objections, before the Assembly at its session of 1908, it became a law; that the Legislature is under no duty to pursue its bills in order to pass them over the Governor's objections; that the Governor is under a duty to follow up such bills in order to defeat them; that, in doing so, he acts through the Secretary of State, who, for this purpose, is made his representative by the Constitution, and this bill, which passed both Houses in the General Assembly of 1907, became a law when the special session adjourned, without the Secretary of State having laid the bill before it, regardless of any action thereon by the Assembly of 1909.

This contention cannot prevail. When the Governor, within five days after the adjournment of the General Assembly, filed the bill, with his objections thereto, in the office of the Secretary of State, he thereby prevented the bill from becoming a law, unless, at the next session of the Assembly, on reconsideration, it should have been approved, notwithstanding the Governor's objection, by a majority of the members of each House. The Constitution requires the concurring acts of the two Houses of the Assembly, and of the Governor in approving, or determining to withhold his approval, in the manner pointed out. When the Governor files such bill in the office of the Secretary of State, his power over it ends. Tarlton v. Peggs (1862) 18 Ind. 24; People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377; Powell v. Hays, 83 Ark. 448, 104 S. W. 177; State v. Whisner, 35 Kan. 271, 10 Pac. 852; People v. McCullough, 210 Ill. 488, 71 N. E. 602; 36 Cyc. 962. Nor can it be justly said that the Secretary of State is, in any manner, the agent or representative of the Governor. He is by the fundamental law required to keep and preserve the manuscripts containing the enrolled acts, etc., of the General Assembly. If he represents any department of the government, it would be more logical to treat him as the representative of the General Assembly because he is the custodian of its enactments. Tarlton v. Peggs, supra.

Counsel for appellant say that "it is unreasonable to assume that, in any possible case, the framers of the Constitution intended to place it in the power of the Governor, in collusion with the Secretary of State, to

defeat legislation as completely as if the veto were absolute." No fault can justly be found with this contention; but the facts here do not disclose such a condition. If there were a collusive attempt on the part of the Governor and Secretary of State to defeat action by the General Assembly on a bill, it cannot be doubted that the General Assembly could find a way to procure the bill and objections of the Governor thereto from the office of the Secretary of State. Section 16, art. 4, and section 7, art. 6, Const. Ind.; Burns' Ann. St. 1908, § 9193; *State v. Junkin*, 79 Neb. 532, 113 N. W. 256. There is nothing suggested by the facts of this case to warrant the slightest criticism of the Governor. The Constitution clothes him with certain legislative power, and in no respect did he go beyond the limit of his authority. Nor is there anything in this case which would warrant criticism of the Secretary of State in much greater measure than should be meted out to the General Assembly. The Acts of 1907 were published April 10, 1907. They did not contain the act in controversy. The only inference to be legitimately drawn from its absence was its disapproval by the Governor and its filing with the Secretary of State for consideration at the next session. In this particular instance, the members of the Assembly at the session of 1907 and 1908 were the same except as to those who may have died or resigned in the interim. Even the appellant was bound to know the condition of this bill. The reasonable presumption to indulge is that the Secretary of State and members of the General Assembly either forgot about the condition of this bill, or misconstrued the constitutional provision. The sheriffs of the state had a special interest in this bill. Had any one of them, during the 1908 session, suggested the matter either to the Secretary of State or the members of the Assembly, it would be presumed that the bill would have been laid before the Assembly and considered.

It is also suggested by appellant's counsel that the practical disadvantages to the public which might follow in sustaining appellee's theory should be considered. It is sufficient to say that constitutions import the utmost discrimination in the use of language, and courts are not warranted in substituting for the clear language of the instrument their own notions of what it should have been. *Greencastle Township v. Black*, 5 Ind. 557; *Cooley*, Const. Lim. (7th Ed.) 93.

It is further contended by appellant that, inasmuch as the enrolled act in the office of the Secretary of State shows on its face that it was duly passed by both Houses, and properly authenticated by the presiding officers of each, the court will not go back of the act, as thus appearing, but will conclusively presume that all necessary steps were taken; that the demurrer only admits the truth of the facts alleged in the complaint that were

properly pleaded; that the allegation of the complaint that the bill was vetoed by the Governor in 1907, and not again voted on in the session of 1908, is incapable of legal proof, and hence not properly pleaded; the complaint stands, therefore, as if it merely alleged that this bill was passed in 1907, and was presented to the Governor. This contention cannot prevail. The enrolled bill, on file in the office of the Secretary of State, with the Acts of 1909, is signed, not by the presiding officers of the Assembly of 1909, but by the officers of the Assembly of 1907, and on its face shows it was not signed by the Governor, but was passed, notwithstanding the objections of the executive, by each House, in 1909, which fact is authenticated by the proper presiding officers of each House at that session. This court knows, regardless of the allegations of the complaint, that this bill was passed by both Houses of the General Assembly in 1907, and presented to the Governor, who, within the prescribed time, filed it in the office of the Secretary of State, with his objections thereto; that it was not acted on by the Assembly at its next session held in September, 1908, but was considered by the Assembly of 1909, and passed by each House thereof, over the objections of the Governor. *State v. Wheeler*, 172 Ind. 578, 89 N. E. 1; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710.

Because the General Assembly, at its session in 1908, did not pass the bill, notwithstanding the objections of the Governor, it never became a law, and the circuit court did not err in overruling appellant's demurrer to the complaint.

Judgment affirmed.

JORDAN, J. (dissenting). I am unable to concur in the result reached in this case by the majority of the court.

The question involved is not one merely affecting the right of appellant to the fees which he claims, but is one of great public concern, namely: Can the will of the people, expressed through their duly constituted representatives composing the Legislature, be defeated by the mere failure or neglect of the executive department to comply with the express mandate of our Constitution?

The conclusion of the majority opinion is that the act in dispute was not a law because the General Assembly at the session of 1908 did not pass the bill over the Governor's objection. But certainly it cannot be said that the Legislature should have acted in a matter when it was afforded no opportunity so to do. The question in respect to the valid existence of the statute involved hinges upon the requirements of section 14 of article 5 of our Constitution, which is set out in the majority opinion. It will be observed that by this section it is provided: "Every bill which shall have passed the General Assembly shall be presented to the

Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the House in which it shall have originated, which House shall enter the objections, at large, upon its journals, and proceed to reconsider the bill. * * * *If any bill shall not be returned by the Governor within three days, Sunday excepted, after it shall have been presented to him, it shall be a law without his signature, unless the general adjournment shall prevent its return, in which case it shall be a law, unless the Governor, within five days next after such adjournment, shall file such bill, with his objections thereto, in the office of Secretary of State, who shall lay the same before the General Assembly, at its next session, in like manner as if it had been returned by the Governor.*" (Our italics.)

It will be observed that the part of section 14 which I have embraced in italics deals with the return of the bill by the Governor after it has been presented to him. If it, after being presented to the executive, is not returned by him within three days, Sunday excepted, the Constitution declares that it shall become a law without his signature unless the general adjournment shall prevent its return, in which case the Constitution points out or prescribes the course which the Governor shall pursue, which is that he shall file such bill, together with his objections, in the office of the Secretary of State, who shall lay the same (meaning the bill and the Governor's objections thereto) before the General Assembly at its next session, "in like manner as if it had been returned by the Governor."

The manifest purpose or object of the Constitution in requiring that a bill, after it is passed by the General Assembly, shall be presented to the Governor, is to afford him an opportunity for considering its provisions and thereupon either approve by fixing his signature, or, if he disapproves, by withholding his signature, and return it, with his objections, to the House in which it shall have originated, etc. Requiring the return of a disapproved bill as provided by the Constitution is for the evident purpose of affording the General Assembly an opportunity to reconsider it and pass it notwithstanding the executive's objections and thereby prevent his veto from becoming absolute.

The Governor of the state is the head of the executive department. *Massey v. Dunlap*, 146 Ind. 350, 44 N. E. 641. The office of the Secretary of State is but a subdivision of the executive department. *French v. State ex rel.*, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113.

It is disclosed by the record in this case that the bill in question, after its passage by the General Assembly at its session in 1907, was presented to the Governor and by him received, but was not returned by him to the Legislature with his objections thereto on account of the general adjournment of

that body. Accordingly, as shown, within five days after the general adjournment the Governor filed the bill with his objections thereto in the office of the Secretary of State. In September, 1908, the Legislature, as it appears, was convened in special session upon the call of the Governor, at which session, under the provisions of the Constitution, the bill, together with the Governor's objections thereto, was required to be laid before the Legislature or returned to that body by the Secretary of State "in like manner as if it had been returned by the Governor."

The return of a bill disapproved by the executive to the General Assembly is quite essential under the Constitution in order to defeat it before becoming a law; as much so as is its presentation to him after its passage in order that it may become a law under the constitutional requirement.

When the Governor disapproved the bill herein involved, he was, under the circumstances as shown in this case, empowered by the Constitution to file it, with his objections thereto, within five days next following the adjournment of the General Assembly, in the office of the Secretary of State, which office, as heretofore shown, is a subdivision of the executive department. After the bill was filed in the Secretary's office, the Constitution pointed out, or in other words constituted the Secretary of State, the means or agency through which the bill with the Governor's objections thereto should be returned to the Legislature at the session next following. The return, according to the Constitution, was to be in like manner as if it had been returned by the Governor had he vetoed it when the Legislature was in session. Such return, as we have previously said, was to afford that body at its next session an opportunity to take such action upon the vetoed bill as the Constitution provides shall be had. The bill was not returned or laid before the Legislature at the special session of 1908; consequently, no opportunity was afforded that body to reconsider it and pass it over the Governor's objections as authorized by the Constitution. In my opinion, under the circumstances it must necessarily follow that at the close of this special session the bill, under the circumstances, became a law by the express mandate of the Constitution, regardless of the Governor's objections thereto.

If this is not true, then the veto of the Governor became absolute—a result in no manner contemplated by our Constitution, or by any other, so far as I have been able to discover. It certainly was not intended by the framers and ratifiers of the Constitution that the Secretary of State by sheer neglect or failure to comply with the constitutional mandate in respect to the return of the bill could thereby defeat the will of the Legislature, or, rather, that of the people as expressed through that body. If this

is true, then our fundamental law should be amended or changed in order to prevent such a result in the future.

Doubtless the failure of the Secretary of State in this case to comply with the duty enjoined upon him by the Constitution was due to a mistake, and not to any purpose or intention on his part to prevent the bill from becoming a law; but the cause to which his failure or neglect may be attributed is not material. The result thereof must be the same regardless of the cause which produced it.

It certainly is untenable and unreasonable to assert that it was in any manner the duty of the Legislature, at the special session of 1908, to go upon a voyage of discovery in order to ascertain what action the Governor had taken in respect to this bill which had been passed at the session of 1907 and presented to him at that session, or to see that the Secretary of State return it to the Legislature as required by the Constitution. It had a right to assume that, if the bill had been vetoed by the Governor and filed with the Secretary of State as authorized, that official would discharge his constitutional duty and return the bill at the special session for legislative action. It is wholly untenable to assert or hold that the fact that the act in question did not appear in the volume containing the laws passed at the session of 1907 was notice to the Legislature, either actual or constructive, that the bill for the act had been vetoed by the Governor. Such fact could afford the legislative department no notice whatever. Hence it cannot in reason be said that that body was put upon inquiry, and that it was its duty to look after the bill and cause the Secretary of State to return it as provided, and, if he did not, to take proceedings against him, as the majority opinion holds, in order to coerce him to discharge his duty.

Tarlton v. Peggs, 18 Ind. 24, relied upon, as I view it lends no support to the majority opinion. The sole question involved in that case was in respect to the power of the Governor, after he had filed the act with the Secretary of State, to file his objections thereto and thereby defeat it, as was claimed.

In my opinion the act involved is valid, and the judgment below should be reversed.

(175 Ind. 672)

SKINNER et al. v. SPANN. (No. 21,583.)¹
(Supreme Court of Indiana. Feb. 21, 1911.)

1. WILLS (§ 449*)—CONSTRUCTION—PARTIAL INTES- TACY.

The court in construing a will must so interpret it as to avoid partial intestacy, unless the language compels another construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

2. WILLS (§ 440*)—CONSTRUCTION—INTENT OF TESTATOR.

The court in construing a will must, if possible, discover the primary purpose and intention of testator, and give effect thereto as he has expressed the same in the will, if it can be done without contravening a principle of public policy or an unyielding rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

3. WILLS (§ 441*)—CONSTRUCTION—MEANING OF LANGUAGE.

The court in construing a will must consider together all the parts thereof, and when necessary to ascertain testator's intention, it may look to the circumstances under which the will was executed, as to the condition of testator and his property, family, and the objects of his bounty, and place itself in the position testator occupied at the time of the execution of his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.*]

4. WILLS (§ 450*)—CONSTRUCTION—MEANING OF LANGUAGE.

A will should be so construed as to give effect to all the provisions thereof, and, if possible, it must not be interpreted so as to render any part thereof superfluous, absurd, and meaningless.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 450.*]

5. WILLS (§ 435*)—CONSTRUCTION—RULES OF CONSTRUCTION.

Rules governing the construction of wills are intended in cases of doubt to serve as aids to the court in determining the intention of testator, where such intention is not clearly disclosed by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 946; Dec. Dig. § 435.*]

6. WILLS (§ 436*)—CONSTRUCTION—PRESUMPTIONS.

In the absence of a showing to the contrary, the court construing a will may assume that testator was the scrivener thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1016; Dec. Dig. § 436.*]

7. WILLS (§ 456*)—CONSTRUCTION—PRESUMPTIONS.

The court in construing a will must presume that testator acted in the light of the well-settled legal meaning of the words employed by him, unless there is some provision in the will repelling the presumption.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. § 456.*]

8. WILLS (§ 449*)—CONSTRUCTION—INTESTACY.

A will recited that testator thereby declared the following disposition of his property. He gave all his personal property to his wife absolutely, and the rents of undivided real estate for her use for life, and authorized her to sell the real estate, if necessary for her support or for the benefit of the estate, and on her death the property should go to nieces and nephews, and he gave designated real estate to a sister on condition that she should present no claim against his estate. Testator, at the time of the execution of his will, was 70 years old and had no children. His father and mother were dead, and all his brothers and sisters were dead, except the one mentioned in the will. Held to show testator's intention to dispose of all of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.*]

¹For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
²Rehearing denied, 96 N. E. 242.

9. WILLS (§ 617*)—ESTATES DEVISED—LIFE ESTATE.

A devise to testator's wife of the rents of land for her use for life, coupled with a power to sell the same if necessary for her support or if advantageous to the estate, is not reduced below that of a life estate merely because of the use of the words "for her use for life."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1431-1435; Dec. Dig. § 617.*]

10. WILLS (§ 564*)—PROPERTY DEVISED—INCOME AS INCLUDING CORPUS.

The rule that a devise of the rents and profits of land for the use of the devisee is equivalent to a devise of the land itself, and carries a legal title to the devisee, is one of construction which may be rebutted by any clear expression in the will to the contrary.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1229; Dec. Dig. § 564.*]

11. WILLS (§ 600*)—ESTATE CREATED—FEE—POWER OF SALE.

A power of sale conferred on a devisee is, as a general rule, inconsistent with the intention of testator to invest the devisee with a fee-simple title.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1335-1339; Dec. Dig. § 600.*]

12. WILLS (§ 634*)—CONSTRUCTION—ESTATES DEVISED—VESTING.

Testator gave to his wife absolutely all his personal estate and the rents of undevisee real estate for life, with power to sell, if necessary for her support or for the benefit of the estate. He provided that on her death all the property referred to as devised to the wife for her use for life should be divided between his nieces and nephews. He devised described real estate to a sister on condition that she should assert no claim against his estate. *Held*, that the wife acquired a life estate in testator's real estate, except that devised to his sister, coupled with the power of disposition for the purposes designated, and at testator's death a fee simple to the lands devised to the wife for life vested in the nieces and nephews, subject to the life estate of the wife, and to the power of sale, but the enjoyment by the nephews and nieces of the lands devised was postponed until the death of the wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.*]

13. WILLS (§ 443*)—CONSTRUCTION—MEANING OF WORDS.

The doctrine of ejusdem generis, if applicable to the construction of a will, may not contravene the actual intention of testator as ascertained from the entire provisions and scope of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 960; Dec. Dig. § 443.*]

14. WILLS (§ 565*)—CONSTRUCTION—ESTATES ACQUIRED—"PERSONAL PROPERTY."

Testatrix gave specific personal property and specified sums to beneficiaries, and directed the executor to sell the remainder of household furniture, goods, chattels, and stock, and to convert "all other personal property" into money and divide the same equally between two beneficiaries. *Held*, that the term "personal property" was sufficiently comprehensive to include all goods, chattels, notes, bonds, mortgages, choses in action, and money possessed by testatrix at the date of her death, so that all her personal property was disposed of by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1233; Dec. Dig. § 565.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

15. APPEAL AND ERROR (§ 239*)—PRESENTATION OF QUESTIONS BELOW—COSTS.

The court on appeal in a suit for the construction of a will may not disturb the judgment for costs where no motion was made in the court below to tax any costs against the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 239; * Costs, Cent. Dig. §§ 804, 806, 809, 810.]

Appeal from Probate Court, Marion County; F. B. Ross, Judge.

Action by Thomas H. Spann, executor of Agnes C. Brown, deceased, against Effie C. Skinner and others for the construction of the will of decedent and of the will of her deceased husband, James W. Brown. From a judgment construing the wills, certain of the defendants appeal. Affirmed.

E. D. Salsbury, Philip Wilkinson, Jameson & Hay, and W. A. Bastian, for appellants. Miller, Shirley & Miller, Stafford & Arthur, Walter S. Bent, Gavin, Gavin & Davis, and Lewis C. Walker, for appellee.

JORDAN, J. This is an appeal prosecuted by appellants, Effie C. Skinner and Georgiana Smith, from a judgment in the probate court of Marion county, Ind., whereby the last wills of James W. Brown and Agnes C. Brown, deceased, were each construed and interpreted by that court. The proceedings were instituted by appellee, Thomas H. Spann, the executor of the will of Agnes C. Brown. All persons concerned in the interpretation of either or both of these wills, so far as the same were in controversy, were brought before the lower court by the complaint of the executor and by the five complaints of cross-complainants. The issues raised by all of these pleadings were in respect to the proper construction or interpretation of the respective wills. The facts alleged in the complaints in question in relation to the real estate owned by James W. Brown and the property remaining on hand at the death of Agnes C. Brown are substantially the same. There was a special finding of facts by the lower court and conclusions of law thereon. To these conclusions, and each of them, the appellants herein separately excepted. Over their exceptions the court rendered its final judgment and decree, whereby it construed and interpreted the provisions of the two wills in controversy substantially as follows:

That the said Agnes C. Brown, at the time of her death, was the absolute owner of all the personal estate of every kind and nature then in her possession and which had been inventoried by her executor, Thomas H. Spann, except the sum of \$15,000 in notes and moneys, arising from the sale of real estate sold by her under the power conferred by the will of James W. Brown. That prior to the death of Agnes C. Brown she was the

owner of a life estate in all the real estate of which her husband, James W. Brown, died seised, except certain described real estate in the city of Indianapolis, which by item 8 of the will of her said husband was devised to his sister, Margaret M. Sprole, and except, also, the real estate which she had sold under authority of the will during her lifetime. The said Agnes C. Brown was also, in addition to her life estate in said real estate, invested with the power to sell and convey any thereof except that devised by James W. Brown to his sister, Margaret M. Sprole, and to reinvest the proceeds thereof according to her judgment for the betterment of the estate and to increase the income thereof. That upon the death of the testator, James W. Brown, the absolute title and ownership in and to the fee simple of the real estate of which he died seised, subject to the life estate and power of sale aforesaid mentioned, vested in the nieces and nephews of the testator, James W. Brown, as mentioned in item 2 of his will, to wit, Nellie M. Johnson (only child of John B. Munson, nephew of said James W. Brown) an undivided one-eighth, etc. Here the decree names the various persons and their interest, who, under item 2 of the will of James W. Brown, were invested with the fee in and to the real estate devised for life to his wife, Agnes C. Brown, and herein in controversy; and also names certain children who succeeded to and acquired the interest of their deceased father, who was a beneficiary under item 2 of the will of James W. Brown, and also decrees that the cross-complainants Alpharetta Munson and Kate Munson, by the death of said Charles Munson, husband of said Alpharetta and father of said Kate, succeeded to and became seised of the entire interest of said Charles Munson in the real estate so devised to him by the will of said James W. Brown, in the following proportions, to wit, each the undivided one-sixteenth thereof. The real estate of which the said James W. Brown died seised and which at the death of his wife, Agnes C. Brown, remained unsold, is described and set out in the decree. It is further decreed that Thomas H. Spann, executor of the last will of Agnes C. Brown, as such executor, is entitled to and does hold as a part of the assets of the estate of said Agnes C. all the personal estate which has come into his hands as such executor, including all of the money, notes, accounts, stocks, bonds, choses in action, and all other personal property of any kind and character to be by him disposed of according to the terms of the will of Agnes C., except the sum of \$15,600 in notes and moneys, which represents the proceeds of the real estate sold by Agnes C. Brown in her lifetime under her said husband's will.

It is further adjudged that neither of the cross-complainants, Georgiana Smith nor Effie C. Skinner (appellants herein), has any

interest in any of the real estate described in the complaint or cross-complaints, or in any of the personal assets which have come into the hands of the executor of Agnes C. Brown, save and except that the said Effie C. Skinner is entitled to have and receive upon the settlement of the estate of Agnes C. Brown, the sum of \$4,000, which is especially devised to her by the will of said Agnes C. Brown; that all of the personal estate of Agnes C. Brown of every kind and nature, including money, notes, accounts, stocks, bonds, choses in action and all other personal property of every kind and character which have come into the hands of Thomas H. Spann as executor of the will of said Agnes C. Brown, or which have been by him inventoried as a part of the assets of said estate, except the sum of \$15,600 in notes and moneys above referred to is by said executor to be held in trust for the following purposes, to wit: (1) Payment of costs, etc. (2) Payment of the debts of the decedent, Agnes C. Brown. (3) The payment and satisfaction of the specific legacies and bequests created by the will of Agnes C. Brown. (4) That all the residue of her said personal estate, if any, shall be by the executor, upon the settlement of the estate, equally divided between and paid over to the defendants, the Board of Home Missions of the Presbyterian Church in the United States of America and the Board of Home Missions and Church Extension of the Methodist Episcopal Church.

Some of the material facts contained in the special finding of the court may be summarized as follows: James W. Brown and Agnes C. Brown were husband and wife. They were married in the year 1874, at which time Mr. Brown was 50 years of age and his wife, Agnes C., 33 years old. Neither of them had been previously married. No child was the offspring of their marriage. James W. Brown died on December 5, 1891, in Marion county, Ind., where he had resided for many years. At the time of his death he was the owner in fee simple of real estate situated in the city of Indianapolis Marion county, Ind., of the value of over \$100,000. He was also the owner of personal property which his widow, Agnes C. Brown, took and received absolutely as her own, after the payment of debts, of the value of \$5,518.79. His real estate, after his death, very much increased in value, and what remained undisposed of at the death of his widow, Agnes C. Brown, who died on December 11, 1908, was of the value of \$200,000. In addition to the real estate undisposed of at her death there remained in her hands the sum of \$15,600, the proceeds of lands owned by her husband at the date of his death, and which were sold by her under the power of sale provided by the will of her husband. The will of James W. Brown was executed on the 11th day of November, 1891.

At that time his father and mother and all of his brothers and sisters were dead except his sister Margaret M. Sprole, who was childless. The appellees herein, who are claiming under item 2 of James W. Brown's will, are the only surviving blood kindred of his, except his childless sister, Margaret M. Sprole. Omitting the attestation clause, the following is a copy of the will of James W. Brown:

"I, James W. Brown, do hereby declare the following disposition of my property to be my last will:

"Item No. 1. I give and bequeath to my wife, Agnes C. Brown, all my personal property remaining after the payment of my debts, to be her absolute property. Also all rents and profits arising from my real estate not otherwise disposed of in this will for her use and benefit during her life. Should such rents and profits and personal property as herein mentioned be insufficient for her comfortable maintenance and support she is hereby authorized and empowered to dispose of, sell and convey so much of my real estate and appropriate the proceeds thereof as may be necessary for her comfortable maintenance and support. Also I give her the right and empower her to sell and convey by deed any of my real estate not otherwise disposed of in this will, if in her judgment it should become advisable so to do, and she shall invest the proceeds as she may think best for the betterment of the estate and the increase of the income thereof.

"Item No. 2. Upon the death of my wife I hereby direct that all of said property referred to in the first item of this will as devised to her for her own use and benefit during her life, which shall be remaining, shall be divided in eight equal parts and one eighth given to the children of my nephew, John B. Munson, and one eighth, to each of the following persons, to-wit: Alice M. Cheney, Lida Munson, Charles Munson, children of my sister Eliza J. Munson, Jennie Brown, Alexander B. Brown, Emma Minnich, children of my brother Alexander M. Brown and the remaining one-eighth to be divided equally between Irvin Wilson and Irene Wilson, children of my niece Louise M. Grant.

"Item No. 3. I give and devise to my sister Margaret M. Sprole, lot 20 in square 8, in Hubbard, Martindale et al., southeast addition to the city of Indianapolis, Marion County, state of Indiana, also lots 40, 41, 42, 43 and 44, square 1, in Wright's first north side addition to the city of Indianapolis, Marion County, Indiana. This devise and bequest, however, is upon the condition that said Margaret M. Sprole accepts the same and shall assert no claim of any kind against my estate. I am in no way indebted to her and this devise is not made in payment of satisfaction of any liability, but out of love and affection for my sister. If she shall

assert any claim against my estate or liability on the part of the same to her, in that event this devise and bequest is to be void, and the property described in this item shall then be disposed of under the provision of item first of this will.

"Item No. 4. I hereby revoke all wills heretofore made by me.

"Item No. 5. I hereby appoint my wife, Agnes C. Brown, my executor to carry out the provisions of this will."

Agnes C. Brown remained the widow of James W. Brown until her death, and at the time of her death she was the owner of personal property, including money, to the value of \$25,000, which she disposed of under the provisions of her will. She left surviving her no child or descendants of any child and no father or mother, leaving Effie C. Skinner and Georgiana Smith, her sisters, as her sole and only heirs at law. Her will, which was executed on the 14th day of August, 1906, is as follows:

"I, Agnes C. Brown, of the city of Indianapolis, Marion county, Indiana, do make this my last will and testament, hereby revoking any and all wills heretofore made by me.

"1. I direct my executor to pay my funeral expenses and all just debts or obligations.

"2. I give and bequeath to my nephew, Ralph M. Skinner, residing at Number 73 Green Avenue in the City of Brooklyn, N. Y. Ten (10) silver teaspoons marked 'Agnes' on one side and 'Mary' on the reverse.

"3. To my sister, Mrs. Effie C. Skinner, residing at Number 73 Green Avenue in the City of Brooklyn, New York, the sum of Four Thousand (\$4,000) Dollars, together with all my clothing, table linen and lace curtains."

Here follow a number of other clauses or items bequeathing numerous specific articles of personal property, such as diamond finger and earrings, pictures, paintings, music box, money, etc., to certain named servants and friends and relatives. We make mention of the following only: To the Rescue Mission and Home of Indianapolis there is bequeathed the sum of \$500; to the Moravian Episcopal Church in the city of Indianapolis, the sum of \$800; to the Industrial Home for Blind Men of the latter city the sum of \$500.

After all of the specific bequests, the will then, by item 21, provides as follows: "I desire my executor to have the old horse (which I have owned for a number of years) shot; to sell all the remainder of my household furniture, goods, chattels, and stock at the best price he may be able to obtain, using his judgment in the manner of the sale of the same, and to convert all other personal property which I may possess at my death into money and divide the same equally between the General Boards of the Presbyterian and Methodist Churches for the cause of home missions."

It will be noted that the lower court, by its decree, construed or interpreted the will of James W. Brown to give to his widow, Agnes C. Brown, a life estate in all of his real estate, except that portion which he specifically devised to his sister, Mrs. Sprole, and thereunder he invested her with two powers of sale—one for her own benefit, and the other for the benefit of the estate; that at her death the part of his lands which remained undisposed of he gave the fee simple, together with the proceeds arising out of that which she had sold under the power conferred upon her by the will for the betterment of the estate, to the persons as directed in the second item of the will. These parties are the appellees in this appeal.

As shown, appellants, Mrs. Effie C. Skinner and Georgiana Smith, are the only two surviving sisters of Agnes C. Brown, the deceased widow of James W. Brown. The argument advanced by Mrs. Smith's counsel in respect to what should be the proper construction of the will of James W. Brown is that it should be so construed or interpreted as to mean that by item 1 thereof the testator gave to his wife, Agnes C., for her use and benefit during her life, the rents and profits arising out of the real estate, and that by item 2 he directed and devised that at the death of his said wife all these rents and profits which remained unused or unconsumed by his wife should be divided into eight equal parts, and that one part should go to each of the testator's nephews and nieces, etc., as provided by item 2; that the court should hold that under the will in question no real estate whatever, or any interest therein, was devised to appellees or was intended by the testator to be given to them; that so far as the real property of James W. Brown is concerned, with the exception of that devised to Mrs. Margaret Sprole, his sister, it remained undisposed of by the will, and at his death, under the statute of descent, it went in fee simple to his only surviving heir, his wife, Agnes C. Brown.

Continuing their argument, counsel for Mrs. Smith say: "Now by devising to Agnes C. Brown the rents and profits of the real estate for her use and benefit during her life, testator by implication or by rule of construction gave her some interest in the real estate. Such interest was indefinite to some extent, and it may be difficult to state just what interest it was that she took in said real estate. It is sufficient, however, to know that the interest thus given was some kind of a life interest, but not 'an estate for life only, by certain and express terms,' and that it was not such a life estate as would give her the rents and profits absolutely." Counsel say: "We concede that where the rents and profits of real estate are devised to a person absolutely it carries with it a life estate in such property by a rule of con-

struction, but we insist that it does not create a life estate 'by certain and express terms' as a rule of law. * * * By giving to Agnes C. Brown the rents and profits of real estate for her use and benefit during her life, testator gave her some interest in the real estate, be it more or less than a life estate, but the rule of construction as to taking a life estate in real estate from a gift absolutely of the rents and profits would not apply even if such a gift had been made by the will, because it would enlarge her interest in the rents and profits from 'use during her life' to an absolute ownership therein, contrary to and inconsistent with the plain intent of the testator and the unequivocal terms of the will."

Counsel for Mrs. Skinner virtually concur in the view entertained by counsel representing Mrs. Smith. If the interpretations or construction of the will for which appellants contend be sustained, it will in effect result in a holding that as to about 95 per cent. of the real estate owned and held by James W. Brown at the date of his death he died intestate, and that such intestate property at his decease descended in fee simple to his widow as his only heir. This will not be the only result of such interpretation, but the conclusion must necessarily follow that Agnes C. Brown, his widow, under her will herein involved, also died intestate in respect to the lands which appellants claim she acquired by descent from her husband, for it will be noted that she by her will neither does nor in any manner professes to dispose of any real estate whatever. This is conceded by appellants, for they base their title or right to the land in question, as against appellees, upon the fact as alleged that they acquired such property by descent from their sister, Agnes C. Brown, as her heirs.

Under the circumstances, it follows, therefore, that appellants in their endeavor to sustain the construction of the will of James W. Brown, for which they contend, are confronted with the well-settled rule which requires a court in the construction of a will to so interpret the instrument as to avoid or prevent partial intestacy, unless the language or provisions of the will require or compel a construction which will impress it with a partial intestacy. This rule has been affirmed and reaffirmed by this court in a series of decisions extending from *Cate v. Cranor*, 80 Ind. 292, to *Myers v. Carney*, 171 Ind. 379, 86 N. E. 400. See the authorities cited in this latter case.

The fact that a person has made a will creates a strong presumption that thereunder he intends to dispose of his entire estate unless such intention is rebutted by some provision or language of the will or by other evidence to the contrary. *Cate v. Cranor*, supra; *Roy v. Rowe*, 90 Ind. 54; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Groves*

v. Culp, 132 Ind. 186, 31 N. E. 569; Pate v. Bushong, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287, and authorities there cited.

In the construction or interpretation of a will, the primary purpose or object on the part of the court is to discover, if possible, the intention of the testator, and give effect thereto as he has expressed such intention in his will, provided, always, that this can be done without contravening some principle of public policy or some inflexible or unyielding rule of law. *Brunson v. Martin*, 152 Ind. 111, 52 N. E. 599; *Stimson v. Rountree*, 168 Ind. 169, 78 N. E. 331, 80 N. E. 149.

In the construction of a will, all of its parts must be considered together, and, when necessary, in order to ascertain the testator's intention, the court will, in addition to considering its provisions, look to and consider the circumstances under which it was executed, both in respect to the condition of the testator, and also that of his property, family, and the objects of his bounty, and will, when necessary, so far as possible, place itself in the position or condition of the testator at the time he executed his will. *Jenkins v. Compton*, 123 Ind. 117, 23 N. E. 1091; *Brunson v. Martin*, supra, and authorities there cited.

A will should be so construed as to give effect to all of the language and provisions thereof, and, if possible, it must not be interpreted so as to render any part thereof superfluous, absurd, and meaningless. *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Jenkins v. Compton*, supra.

Rules in respect to construction of wills rest upon substantial ground, and are intended in cases of doubt to serve as aids to the court in determining the true intent of the testator in a case in which such intention is not clearly disclosed by the terms or language of his will. *Myers v. Carney*, 171 Ind. 879, 86 N. E. 400.

Guided by the rules of construction to which we have referred, we will first consider the construction of the will of James W. Brown. As shown, this instrument was executed on November 11, 1891, and his death occurred in less than a month thereafter. He was married late in life, being 50 years of age and his wife 33. They had no children. At the time he executed his will his father and mother were both dead, and so were all of his brothers and sisters except his sister, Mrs. Sprole. Aside from her he had no surviving kindred of his own blood except his nieces and nephews mentioned in item 2 of his will. He was nearly 70 years of age, and was the owner of personal and real property. The net amount of the personal property received by his widow, which was given her by the will, was \$5,518.79. His real estate, at the time he made his will, was of the value of \$100,000 and continued thereafter to increase in value. Undoubtedly he recognized the fact that under the circum-

stances, in the absence of a will, his wife at his death as his sole heir would inherit all of his large estate to the exclusion of the kindred of his own blood. For this reason, perhaps, he appears to have concluded to dispose of his property as he deemed best during his life, and this purpose apparently led up to the execution of the will in question. It was his desire, no doubt, to make ample provisions for the benefit of his surviving widow during her life, and this desire he appears to have carried out by the provisions of his will. These provisions she seems to have accepted, as there is nothing to disclose that she elected to take under the law in lieu of her husband's will. For aught appearing to the contrary, we may assume that Mr. Brown, the testator, was the scrivener of his own will. It must be further presumed that in making disposition of his property by will he acted in the light of the well-settled legal meaning of the words and terms which he therein employed, unless there is some language or provision in the instrument to repel such presumption. *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980, and authorities there cited; *Rocker v. Metzger*, 171 Ind. 364, 86 N. E. 403.

In the introductory part of the document the testator states that: "I, James W. Brown, do hereby declare the following disposition of my property to be my last will." This positive declaration by the testator lends much strength and force to the legal presumption which arises from the fact that he made a will, that he thereby intended to dispose of all of his estate, and did not intend to die intestate as to any portion thereof. Again, in item 3 of his will, in dealing with the devise which he made to his sister, Mrs. Sprole, he declares: "If she shall assert any claim against my estate or liability on the part of the same to her, in that event this devise and bequest is to be void and the property described in this item (which property, as will be noted, consisted of certain lots of land in the city of Indianapolis) shall then be disposed of under the provisions of item first of this will." If it could be said in this case that the disposition by the testator of his entire estate was a doubtful question, we are satisfied that under such circumstances the two positive expressions or declarations in the will which we above set out fully reveal that he intended to dispose of all of his real estate, and that it was not his intention or purpose to die intestate as to any part thereof. His intention in this respect is certainly emphasized by the provision in the third item of his will that in event the devise of the lands to his sister, Mrs. Sprole, should become void, then and in that event the property which he had described as devised to her should be disposed of under the provisions of the first item of his will; or, in other words, the disposition thereof should be in like manner as provided for the disposal of the real estate mention-

ed and referred to in the first item or clause of his will.

Briefly, it may be said that there is nothing in the language or terms of the will which can be said to rebut the legal presumption that the testator intended to make a complete disposition of his entire estate; but, on the contrary, this positive declaration in his will fully sustains this intention or purpose. Having reached the conclusion that this was the testator's intention, we may next inquire and determine whether he has carried it out in harmony with the well-settled rules of law.

The first disposition of his property as made in this will is to his wife, Agnes C. Brown, absolutely of all of his personal property remaining after the payment of his debts. Next, in addition to the personalty, he gives to her for her use and benefit during her life all rents and profits arising from his real estate not otherwise disposed of in his will. He then provides that if such rents and profits and the personal property bequeathed to her be insufficient for her comfortable maintenance and support, then, and in that event, he authorizes and empowers her to dispose of, sell, and convey so much of his real estate and to appropriate the proceeds thereof as may be necessary for her comfortable maintenance and support. Immediately following this provision he invests her with a second power, namely, to sell and convey by deed any of his real estate not otherwise disposed of in his will, if in her judgment it should become advisable so to do, and to invest the proceeds as she may think best for the betterment of the estate and the increase of the income thereof. The devise to Agnes C. Brown of the rents and profits arising out of the land of her husband was for her use and benefit during her life. It will be noted that this devise was coupled with powers of disposition; not absolutely, however, but powers to be exercised for a designated purpose. The first was the authority to sell so much of the real estate as might be necessary for her comfortable maintenance and support; the second vesting in her authority to sell and dispose of any of the real estate if she deemed it advisable, for the betterment of the estate and the increase of the income thereof. The words "for her use and benefit during her life" cannot serve or operate to reduce her interest in her husband's lands below that of a life estate. *Thompson v. Schenck*, 16 Ind. 194.

Under the construction accorded to the will in question by counsel for appellants, it is only the rents and profits separate and apart from the lands out of which they arise, which were devised by the testator to his wife, Agnes C. Brown, for her use and benefit during life by item 1 of the will. Under this contention the argument is advanced that the land itself was not disposed of, and at the death of the wife the rents and profits so devised which then remained unconsumed

passed under item 2 of the will to the testator's nieces and nephews therein mentioned, to be divided among them as directed. Or, in other words, the view of appellants, in effect at least, is that the rents and profits must be separated from the real estate out of which they arise, and what remain unconsumed at the death of the testator must be disposed of under the provisions of item 2. It is insisted that by the term "property" in the following clause in item 2: "I hereby direct that all of said property referred to in the first item * * * devised to her for her own use and benefit during her life, which shall be remaining, shall be divided in equal parts," etc., "and given to the children of my nephew," etc.—the testator meant and intended only the rents and profits devised to his wife and not the real estate itself. Of course the testator in devising a life estate in his lands to his wife could have done so by the use of terse language or terms to express his intention in this respect. Nevertheless, however, in making the devise to his wife he appears to have employed language or terms which under a well-settled rule had been construed or interpreted to be the equivalent of a devise of the land itself, and which had been held to vest or carry the legal title thereof to the devisee as well as the beneficial interests therein. The rule that a devise of the rents and profits or income of land for the use of the devisee is equivalent to a devise of the land itself and passes or carries a legal title thereof to the devisee as well as the beneficial interests therein is one which has been well affirmed and sustained by the authorities. See *Thompson v. Schenck*, 16 Ind. 194; *Stout v. Dunning*, 72 Ind. 343; *Williams v. Owen*, 116 Ind. 71, 18 N. E. 389; *Miller v. Wohlford*, 119 Ind. 305, 21 N. E. 894; *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725; *Jenkins v. Compton*, 123 Ind. 117, 23 N. T. 1091; *Hunt v. Williams*, 126 Ind. 493, 26 N. E. 177; *Conner v. Gardner*, 230 Ill. 258, 82 N. E. 640, 15 L. R. A. (N. S.) 73. The same rule was announced by Lord Coke in *Coke on Littleton*, 45, where it is said: "If a man seized of land in fee, by his deed granteth to another the profits of those lands to have and to hold to him and his heirs and maketh livery secundum formam chartæ *the whole land itself doth pass; for what is the land but the profits thereof?*" (Our italics.)

In *Lewis v. Palmer*, 46 Conn. 454, the testator in a will there involved devised as follows: "I give to my wife the use of all the rest of my real estate during her natural life and for her to dispose of as she may think proper." It was contended in that case that the provision "for her to dispose of as she may think proper" referred to the use and not to the estate itself. The court in considering the question said: "If that is the true meaning of the will then the words quoted are without force. * * * There

is no substantial difference between giving real estate for life and the use of real estate for life. They both mean the same thing. The distinction is all in the words, and not in the meaning, and too shadowy to admit of, much less to require a different construction." Many other decisions of courts of sister states as well as text-books might be cited, but the above authorities will suffice.

It is true that this rule is not an inflexible one of law, but is one of construction which may be repelled or rebutted by any clear expression in the will to the contrary. We must presume that James W. Brown had knowledge of this rule and employed or used the words which he did in the light of the meaning which had been accorded to them. *Taylor v. Stephens*, supra; *Rocker v. Metzger*, supra. We discover no expressions or provisions in the will before us which in reason can be said to repel the force and effect of the rule in question.

Appellants' counsel appear to entertain the idea that the testator intended that at his death his wife should become the owner in fee of all of his real estate not otherwise devised; that if it can be held that his will does not invest her with a fee-simple title to her husband's land, then, it is claimed, he intended that at his death the land should descend to her under the law as intestate property. Such a construction would render absurd the provisions in the will which empower her to dispose of, sell, and convey the real estate for her maintenance and support, and the further provision authorizing her to sell and convey any of the land and invest the proceeds arising from the sale for the betterment of the estate and the increase of the income. If he intended that his wife at his death should become the owner absolutely in fee simple of his real property, except that which he had devised to his sister, Mrs. Sprole, why did he consider it necessary to empower her to sell that which he had given to her as claimed as her own property? Under the circumstances such provisions were unnecessary and superfluous, and, as previously asserted, his will must be so construed as not to render any of its provisions absurd, superfluous, or meaningless. It is certainly unreasonable to assert that the testator intended to confer upon his wife the power to sell that which he intended should go to her absolutely as her own property. As a general rule, a power of sale conferred upon a person to whom real estate is devised is regarded as inconsistent with the intention of the testator to invest such devisee with a fee-simple title to the land devised. *Wood v. Robertson*, supra. If the construction of the will for which appellants contend could prevail, we would have the testator separating the rents and profits from the land out of which they arose, and devising them to his wife for life with the direc-

tion that at her death the bare remnant or remainder thereof, if any, should go to the persons—kindred of his own blood—mentioned in item 2 of his will. If nothing at the death of his wife remained of this income or rents, then and in that event the kindred of his own blood, except his sister Mrs. Sprole, would receive nothing out of his large estate, and it in its entirety would go to his wife, and ultimately, perhaps, to her own blood kindred, to the exclusion of his. In view of the language and provisions of the will in question and the circumstances and conditions of the testator at the time of its execution we cannot in reason adopt appellants' construction. To sustain their interpretation would violate well-settled rules of the law, and defeat what we believe was the intention of the testator. By the expression "my real estate not otherwise disposed of in this will" as contained in item 1, the testator meant and intended to except the real estate which he had devised to his sister, Mrs. Sprole, in item 3 of his will.

The testator's wife appears to have survived her husband about 17 years. She seems to have understood the intention of her husband as expressed in his will in regard to the disposition of his estate, for, so far as disclosed, there was no attempt on her part after his death to claim anything more than a life estate in his land. The fact that her will is silent in respect to the disposition of any real estate goes to show that she did not believe that she had acquired any land from her husband which she could dispose of by her will. By the provision or direction contained in item 2 of the will "that all of said property referred to in the first item of this will, as devised to her [his wife] for her own use and benefit during her life, which shall be remaining, shall be divided into eight equal parts," etc., the testator evidently meant and intended the land itself, which he devised to his wife for life under the first item and did not merely mean, as appellants insist, the unconsumed rents and profits remaining at the death of the wife. The authorities cited by appellants to support their contention are cases involving wills quite different from that in the case at bar, and therefore are clearly distinguishable. Our own cases fully sustain the conclusion which we have reached in regard to the interpretation of the will under construction.

Without attempting to refer in detail to all the points and argument presented by appellants' counsel, we conclude and so hold, that by the first item of the will in question the testator devised to his wife, Agnes C. Brown, a life estate in all his land, except that which he specifically devised in item 3 to his sister, Mrs. Sprole; that the life estate so devised to her was coupled with two powers of disposition as therein conferred for the purposes designated. That at the death of

the testator a fee simple in and to all of the lands devised to his wife for life, vested in appellees by item 2 of the will, subject to said life estate of Agnes C. Brown, and subject to the powers of sale and disposition as therein conferred. The enjoyment, however, by the appellees of the lands so devised to them was postponed until the death of the life tenant, Agnes C. Brown.

We next take up for consideration the will of Agnes C. Brown.

By item or clause 21 the testatrix constitutes the two boards of home missions her residuary legatees. This is the last item of the will, and it immediately follows some 20 other specific bequests, which include household furniture, money and other personal property as heretofore stated and mentioned in this opinion. These two residuary legatees are not named or included in any specific bequests contained in Mrs. Brown's will, or, in other words, there is no bequest made to them independently of the residuum bequeathed in item 21. There is no gift in her will to appellant, her sister Georgiana Smith, but as previously stated, she specifically gives the sum of \$4,000 to her sister, appellant, Effie C. Skinner. We are met with the contention of counsel for Mrs. Skinner that the will must be so construed as to pass into the residuary clause to be divided equally between the two mission boards, the sum only of \$1,045.51, the same being the proceeds arising from the sale and conversion into money of the household furniture, goods, and chattels and other personal property as disclosed by the forty-second special finding of the lower court. It is insisted that this is the only money which under the will can legally go to and be divided between appellees, the boards of home missions; that all the remainder of the personal estate of the testatrix, after the payment of the cost of administration, debts, and obligations for which her estate is liable and the discharge of the specific bequests provided for by the will, must be divided equally between appellants as property of which she died intestate. In order to bring about this partial intestacy, counsel invoke the application of the doctrine of ejusdem generis. If it could be said that the doctrine of ejusdem generis is in any manner applicable to the case at bar, it will not in its application be permitted to contravene the actual intention of the testatrix, which is to be ascertained from the entire provisions, terms, and scope of her will.

In *Williams v. Williams*, 18 Tenn. 20, a will in some respects quite similar to the one before us was involved. The testator therein, after making several specific gifts, three of which were money legacies and one a devise of land, gave, in the last item of his will to a certain beneficiary therein mentioned, all his lands not otherwise disposed of by the will and certain slaves specially designated,

and then added—"I also give him all of my stock of all kinds, household and kitchen furniture, with all of my notes and accounts, with my stills, whiskey, and everything else not otherwise disposed of" upon the condition that he was to pay the money legacies provided for by the will within a given time and also the just debts of the testator. This was held by the court to clearly constitute a residuary devise and was not limited to articles ejusdem generis and therefore carried the slaves of the testator acquired by him after the execution of his will.

In this case, as in the one at bar, it was sought to have the rule of ejusdem generis applied to and control the residuary clause. The court in passing upon the question said: "The great rule in the construction of wills, to which this one of ejusdem generis and all others, except those founded upon public policy, are not only subordinate but ancillary, is that the intention of the testator, to be ascertained from the particular words used, from the context, and from the general scope and purpose of the instrument, is to prevail and have effect. In an enumeration of particulars, general and comprehensive terms are sometimes used, in the construction of which reason and good sense require that, if you would not violate the intention of the writer, their meaning must be restricted to things of a like nature and description with the particulars among which they are found. This is a rule of intention, and it readily yields where the circumstances show that a reliance upon it would defeat, rather than effectuate, the intention."

In *Arnold v. Arnold*, 2 Mylne & Keen's Reports, 365, in a will therein involved, a bequest of "wines and property in England" was held to pass the testator's property in England of every description, including money in the funds and at his banker's, debts and arrears of a pension due him, and was not confined to property ejusdem generis with wine. In that case the court said: "That the mere enumeration of particular articles, followed by a general bequest, does not of necessity restrict the general bequest, is obvious, because, as has been stated, a testator often throws in such specific words, and then winds up the catalogue with some comprehensive expression, for the very purpose of preventing the bequest from being so restricted."

Appellants' counsel argue that the provision in clause 21 whereby the testatrix directs her executor to convert all other personal property which she may possess at her death into money and divide the same equally between the two boards of home missions must be limited to or held to mean personal property ejusdem generis with that mentioned and enumerated in the clause next preceding. It will be noted that item 21 is the only residuary clause in the will. Therefore, if after the payment of the cost of adminis-

tration, funeral expenses of the deceased, and all of the just debts and obligations of her estate, and the discharge of the specific bequests made by her in the will, the residuum of her personal estate of every kind and character whatever is not disposed of by the residuary clause, then it must be held that all of the remainder of her personal estate, amounting to about \$8,000, was left undisposed of, and in respect to that part she died intestate. This, too, against the presumptive rule to which we have herein referred, that she intended to dispose of her entire estate and to die intestate as to no part or portion thereof. This contention of counsel is unsound and cannot be maintained.

It is only under two items of the will that she gives directions to her executor, namely: "Item 1. I direct my executor to pay my funeral expenses and all just debts and obligations." In item 21 she directs him to have the old horse shot. The next and further directions is "to sell all the remainder of my household furniture, goods, chattels and stock at the best price he may be able to obtain," etc., and "to convert all other personal property which I may possess at my death into money and divide the same equally between the general Boards of the Presbyterian and Methodist Churches for the cause of Home Missions."

Some of the special dispositions which she made embrace household furniture, some other personal property—for instance, a cow—while others bequeath a money legacy only. Immediately following these special bequests by item 21 she disposes of the old horse by directing him to be shot, and then she directs her executor to sell all the remainder of her household furniture, goods, chattels, and stock. By this direction the testatrix evidently meant and intended for the executor to sell, for the purpose of converting into money preparatory to a division thereof between the two boards mentioned, all of her household furniture, goods, and chattels capable of being sold, which had not already previously been disposed of by the will. As disclosed by the special finding, the personal property owned and held by her at the time of her death consisted of money, notes, bonds, mortgages, household furniture, goods and chattels and the articles and property specifically devised in the will. Mrs. Brown, at the time she executed her will, no doubt realized that she might at the date of her death hold personal property such as notes, bonds, and mortgages which could be converted into money by a method more convenient and better than that of a sale, namely, by her executor merely collecting them when due. Clearly the phrase "all other personal property," as directed by the testatrix to be converted into money, should be construed or interpreted as meaning and embracing all personal property other than that previously disposed of in any of the preceding clauses

of the will. The word "other" must be read in connection with the preceding clauses or provisions of the will in question. The mere enumeration or bequests of particular articles of property followed by a general bequest or residuary clause does not, as the authorities affirm, restrict the general bequest. *Williams v. Williams*, supra; *Arnold v. Arnold*, supra.

The phrase "personal property" employed by the testatrix in clause 21 in the direction "to convert all other personal property into money" is quite comprehensive, sufficiently so to include and embrace all goods, chattels, notes, bonds, mortgages, choses in action, and money held and possessed by the testatrix at the date of her death. *Cate v. Cranor*, 30 Ind. 292; *Vawter v. Griffin*, 40 Ind. 593; *Bush v. Grooms*, 125 Ind. 14, 24 N. E. 81; *Simmons v. Beazel*, 125 Ind. 362, 25 N. E. 344; *Stelf v. Hart*, 1 N. Y. 20, 24.

In *Simmons v. Beazel*, supra, the will therein involved contained the following clause: "I give and bequeath to my beloved wife all the personal property which I may have at my death." This court in that case said: "This language is broad and emphatic enough to cover his personal estate of every kind, and derived from whatever source."

In the case of *Cate v. Cranor*, supra, the will in that case contained the following provision: "My further will and desire is, that my executors sell all of my property not above named, and the proceeds, after paying all my just debts and the above named bequests, be divided amongst my sons"—naming them. It appeared in that case that the testator at the time of his death had certain money and notes, and the argument was advanced by appellant that inasmuch as the will did not specifically mention money and notes, and it was not reasonable to suppose that the testator meant that money should be sold, therefore, it was insisted, that the money and notes which he held were not included in the word "property," and that in respect to this part of his estate he died intestate. This contention the court denied, and held that the term "property" embraced as well the right one has to things in action as to those in possession, including things both real and personal, promissory notes, and money. The court held in that case that while there was some plausibility in appellant's argument, nevertheless it was unsound, and that it was the intention of the testator to convert all of his estate into money and divide it as directed; that to construe the will otherwise would result in partial intestacy, which was to be avoided unless the language of the will compelled it.

So, in this case, it cannot be presumed that by the direction "to convert all other personal property into money" that the testatrix did not intend to include any part of her property which at the time of her death might already consist of money. She certainly did not expect or contemplate that her

executor should do that which had been already accomplished previous to her demise.

We finally conclude and hold that by the judgment of the lower court each of the wills herein involved was correctly interpreted and construed.

Appellants complain because the court below rendered judgment against them for costs. We cannot disturb the judgment on the question of costs. No motion was made below to tax any costs against appellees. Therefore no question in respect to the apportionment of costs is presented.

Finding no error, the judgment below is in all things affirmed.

(175 Ind. 241)

CARR v. STATE (No. 21,619.)

(Supreme Court of Indiana. Feb. 23, 1911.)

1. CRIMINAL LAW (§ 1090*)—APPEAL—BILL OF EXCEPTIONS—INSTRUCTIONS—REVIEW.

Where the instructions given and refused have not been brought into the record by a bill of exceptions, errors based on the court's rulings thereon cannot be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2818; Dec. Dig. § 1090.*]

2. CONSTITUTIONAL LAW (§ 67*)—POWER TO DEFINE AND PUNISH CRIME.

The Legislature alone may create and define offenses for which individuals may be punished, and the courts cannot inflict any penalty for an act which the Legislature has not declared to be a crime.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 67.*]

3. CONSTITUTIONAL LAW (§ 48*)—STATUTE—VALIDITY.

The power of the court to declare a statute unconstitutional must be exercised only under the clearest and most positive conviction that a constitutional provision has been violated thereby.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. CONSTITUTIONAL LAW (§ 50*)—LEGISLATIVE POWER—SCOPE.

The legislative power vested in the General Assembly by Const. art. 4, § 1, vesting in the General Assembly the lawmaking power, is supreme, subject only to the express or clearly implied limitations in the state and federal Constitutions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

5. CONSTITUTIONAL LAW (§ 205*)—GRANTS OF PRIVILEGES AND IMMUNITIES—SUNDAY LAWS.

The Legislature in classifying what acts may or may not be prohibited on Sunday has constitutional power to make selections at least of those things not inherently wrong, and not involving moral turpitude, and exempt them from the prohibition.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 611; Dec. Dig. § 205.*]

6. CONSTITUTIONAL LAW (§ 205*)—LEGISLATIVE POWER.

The Legislature in legislating for the general welfare may make reasonable exceptions to the general operation of penal laws without conflicting with the constitutional limitations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.*]

7. CONSTITUTIONAL LAW (§ 70*)—STATUTE—VALIDITY—LEGISLATIVE QUESTION.

The questions of the wisdom, justice, policy, or expediency of a statute are for the Legislature alone.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

8. CONSTITUTIONAL LAW (§ 81*)—"POLICE POWER."

The "police power" is the inherent and plenary power residing within constitutional limitations in the Legislature to pass wholesome and reasonable laws for the good and welfare of the people of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

9. SUNDAY (§ 2*)—STATUTES—VALIDITY.

Sunday laws invading natural private rights are within the police power of the state as sanitary measures, on the ground of necessity for periodical relaxation from mental and physical toil for the general good, and such laws can only be upheld as civil regulations of a sanitary nature.

[Ed. Note.—For other cases, see Sunday, Dec. Dig. § 2.*]

10. CONSTITUTIONAL LAW (§ 205*)—CLASS LEGISLATION—SUNDAY BASEBALL.

Act March 9, 1909 (Laws 1909, c. 175), repealing so much of Act March 10, 1905 (Laws 1905, c. 169) § 463, as makes it unlawful for any one to play baseball on Sunday, is valid as within the power of the Legislature to withdraw a class from the inhibition of Sunday labor, and not in conflict with Const. art. 1, § 23, prohibiting the granting of privileges to one class of citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 611; Dec. Dig. § 205.*]

Myers, C. J., and Monks, J., dissenting.

Appeal from Criminal Court, Marion County; Jas. A. Pritchard, Judge.

Charles C. Carr was convicted of baseball playing on Sunday, and he appeals. Reversed.

Chas. O. Roemler, A. C. Ayres, R. Kane, and F. Winter, for appellant. Jas. Bingham, Chas. W. Smith, John S. Duncan, Henry H. Hornbrook, Albert P. Smith, Alex. G. Cavins, Edw. M. White, and Wm. H. Thompson, for the State.

COX, J. On May 24, 1909, appellant, who followed baseball playing for hire as a vocation, was charged by affidavit in the criminal court of Marion county with a violation of the Sunday observance law by playing baseball on Sunday the 23d day of May, 1909. No question was raised as to the sufficiency of the affidavit, and appellant was tried on it and convicted by a jury. A motion for a new trial and a motion in arrest of judgment were successively overruled, and then judgment was rendered, from which this appeal is taken.

The instructions given and refused by the trial court have not been brought into the record by bill of exceptions as required in criminal cases, and errors urged by appellant based on the action of the court in giving

and refusing to give instructions cannot be considered. *Donovan v. State* (1907) 170 Ind. 123-132, 83 N. E. 744.

The other assignments of error center in the one question of the validity of the act of March 8, 1909, which purports to amend section 467 and to repeal a part of section 468 of the act concerning public offenses approved March 10, 1905 (Laws 1905, c. 169), and which, as found in Acts 1909, p. 436, reads as follows:

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that section 467 of the above entitled act be and the same is hereby amended to read as follows: Section 467. Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor or engaged in his usual avocation, works of charity and necessity only excepted, shall be fined not less than one dollar nor more than ten dollars; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travelers, and those engaged in conveying them, families removing, keepers of toll bridges and toll gates, ferrymen acting as such and persons engaged in publication and distribution of news, or persons engaged in playing the game of baseball between the hours of one o'clock p. m. and six o'clock p. m., and not less than one thousand feet distant from any established house of worship or permanent church structure used for religious services or any public hospital or private hospital erected prior to the passage of this act.

"Sec. 2. So much of section 468 of said act approved March 10, 1905, as makes it unlawful for any one to engage in playing any game of baseball between one o'clock p. m. and six o'clock p. m. on Sunday is hereby repealed."

The record discloses, with others, the following uncontradicted material facts, upon which appellant was found guilty below: That on and prior to May 23, 1909, appellant was a professional baseball player, and was pursuing that vocation as the manager and first baseman of the Indianapolis Baseball Club, which was associated with clubs in seven other cities, and with them formed the clubs of the American Association, playing a series of games in the several cities; that on Sunday, May 23, 1909, he participated as the first baseman of the Indianapolis club in a game played with one of the other clubs of the association on grounds maintained by the Indianapolis club in the city of Indianapolis, known as Washington Park; that the game was played between the hours of 3 o'clock and 5 o'clock in the afternoon on that day; and that there was no church or hospital within 1,000 feet of the grounds or park where the game

was played. Appellant was convicted on the theory that so much of the act set out above as undertakes to exempt persons whose usual vocation is playing baseball for hire, and who follow such vocation on Sunday under the restrictions named in the act, is in violation of section 23 of article 1 of the state Constitution, which provided: "The General Assembly shall not grant to any citizen or class of citizens, privileges or immunities which upon the same terms, shall not equally belong to all citizens." And on that theory the state is depending to sustain the conviction. Other questions raised and discussed flow from this one question, and the need of considering them or not depends on the decision of the question of the validity of the exemption of baseball playing from the general effect of the act.

In the very able brief of the counsel for the state, it is conceded that it is for the legislative department of the state government to declare the public policy of the state, and that as to all offenses against the state—that is, all questions of crime—what shall be the policy of the state is within the exclusive power of the Legislature. In other words, that the Legislature alone can create or define offenses against the state, for which individuals may be punished, and that none exist except such as have been so created and defined; that therefore courts cannot inflict any penalty for an act which the Legislature has not declared to be a crime, however immoral the members of the court may conceive the act to be. Counsel in further concession say: "Unquestionably the state, in the exercise of its police power, may determine on the grounds of morality, or from sociological consideration, that there should be a cessation from all the usual labors of life on one day in each week. And therefore, unquestionably, the Legislature was acting in its province when it enacted the body of the section forbidding all persons save those excepted from following their usual avocations. And unquestionably it would be within the power of the Legislature as a mere abstract proposition to repeal this and all other similar enactments altogether, and leave no enactment whatever in force forbidding labor of any kind, or pursuits of any kind on Sunday. We are not disputing this question at all. And, further than this, we admit that the Legislature may pass a general law forbidding men generally from following their usual vocations on Sunday, and that then they may except or exempt certain vocations from the operation of the law." All this is manifestly true and well conceded. Counsel for the state also well say: "We are also mindful that when any party to a cause, whether it is the state itself, or the humblest citizen, challenges the validity or constitutionality of any act of the General Assembly of the state, it must stand ready to point out and put its finger on the provision of the

Constitution which it is claimed is violated." While this states correctly the obligation resting on one assailing the validity of a law, it does not fully measure the duty resting on a court in considering and determining the question presented. The power given to courts to overthrow an act of the Legislature is the highest and most solemn function with which they are vested, and it is to be exercised only under the compulsion of the clearest and most positive conviction that some constitutional provision has been violated by the lawmaking body in the enactment of the law assailed. Section 1 of article 4 of our Constitution vests in the General Assembly the lawmaking power of the state, and that body is supreme and sovereign in the exercise of the power subject only to such limitations as are imposed, expressly or by clear implication, by the state Constitution and the restraints of the federal Constitution and the laws and treaties passed and made pursuant to it. Apart from these curtailments of power, the Legislature is without fetter or clog, especially when exercising its police power. *State ex rel. v. Menaugh* (1898) 151 Ind. 260-266, 51 N. E. 117, 357, 43 L. R. A. 408, 418, and cases there cited; *State ex rel. v. Fox* (1901) 158 Ind. 120-129, 63 N. E. 19, 56 L. R. A. 893; *Cain v. Allen* (1906) 168 Ind. 8-24, 79 N. E. 201, 896. The duty of this court in considering a question as to the validity of a legislative enactment was well defined in part in the following language in the opinion in *State ex rel. v. Menaugh*, supra: "Being therefore required to give the benefit of all reasonable doubts in favor of the validity of the act of the lawmaking power, it is consequently incumbent upon him who assails its validity to establish affirmatively and clearly his charge to the exclusion of all such doubts. Especially must this rule prevail in view of the fact that the Legislature is invested with plenary power for all purposes of civil government. Therefore an inhibition to exercise a particular power is an exception, and the burden must rest upon the party who questions the validity of a statute to show that it is forbidden. *Jamieson v. Indiana, etc., Gas Co.*, 128 Ind. 555 [28 N. E. 76, 12 L. R. A. 652], and cases cited; *State ex rel. v. McClelland*, 138 Ind. 395 [37 N. E. 799]; *Cooley, Const. Lim.* 105. * * * To doubt the constitutionality of a law is to resolve in favor of its validity. An act of the Legislature is not to be declared unconstitutional unless it is clearly, palpably, and plainly in conflict with the Constitution." *Henderson v. State ex rel.* (1898) 137 Ind. 552-556, 36 N. E. 257, 24 L. R. A. 469; *State ex rel. v. McClelland*, 138 Ind. 395, 37 N. E. 799; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 466, 33 L. R. A. 313; *Townsend v. State*, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294, 62 Am. St. Rep. 477.

The following statement of the duties and

responsibilities of the courts in relation to enactments by the Legislature, by Frazier, J., in *Brown v. Buzan*, 24 Ind. 196, 197, is as wise and pertinent now as then: "The Constitution is paramount to any statute, and, whenever the two are in conflict, the latter must be held void. But, where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely expressed, that this rule is vicious, and constantly tends toward the destruction of popular liberty by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The Legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can therefore be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts, in the absence of clear convictions, shall abridge the just authority of the Legislature, there is no remedy for six years. Thus to whatever extent this court might err in denying the rightful authority of the lawmaking department, we would chain that authority for a long period at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute unless its conflict with the Constitution is clear. Then, too, the judiciary ought to accord to the Legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the Constitution, and also a high capacity to judge its meaning. Hence its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the Legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon the legislative action as rare a thing as it ought to be, and secure that harmonious co-operation of the two departments, and that independence of both, which are essential to good government."

With a full realization of the limitations upon the power of the court and the grave duties resting upon it, as well as a serious appreciation of the importance of this case which involves a modification of the Sunday law of our state as it has heretofore existed, which is unique, we approach the considera-

tion of questions presented for decision. There have been Sunday laws in our state throughout its history. Such an act was passed at the first session of the First General Assembly and was approved January 3, 1817. Acts 1816-17, p. 165. This act contained numerous exceptions to the general application of the penalty provided, and it continued in force without substantial change until 1905, when the Legislature added to the exceptions by the provision that it should not apply to "persons engaged in the publication and distribution of news." As has been seen, the act of 1909 merely added the further exception of baseball playing under certain conditions which is assailed as invalid in this case. Many times the law has been upheld by this court, together with all the exceptions contained in it except the two just mentioned. *Voglesong v. State*, 9 Ind. 112; *Foltz v. State*, 33 Ind. 215; *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577. There has probably never been enacted a law for Sunday observance which was wholly general and without exception. Some prohibit generally all vocations of life, and except generally from the operation of the law and save from its penalty work in any vocation which may be determined as a matter of fact to be done in response to a present necessity or to charity. Others go farther, and except some one or more designated business or vocation, the continuous exercise of which may be deemed necessary, either on account of the inherent nature of the business or the welfare of the public. Others again place the ban of the prohibitive statute on some one or more business or vocation of a noisy character or otherwise offensive and disturbing to the full and peaceful enjoyment of the day, as a period of rest, or recuperation, or of devotion as each individual may please to keep it, leaving all other employments to be pursued or dropped according to the individual choice. The exception from the operation of such laws of those who observe another day as their Sabbath from religious conviction is common. Many Sunday laws with varying exemptions from their general effect within the range stated have been uniformly held to be within the constitutional powers of lawmaking bodies.

In *Liberman v. State*, 26 Neb. 464, 42 N. W. 419, 18 Am. St. Rep. 791, a city ordinance which made it unlawful for any business house, bank, store, saloon, or any office to keep open on Sunday for general business, but which excepted telegraph, railroad, telephone, and express offices, photograph galleries, hotels, restaurants, cigar stores, ice cream parlors, fruit stands, meat markets, bathrooms, the printing and distribution of newspapers, and other business and vocations was held valid, and that the classification was permissible. In *People v. Hagan*, 36 Misc. Rep. 349, 73 N. Y. Supp. 564, it was held that a Sunday observance law permit-

ting the sale of articles of food generally before 10 o'clock in the morning, but excepting from the permission and prohibiting the sale of "uncooked flesh, food, or meats, fresh or salt," at any time during the day, was well within the police power of the Legislature. In *People v. Zimmerman*, 48 Misc. Rep. 203, 95 N. Y. Supp. 136, it appears that there was in force in the state of New York a general Sunday law and also a law prohibiting "all manner of public selling or offering for sale of any property on Sunday," and providing, "except that articles of food may be sold and supplied at any time before 10 o'clock in the morning, * * * and except that prepared tobacco, milk, ice and soda water, * * * fruit, flowers, confectionery, newspapers, may be sold," and also prohibiting the "sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day." The law was upheld. The case of *State v. Nichols*, 28 Wash. 628, 69 Pac. 372, involved the validity of a Sunday law which made it unlawful to "open on Sunday for the purpose of trade or sale of goods, wares, and merchandise, any shop, store or building, or place of business whatever," but exempted drug stores, livery stables, and undertakers. The law was held valid, and the exceptions ones which were clearly within the legislative discretion to make. In the case of *State v. Judge*, 39 La. Ann. 139, 1 South. 437, a Sunday law was assailed on the ground that it sought to compel the observance of Sunday as a religious institution, and also on the ground that it was class legislation because of certain exemptions from its general effect. Its provisions required under penalty that "all stores, shops, saloons, and all places of public business * * * and all plantation stores" should close at 12 o'clock Saturday night, and remain closed 24 hours. It was provided that the act should not apply to newsdealers, keepers of soda fountains, places of resort for recreation and health, watering places, and public parks, the sale of ice, newspaper offices, printing offices, book stores, drug stores, bakeries, and other named businesses. The court held, and such holding is in accordance with what is almost the unanimous opinions of courts in decided cases and of eminent jurists in text-books, that if the object of the act were to compel the observation of Sunday as a religious institution, because it is the Christian Sabbath, to be kept holy under the ordinances of the Christian religion, they would be compelled to declare it violative of the Constitution. It was declared that the statute was to be judged precisely as if it had selected any other day of the seven as a day of rest, and that its validity was not to be questioned because, in the exercise of a wise discretion, that day had been chosen which a majority of the people, under the sanction of their religious faith, already voluntarily observed as their day of rest. On

the question of the effect of the exceptions on the validity of the act the court said: "It only remains to consider the objection urged against the law on the ground of inequality, because of the numerous exceptions contained in the act. The objection has not the slightest force. The law is not unequal in any constitutional sense. No person in the state is permitted to pursue any of the prohibited callings on Sunday. Every person is at liberty to pursue those which are excepted. The same discretion which authorizes the Legislature to determine that the public health, welfare, and convenience required the adoption of the general rule equally authorized it to exempt from its operation certain specified callings, on the ground that the public welfare and convenience would be more hindered than advanced by the suspensions of such callings. It is not for us to control the lawmaking power in such a case or to require it to fit its laws to a Procrustean bed of our own construction."

The constitutionality of a Sunday law with numerous exceptions was involved in the case of *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259. The act in its general provisions made it unlawful for any person to keep open on Sunday any shop, store, building, or place of business whatever for the purpose of any business, trade, or sale of goods, wares, or merchandise. It was further provided that the law should not apply to news stands for the sale of daily papers and magazines, nor to the sale of nonintoxicating refreshments, candies, and cigars, nor to the carrying on of certain other named businesses and vocations. As against a contention that the law was in conflict with the constitutional provisions against unreasonable discriminatory classification, the court said: "An examination of the authorities, however, supports the contention that the Legislature is the sole judge of the exemptions that may be made from the operation of such a statute, that the question of determining what classes of business shall be exempt from a Sunday closing law is a matter of policy, and entirely within the power of the Legislature, and that the judicial department will not call in question the motive of the legislative department in enacting a statute." A statute of the state of Utah prohibited in general the keeping open on Sunday of any place of business for the purpose of transacting business therein, but also excepted from the general operation of the law, baths, livery stables, retail drug stores, etc., and such manufacturing establishments as are usually kept in constant operation. In dealing with the contention urged on behalf of a barber who was being prosecuted under the general provisions of the act, that the exceptions made the act unjustly discriminating and rendered it invalid, the court said: "The exception permitting

baths to be kept open on Sunday approaches nearest to the act here complained of; but the court is unable to say that there is such a similarity between keeping open a bathhouse and a barber shop that it was not within the province of the Legislature to make a distinction between the two. Upon reflection, many points of difference in the manner in which each is conducted are readily suggested. The court may not assert a wisdom it would deny to the co-ordinate branch of government (the Legislature) and interfere with the discretion of that department of government. All presumptions are in favor of the validity of a statute, and, unless the courts can clearly say that the Legislature has erred, the act should stand. Courts may interpret, construe, declare, and apply the law, but may not usurp the functions of the lawmaking power by assuming to interfere with or control the legislative discretion." *State v. Sopher* (1902) 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468, 95 Am. St. Rep. 845.

A statute of the state of Minnesota placed a general prohibition on all manner of selling or offering for sale on Sunday of any property, and then excepted from its general provisions prepared tobacco, fruits, confectionery, newspapers, and other articles, and then followed this exemption with a proviso "that nothing in this section shall be construed to allow or permit the public sale of uncooked meats, fresh or salt, or groceries, dry goods, clothing, wearing apparel of any kind, or boots or shoes." It was contended that the statute involved and authorized a discrimination for favored classes in the exemption of fruit, confectionery, and newspaper selling, and against meat dealers especially so, palpably unreasonable as to convict the Legislature of gross and arbitrary partiality in its adoption, but the court held that the selection of the classes for the ban of the law and the exemption therefrom was for the Legislature, saying: "Whether the discrimination be justified by wise legislative policy we are not required to determine. That is the province of the lawmaking power, not ours. It is our duty to ascertain, if possible, whether from our knowledge of existing conditions there is such a sensible distinction between these occupations as would furnish a basis of judgment in making the same." Upon such consideration, the court concluded that there were differences upon which the Legislature might have acted in the exercising of a reasonable judgment. *State v. Justus* (1904) 91 Minn. 447, 98 N. W. 325, 64 L. R. A. 510, 103 Am. St. Rep. 521.

In the case of *Ex parte Koser*, 60 Cal. 177, in holding good a Sunday statute prohibiting generally the conducting of business on Sunday, and excluding some from the general provisions, it was said that the questions of exemption or not, and what should be excluded, were for the Legislature. "Cer-

tainly the Legislature is intrusted with an enlarged discretion to determine what shall be punished criminally and what shall not be, to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included. * * * Declaring the provisions of the sections referred to invalid as violative of the Constitution would be to strike at the foundation of the legislative power to determine what acts of those not *mala in se* shall be punished criminally and what shall not be punished. In most cases acts not *mala in se* are by statute declared penal offenses, while other acts apparently of a like nature are not declared to be penal. What other power than the Legislature can or should draw the line on one side of which is liability to punishment, and on the other side no such liability is incurred."

In *People v. Havnor* (1896) 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707, a law prohibiting barbers generally carrying on their business on Sunday throughout the state, but providing that barbers in the city of New York and the village of Saratoga Springs might conduct such business until 1 o'clock of the afternoon of that day, was held to be a valid exercise of the police power by the Legislature, and that the exception was not so obviously arbitrary as to nullify the provision.

In the case of *Pettit v. Minnesota* (1899) 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716, a Sunday law of the state of Minnesota excepted from its general operation works of charity and necessity, and then specially provided that the keeping of a barber shop open on Sunday for work should not be deemed a work of necessity. It was contended both in the Supreme Court of Minnesota and the Supreme Court of the United States that, by reason of the proviso, the act must be held unconstitutional, because thereby it was restricted in its operation on the particular class of craftsmen to which Pettit the defendant belonged, as contradistinguished from other classes of labor. The Supreme Court of the United States, following that of the state, held that the classification was not purely arbitrary, and said in conclusion: "We recognize the force of the distinction suggested, and perceive no adequate ground for interfering with the wide discretion confessedly necessarily exercised by the states in these matters by holding that the classification was so palpably arbitrary as to bring the law into conflict with the federal Constitution."

This review of the cases involving the right of the lawmaking department of states to make classification of what should or should not be prohibited on Sunday and made criminal if done on that day might be largely extended, but to no good purpose. These cases are reviewed at this length, not in admission that this court, in every instance, approves the conclusion reached or the reasoning by which it was reached, nor that

they are precedents of such strength and manifest correctness as to coerce this court in the decision of the question before it. But they are all illustrative of the fact that Legislatures have undoubtedly constitutional power to make selection at least of those things not inherently wrong, and not involving moral turpitude, and place or not the ban of the law upon them. The exercise of the power of the Legislature to make exceptions from the general effect of a penal statute is seen in many of the provisions of our Criminal Code affecting various things, persons, and conditions. The act for the protection of fish approved March 9, 1867, was a general law for the protection of fish for a certain number of years and at certain seasons thereafter throughout the state, but it provided that the penalties prescribed should not be enforced against persons taking fish out of the Ohio and St. Joseph rivers. This court held that both the act and the exception were valid. *Gentile v. State*, 29 Ind. 409. A later case than that of *Gentile v. State*, *supra*, which involved the validity of our fish law, is the case of *Long v. State*, decided by this court last term (92 N. E. 653). Long was convicted of taking fish from the Wabash river with a seine, in violation of section 2541, Burns' Ann. St. 1908, and on appeal urged that the section in question was unconstitutional because in violation of section 22 of article 4, which prohibits the passage of local laws for the punishment of crime, and of section 23 of article 1, against the granting of privileges and immunities. The section makes it generally unlawful to take fish from any of the waters of the state by means of any gig, spear, seine, net, or trap, etc., under a heavy penalty, but contains a proviso that its provisions shall not apply to the waters of Lake Michigan, private ponds, the Ohio river, or the Wabash river, but making only a partial exemption of these two rivers. The court by Montgomery, J., in passing on these questions, said: "If it be conceded that the act provides for the punishment of crimes and misdemeanors within the meaning of the constitutional provision cited, it does not follow that it is local and invalid. Section 22, art. 4, Const., does not preclude proper classification in legislation relating to the subjects therein enumerated but does prohibit legislation which rests upon such arbitrary selection as renders the act local or special. Many of our penal statutes have exclusive application to special localities or objects, and are nevertheless general and unquestionably valid, because they rest upon an inherent and substantial basis of classification. * * * The line defining the precise limits of classes must in most cases be in a sense arbitrary. The Legislature had full power over the subject-matter of this legislation, and in making the exceptions contained in the act there is no evidence of bad faith or purely arbitrary action. * * * It is our conclusion, there-

fore, that the statute does not contravene section 22, art. 4, Const. * * * The only reason advanced in support of the other constitutional objection raised is that the act confers privileges on citizens resident near the Wabash river where it forms a state boundary, which are not allowed citizens residing near the same stream where it is wholly within the state. This scarcely requires discussion, since it is manifest that a few persons necessarily share more largely than others the benefits of every general law by reason of their special situation. This act does not confer privileges or immunities upon any citizens, but such fishing privileges as are not prohibited are available to all citizens on the same terms." Section 440 of the public offense act of 1906 (Burns' Ann. St. 1908, § 2345) makes it generally unlawful to wear or to carry any dirk, pistol, bowie knife, dagger, sword in cane, or any other dangerous or deadly weapon, but excepts travelers. One would have to consider earnestly to evolve any especially good reason in our day and condition of society that would make it needful for a traveler to carry a weapon contrary to the general inhibition that would not apply with equal force to many persons not travelers, but the law in its entirety has long been upheld and as lately as within two years. *McIntyre v. State* (1908) 170 Ind. 163, 83 N. E. 1006.

In *Johns v. State* (1881) 78 Ind. 332-335, 41 Am. Rep. 577, this court sustained the validity of our Sunday law and especially the exception from the general operation of the law of those who conscientiously observe the seventh day of the week as the Sabbath. In the opinion of the court given by Elliott, J., it was said: "The opinion in *Fry v. State*, 63 Ind. 552 [30 Am. Rep. 238], vindicates the constitutionality of the statute we are discussing. It was there held that it is competent for the Legislature to restrict the sale of railway tickets to persons who have complied with certain prescribed terms, and to punish persons selling tickets who had not complied with the requirements of the law. As was there said by Howk, C. J., as the organ of the court: 'It is neither the province nor the duty of the courts to call in question either the policy or the wisdom of any act of legislation.' " Our statute relating to the practice of medicine, which provides for licenses and declares penalties for violations, makes certain exemptions from the general application for the penal provisions. Burns' Ann. St. 1908, § 8400 et seq. This court in *Parks v. State* (1902) 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190, held it to be not unconstitutional and not in conflict with the "privileges and immunities" clause of the federal or of our Constitution. It was there said that: "As the power to enact laws has been confided to the legislative department, a very large measure of authority is vested in that department to determine what is reasonable and wholesome in the enact-

ment of statutes under the police power. * * * In the exercise of the police power there must needs be a considerable discretion vested in the Legislature, whereby some people have rights or suffer burdens that others do not." And again it was there said: "The power or reasonable classification, however, exists (*Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 71, 7 Sup. Ct. 350, 30 L. Ed. 578), and, in cases where there is room for the presumption that a substantial and just reason furnished the basis for legislation enacted in the carrying out of a public purpose, the exercise of the legislative discretion, in the establishing of a classification, must be respected by the courts. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780." The late case of *Chandler Coal Co. v. Sams* (1908) 170 Ind. 623, 85 N. E. 341, settled affirmatively the validity of an act of this state for the protection of miners which was general in its scope, but contained exceptions which removed certain mines from its requirements. The court held the classification permissible, approving this statement: "Of course, the Legislature must have the power to classify, when necessary, subjects for legislation, and make provisions for subjects within one class without making them applicable to subjects in another; and the proper exercise of that power is not liable to the objection that it is class legislation." It follows, and so we conclude, that neither of the exceptions in controversy violates any principle of constitutional law, either state or federal." Another late case decided by this court which involved a contention that a penal law which was enacted for the protection of miners, but which excepted certain mines from the general operation of the law, was invalid, is the case of *State v. Barrett* (1909) 172 Ind. 169, 179, 87 N. E. 7, 10. In holding both the act and the exception constitutional and a just exercise of the police power, this court said: "The Legislature had the right, and we must presume, exercised it, of learning for itself the reasons which impelled it to act, and we cannot say that it did not find substantial reasons for its conclusions. Unless we can say that the act is unreasonable, we would not be authorized to overthrow it, for a very large measure of authority is vested in the Legislature upon that subject." In a case decided by the Supreme Court of the United States on December 12, 1910, *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151, it is disclosed that a statute of Connecticut made it unlawful with severe penalty for any person, firm, or corporation to exact more than 15 per cent. interest for money loaned. National banks and banks and trust companies of that state and pawnbrokers were excepted from the general effect of the law, and this was made the ground for the contention that it was

invalid. It was held, sustaining the superior court of the state, that the General Assembly in respect to the matter of usury had the right to deal with different classes of money lenders and money borrowers in a different way provided that there was nothing apparently unreasonable in creating such distinctions, and all members of each class were treated alike.

It cannot be otherwise than that the law-making department has the power in legislating for the general welfare to make reasonable exceptions to the general operation and effect of penal laws in certain instances without conflicting with the constitutional limitations placed upon their action. It is a high power, a governmental power of the very highest nature. Within what limits must that department keep to avoid the power of the judicial department to nullify their action? This court has decided many times, times almost innumerable, that courts have nothing to do with the wisdom, justice, policy, or expediency of a law; that these questions are for the Legislature. The Legislature is unfettered save by the constitutional restraints. The police power is not a fixed known quantity, but the expression of social, economic, and political conditions. As these conditions vary, the police power must continue to be elastic and capable of development to meet these changes. Freund, *Police Power*, § 3. That it might have been proper and perhaps necessary in the early history of our state for a traveler to carry with him on his journey a deadly weapon seems evident, but changed conditions in the increase of population, means of travel, and otherwise, would seem to make it much less clear that the traveler should be exempted from the law against carrying weapons. In the early days when life was lived more in the open, when employments were less confining, less monotonous, and when the stress of life and spur of competition did not so drive to continuous toil, when the pleasures and amusements of life were few and simple, we can well see that the Sunday law might reasonably be different in its restraints than now. The police power may be said to be that inherent and plenary power residing within constitutional limitations in the Legislature to pass wholesome and reasonable laws for the good and welfare of the people of the state. Sunday laws which are an invasion of natural private right are enacted under this power. They are upheld as sanitary measures, on the ground of necessity for periodical relaxation and rest from mental and physical toil, for the general good. The influence of the Christian religion we know has been potent in establishing our civil Sunday, and it is probably true that the desire to give free opportunity for religious devotion and observance of the day as a Christian institution was not absent from the mind and intent of the lawmaking power in providing for and requiring fulfillment of

the day as a day of pause in the activities of life. And we know, also, that without the influence of the Christian religion and its followers and believers the enforcement of observance of the day as a civil day of rest and recuperation would be difficult indeed, and its integrity hardly preserved. But eminent jurists and courts with practical unanimity agree that Sunday laws can only be upheld as a civil regulation of a sanitary nature. Freund, *Police Power*, § 185; Tiedeman, *Police Power*, § 78; Cooley, *Const. Lim.* (7th Ed.) p. 675; *Hennington v. Georgia*, 163 U. S. 290, 16 Sup. Ct. 1086, 41 L. Ed. 166. Such laws may be said to be based on the saying of the Master: "The Sabbath was made for man, and not man for the Sabbath." Indeed, it is true, for the idea is to work a recuperative benefit primarily to the individual, that good may follow to society at large. It will appear by examination of the exceptions in Sunday laws that they are sometimes made for the benefit of the business or vocation exempted, sometimes for the benefit of those patronizing the business or vocation exempted, sometimes for the benefit of both, and, again, for the benefit of society generally.

If the act in question and the circumstances connected with it were such that in considering the exemption of ball playing from the general provision against Sunday work, we must say that it is patent that the Legislature intended solely to give baseball players an advantage over those pursuing other vocations, or that it intended to place it in the power of those employing baseball players to force them to pursue their calling seven days in the week, then we would be required to hold the action of the Legislature in passing it to be purely arbitrary and the act therefore in conflict with the constitutional restraints upon the Legislature. But we cannot do this, for there are manifest conditions and reasons existing upon which the Legislature might have acted, which they in the exercise of their discretion might have deemed full warrant for making the exemption. The purpose of the required observance of Sunday as a day of cessation of the daily vocations of the people being based on sanitary reasons, it is obvious that the purpose in all cases could not best be carried out by the inertia of absolute rest. The wearing effects of the monotony of daily toil in office, store, factory, or whatever the lot of man is cast to labor is overcome by diversion of mind no less than by the mere respite from the physical or mental strain. That baseball has come to be the one great American outdoor game; that it is played during the summer season throughout the land by boy and youth and man, beginner, amateur, and professional, in country village, town, and city; that it is played out of doors in seasonable weather; that it engages the mind alike of the participant and the spectator in an entertaining way; that it trains the body to vigor and activity and to a degree the mind

to alertness; that the playing of a game requires but a fraction of a half day; that it cannot be successfully played at night; that those who witness it find in it for the time a relief mentally and physically from the stress of the intense life we as a people lead—are facts known of all men, and of which the courts and Legislatures cannot be wholly ignorant. And we cannot say that the Legislature did not have in mind that good might flow to many who during all the secular days of the week might be compelled to persist in continuous toil in office, store, shop, or factory from spending a part of the afternoon of a Sunday in the open air, their minds diverted by interest in the popular game. And, too, it is well and commonly known that the season for baseball, both on account of the nature of the game and the actual practice, is short, that the hours of each day devoted to its pursuit by the players engaged in it are few, and that weather conditions enforce frequent pauses; and it cannot be said that the Legislature did not conclude, as it might, that the welfare of players therefore needed no such restriction of their natural right to pursue their work on each of the seven days of the week as might be necessary in other employments. The Legislature may admittedly withdraw a class from the general anathema of the Sunday law for the purpose of a severer penalty, not for the good or relief of those constituting that class which would be involved in a cessation of their labor on that day, but for such good as might come therefrom to others of the community from added peace or quiet or other reason. *State v. Hogriever* (1899) 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504. It would seem to follow then that it has the correlative power to withdraw a class from inclusion in the inhibition of Sunday labor for the good of others if reason manifestly exists upon which the legislative action may be based. It being conceded that baseball playing in its nature is subject to classification by itself in legislation having reference to Sunday observance, its classification becomes then a legislative question, and not a judicial one. Whether it shall be subjected to such legislation at all, or in what degree and under what circumstances and restrictions, is for the Legislature to say within the reasonable exercise of its discretion which ends only where arbitrary action begins. A reason of such character as to indicate an absence of purely arbitrary action upon which the Legislature might have been moved to act in exempting ball playing from the penalty of the act in question is manifest. As much as we as individuals may desire the integrity of the Sabbath preserved in full measure, we cannot say that the Legislature acted arbitrarily in making this exemption, or that the exemption is clearly, palpably, and plainly in conflict with that provision of the Constitution claimed, and we therefore

hold that it is not, but that it is a valid enactment.

The judgment is therefore reversed, with instructions to the trial court to sustain the motion of appellant in arrest of judgment.

MYERS, C. J. (dissenting). I am unable to concur in the majority opinion in this case. The amended section 467, together with the amendment to section 468, specifically singles out the game of baseball from football, and other games, and exempts the former from the general interdiction. This is in direct contravention of section 23, art. 1, of the Constitution, with respect to the equal rights and privileges of the players of every other kind of game, where a fee is charged, in allowing baseball to be played and a fee to be charged. This proposition is fully sustained in the following authorities: *Indianapolis, etc., Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. (N. S.) 711; *Bedford, etc., Co. v. Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; *Town, etc., v. Crawfordsville*, 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622; *Sellers v. Hayes*, 163 Ind. 422, 72 N. E. 119; *School City v. Hayes*, 162 Ind. 193, 70 N. E. 134; *Dixon v. Poe*, 159 Ind. 492, 65 N. E. 518, 60 L. R. A. 308, 95 Am. St. Rep. 309; *Henderson v. London, etc., Ins. Co.*, 135 Ind. 23, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410; *Graffy v. Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; *Connolly v. Union Sewer Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Cotting v. Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 237, 79 Am. St. Rep. 238; *Ruhstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30; *Carrollton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; *State v. Grabroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524; *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; *In re Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *Ex parte Newman*, 9 Cal. 502; *Murray v. Board, etc.*, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828, 83 Am. St. Rep. 379; *State v. Wagener*, 69 Minn. 206, 72 N. W. 67, 38 L. R. A. 677, 65 Am. St. Rep. 565; *Johnson v. St. Paul, etc., R. Co.* (1890) 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *State v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785; *Sutton v. State* (1896) 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589; *Borough of Sayre v. Phillips* (1892) 148 Pa. 482, 24 Atl. 76, 16 L. R. A. 49, 33 Am. St. Rep. 842; *State ex rel. v. Ashbrook* (1900) 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765; *Waters-Pierce, etc., Co. v. Hot Springs* (1908) 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035; *Mil-*

ton v. Bangor, etc., R. Co. (1907) 108 Me. 218, 68 Atl. 826, 15 L. R. A. (N. S.) 203, 125 Am. St. Rep. 293; State v. Schmuck, 77 Ohio St. 438, 83 N. E. 797, 14 L. R. A. (N. S.) 1128, 122 Am. St. Rep. 527; State v. Holland (1908) 37 Mont. 393, 96 Pac. 719; In re Van Horne (1908) 74 N. J. Eq. 600, 70 Atl. 986.

For the same reason, it is a special law, in violation of section 22, art. 4, of the Constitution, prohibiting the enactment of local or special laws for the punishment of crimes or misdemeanors. It is tantamount to saying that it shall be unlawful for any person to play any games on the forbidden day, not upon religious grounds, but upon grounds of health and recreation, except baseball. If there could be any ground of distinction between or classification of baseball players as distinct from players of other games, we would be bound to yield to the legislative discretion. If it could be said that it is allowable because it provides recreation for the worn and tired persons who cannot yield any other day from their work to witness a game in the daytime, the same thing is true as to football, basket ball, polo, cricket, or any other outdoor game, that they are interdicted and excluded from the privilege and the sightseer and those who are seeking recreation are excluded from other games, and a distinction is made as to both, so that those persons who are within the related or same class—that is, all persons desiring to engage in other games as well as those who may desire to witness them—are denied the privilege, where a fee is charged. I am unable to perceive that there can possibly be any basis for such distinction or ground upon which the classification can rest. There is just as much inequality produced by singling out baseball players and permitting them to play for compensation, while all other games for pay are prohibited, as there was in singling out barbers and punishing them. *Armstrong v. State*, 170 Ind. 188, 84 N. E. 3, 15 L. R. A. (N. S.) 646. The classification is openly and frankly made, as is shown by the repealing clause of the second section, leaving no doubt as to the purpose intended. A classification in which all within the class or naturally related to it are not embraced cannot be justified. *Indianapolis, etc., Co. v. Kinney, supra*; *Bedford, etc., Co. v. Bough, supra*; *Town, etc., v. Crawfordsville, supra*; *Dixon v. Poe, supra*.

It is also invalid as a local law, in violation of section 22, art. 4. The last clause of the act permits the game to be played "not less than one thousand feet from any established house of worship, or permanent church structure, or any public hospital, or private hospital erected prior to the passage of this act." The clause specifically interdicts playing within 1,000 feet of "establish-

ed houses of worship, or permanent church structure, or public or private hospitals, erected prior to the passage of this act" (our italics). By its terms the game may be played within any distance of such structures erected after the passage of the act, and thus it would be unlawful to play within 1,000 feet of these structures if erected prior to the passage of the act, but lawful to play within any distance of those erected later, by reason of which conditions the law would necessarily be local and in violation of section 22. These provisions of the Constitution were adopted by the people as restraints upon legislative power, and a correct construction should be courageously adopted by the courts to effectuate the intent of the people as expressed in the organic law, for by erroneous interpretations of its provisions and by erroneous applications of the doctrine of classification its provisions may be gradually abrogated and Constitution nullified.

No doubtful case should give rise to annulment of a statute as the deliberate act of a co-ordinate and independent branch of government, but by attempted classification and by laws of only local application, to which there is the most natural tendency, and by extension by construction, in deference to class interest and special cases, the organic law may be practically nullified, until we are in danger of having all the train of evils resulting from local or special legislation, and inequalities of rights, which it was a leading purpose of the Constitution of 1851 to prevent.

MONKS, J., concurs in this opinion.

(175 Ind. 709)

ALLES v. CITY OF NEW ALBANY.

SMITH v. SAME

Nos. 21,691-21,697, 21,699-21,705.

(Supreme Court of Indiana. Feb. 24, 1911.)

Appeal from Circuit Court, Floyd County; Wm. C. Ute, Judge.

Rudolph Alles and another were convicted in separate cases of violating a city ordinance, and they appeal in each case. Judgment of conviction affirmed.

A. Dowling, for appellants.

PER CURIAM. Appellant Alles has prosecuted an appeal in fourteen cases, and appellant Smith in one case, all against the same appellee. The causes, on motion of appellants, consented to by appellee, and on order of the court, were consolidated. The appeals were perfected, and appellants' briefs filed, before the decision in *Smith & Alles v. City of New Albany*, 93 N. E. 73, was rendered. The questions involved are the same in each case as those presented in that case, and upon its authority the judgment is affirmed in each of the cases.

(48 Ind. App. 541)

BRADLEY et al. v. HARTER.¹ (No. 6,751.)
(Appellate Court of Indiana, Division No. 2
Feb. 15, 1911.)

1. APPEAL AND ERROR (§ 757*)—BRIEF OF APPELLANT—REQUISITES.

Where appellant fails to set out in his brief so much of his record as presents the error relied on, the error is deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

2. APPEAL AND ERROR (§ 757*)—BRIEF OF APPELLANT—REQUISITES.

Though appellant, denying the sufficiency and correctness of the special findings of fact fails to set out in his brief the findings, the omission may be supplied by appellee, and, when that is done, the court will consider the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

3. APPEAL AND ERROR (§ 757*)—RECORD—EVIDENCE.

An appellant challenging the sufficiency of the evidence to sustain the findings must set out in his brief a statement of the evidence and the setting out of a few isolated parts of the evidence is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

4. TRIAL (§ 397*)—FINDINGS—FAILURE TO FIND A FACT—EFFECT.

A failure of the court to find any material fact is equivalent to a finding against the one having the burden of proving the fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*]

5. APPEAL AND ERROR (§ 931*)—PRESUMPTIONS.

The court on appeal must presume that the findings of the trial court are correct and are founded on competent evidence and that there was no evidence to the contrary, in the absence of any statement of the evidence in appellant's brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3762-3771; Dec. Dig. § 931.*]

Appeal from Superior Court, Madison County; Cassius M. Greenlee, Judge.

Action by Jacob H. Harter against Austin E. Bradley and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Walker & Foster, for appellants. Bagot & Bagot, for appellee.

IBACH, J. This action was instituted by appellee to recover from appellants the sum of \$3,019.95, alleged to have been paid out by appellee on the account of the improvement of Fourteenth street in Englewood addition to the city of Anderson, with interest on said amount from December 7, 1891. Upon issues formed, the cause was tried by the court, and by request, a special finding of facts was made, and conclusions of law were stated thereon in favor of appellee. Over appellant's motion for a new trial, judgment was rendered that the appellants take nothing by the cross-complaint, and that the appellee recover on his complaint and for costs.

Appellants by their assignment of errors seek to question the sufficiency of various pleadings, and, under their motion for a new trial, the sufficiency of the evidence to sustain the special findings and certain rulings on the exclusion of evidence. It is insisted by appellee that no question is presented on these assignments, for failure on part of the appellants to set out in their brief so much of the record as presents the error or objection relied on, in that none of such pleadings nor the demurrers thereto, nor the substance of either is set out; that there is a failure to set out the evidence or the substance thereof. An examination of the briefs supports appellee's contention.

It has been held many times that where briefs do not comply with the rules, as to the important matters here claimed to have been omitted, the errors based on such portion of the record will be deemed waived. *Shatz v. Alexandria Gas Co.*, 35 Ind. App. 310, 73 N. E. 1094; *Springer v. Bricker*, 165 Ind. 532, 76 N. E. 114; *Talbot v. Town of New Castle*, 169 Ind. 172, 81 N. E. 724; *Miedreich v. Frye*, 41 Ind. App. 817, 83 N. E. 752; *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N. E. 869. The rule is not satisfied by a mere reference to the place in the transcript where the alleged error may be found. *Ledbetter v. Coggeshall*, 37 Ind. App. 124, 76 N. E. 787. The appellant has also failed to set out in his brief the special finding of facts found, the sufficiency and correctness of which is denied by appellant. This omission has been supplied by appellee, and we therefore consider it.

The substance of the special finding of the court is as follows: That on the 20th day of October, 1891, appellee Harter entered into a contract with appellants Austin F. Bradley, Henry B. Stout, and — — McCoy, relating to the sale of some land, known as Englewood addition to Anderson; that Fourteenth street was one of the streets in said addition, and was at the time being improved, and one of the stipulations in the contract was that appellee should advance the expense of the improvement of said Fourteenth street, and that the cost thereof should be charged to Bradley, Stout & McCoy; that the appellee, under the contract, did pay out the expense of said improvement to the amount of \$3,019.95; that while this work was in progress, McCoy assigned his interest in the contract to Bradley, and Bradley assigned one-third interest in the contract to appellant Cooper, and that appellant Cooper assumed the obligations of McCoy, under the contract, except the obligation to give notes for any balance that might be owing after three years, as a part of the purchase price of said real estate. Again it is found that while the work of improving said street was still in progress, appellant Stout sold and transferred his inter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

¹Rehearing denied, 95 N. E. 608.

Transfer to Supreme Court denied.

est to appellant Backus, and Backus likewise assumed the obligations of Stout, excepting the obligation to execute notes for the balance of the purchase money unpaid at the expiration of three years. It is found that all of the assignments were with the approval and consent of the appellee. It is also found that the appellee did pay for the improvement of Fourteenth street, between the 7th day of December, 1891, and the 9th day of August, 1892, the sum of \$3,019.95; that said amount was paid in various sums from time to time as the work progressed, during said time, and on the 9th day of August, 1892, appellant Bradley executed to appellee his receipt or contract concerning said money and payment as follows: "Anderson, Indiana, Aug. 9, 1891. Received of Jacob H. Harter, \$3,019.95, on account of 14th st. pay roll, to draw interest at the rate of 6 per cent. from Dec. 7, 1891. Bradley, Backus & Cooper, Per A. F. Bradley;" that until the 9th day of August, 1892, the money was advanced by appellee part of the time to Bradley and part of the time to Stout, and was advanced from time to time as it was needed, for the material and other expenses of making said improvement; that during the time of the first contract, a partnership existed between Bradley, Stout & McCoy; after the purchase by Bradley of the interest of McCoy, a noncommercial partnership existed between Bradley & Stout, until Cooper bought into the company; that from the time of the execution of the first contract with said Cooper until the contract was made with Backus, a noncommercial partnership existed involving all the interest of Bradley, Stout & Cooper, and their respective obligations and duties in and pertaining to said real estate, and said contract; that from and after the execution of the said contract between Bradley, Stout & Cooper and Backus, until the 20th day of October, 1894, a noncommercial or nontrading partnership existed between them and its business pertained to the matters involved in the said contract, and the performance by said partnership of the parts thereof to be performed by said Bradley, Backus, and Cooper, and the said firm did business under the firm name of Bradley, Backus & Cooper; that Bradley had full power to receive and pay out moneys for the improvement of Fourteenth street; that appellee had, or might have had, notice and knowledge at the time of the execution of the receipt of copy set out in the findings; that Bradley did not have power and authority to execute same for himself and his associates, Backus and Cooper; that no part of the money advanced by appellee for the improvement of said Fourteenth street has ever been repaid to him; that he paid out said sum pursuant to the provision of the contract

referred to in these findings, and that at the time of the commencement of this suit, the amount was long past due, and that there is due him from the appellants the sum of \$4,893.52. It is further found that the plaintiff performed all the parts of the contract on his part to be performed, according to the terms thereof.

Upon the foregoing facts, the court stated its conclusions of law as follows: "(1) That the law is with the plaintiff, and he is entitled to recover in this action from the defendants, the sum of \$4500.00, together with his costs and charges laid out and expended, with relief from valuation and appraisal laws. (2) That the defendants herein are entitled to take nothing on account of their cross-complaint."

Complaint is made of the evidence, and a reversal is asked for the reason that it does not sustain the special findings. Appellant thereby seeks to challenge the finding of the court upon the evidence, and yet no statement of the evidence or copy of the findings is set out in the brief. We are able to find a few isolated portions of the evidence from the brief, but such are not sufficient to enable the court to determine the question as to whether the court failed to find all the necessary facts, or that the evidence did not sustain those found. It is a recognized rule, however, that a failure to find any material fact on the part of the court, is equivalent to finding against the party upon whom rests the burden of proving such fact. The trial court having found the facts as he did, we are required to presume that they are correct, and that they are founded upon the competent evidence produced at the trial, and as the evidence does not appear in the brief, it must be concluded that there was no evidence contrary to the finding of the court. Such being the rule, the facts found by the court fully sustain both the conclusions of law.

Judgment affirmed.

(47 Ind. App. 535)

KING et al. v. STATE ex rel. HALBERT
TP. (No. 7,196.)¹

(Appellate Court of Indiana. Feb. 17, 1911.)

APPEAL AND ERROR (§ 758*)—BRIEF OF APPELLANT—CONTENTS.

Rule 22 of the Appellate Court (55 N. E. v) requires appellant's brief to shortly and clearly state (2) what the issues were, (3) how decided, and what the judgment was, (4) the errors relied on for reversal, and (5) a concise statement of enough of the record to present every error or exception relied on. Appellant's brief, under "Issues," showed a demurrer to the amended complaint for want of facts, which was overruled, to which appellants excepted. Under "Points," it showed that "the complaint is questioned by assignment of error, and was also questioned in the court below by demurrer." Under "How the Issues were Determined," it showed that "appellants filed a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.
¹Rehearing denied.

written motion for a new trial, which was overruled, and they excepted," but the motion was not otherwise mentioned in the brief. The brief also set out under "Points" a number of instructions given and refused with the statement that action of the court on each was error. *Held* not the requisite substantial compliance with the rule, it being impossible to tell from the brief what errors were assigned, or, from the brief and the record, what errors were relied on for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

In Banc. Appeal from Circuit Court, Martin County; C. K. Tharp, Special Judge.

Action by the State, on the relation of Halbert Township against Carl C. King and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Padgett & Padgett and Hiram McCormick, for appellants. Frank E. Gilkinson and Fabius Gwin, for appellee.

ADAMS, J. This action was brought by the state on the relation of Halbert township, Martin county, Ind., against Carl C. King and others for an alleged breach of a gravel road contractor's bond.

Rule 22 of the Supreme Court and this court (55 N. E. v) is as follows: "The brief of appellant shall contain a short and clear statement disclosing: First. The nature of the action. Second. What the issues were. Third. How the issues were decided, and what the judgment or decree was. Fourth. The errors relied upon for reversal. Fifth. A concise statement of so much of the record as fully presents every error and exception relied on. * * *"

It has been so often held that a substantial compliance with the rules above set out is necessary, and the principle is now so well established, that a citation of authorities would add nothing to this opinion.

The appellants' brief, under the head of "Issues," shows that the appellant demurred to the amended complaint for want of sufficient facts to constitute a cause of action, and that the court overruled the demurrer, to which ruling the appellants excepted. It is shown under the head of "Points" that "the complaint is questioned by assignment of error and was also questioned in the court below by demurrer." Under the head of "How the Issues were Determined," the brief shows that "appellants filed a written motion for a new trial, which was overruled, and they excepted." No other reference is made in the brief to the motion for a new trial. A number of instructions given, and refused, are set out under "Points," with the statement that the giving, or refusal to give, each was error.

We do not consider this a compliance with the most reasonable interpretation of the rules of this court in the matter of preparing appellant's brief. In order to facilitate

the work of the court and secure the prompt and orderly dispatch of business, it is necessary to uniformly enforce the rules. No rule is more important than the one which requires appellant to set out in his brief the errors upon which he relies for reversal. This is the first matter upon which the court on appeal wishes to be advised, and the appellant's brief is the court's only source of information. It would be impossible from the brief of appellant in this case to determine what errors are assigned, and it would be impossible from the examination of both the brief and the record to determine what errors are relied upon for reversal.

As we have seen, the fourth subdivision of rule 22 requires that the errors relied upon for reversal shall be set out in appellant's brief. In this case no question of a good-faith effort to comply with the rule arises. There was no effort.

Judgment affirmed.

MYERS, C. J., and HOTTEL, LAIRY, FELT, and IBACH, JJ., concur.

(47 Ind. App. 204)

AMERICAN CAR & FOUNDRY CO. v.
NACHAND. (No. 7,167.)

(Appellate Court of Indiana, Division No. 2.
Feb. 23, 1911.)

1. MASTER AND SERVANT (§ 125*)—INJURIES
TO SERVANT—DEFECTIVE TOOLS.

If a safe tool is placed in the hands of the servant, and while in his possession it becomes defective, the master is not liable for injuries to the servant from using the tool, or to a fellow servant, unless he has actual notice of the defect, and he cannot be charged with constructive notice by failure to inspect the tool; there being no duty to inspect tools in the possession of the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

2. MASTER AND SERVANT (§ 219*)—INJURIES
TO SERVANT—ASSUMPTION OF RISK.

If a master furnishes a simple tool to a servant which is so obviously defective that the servant will be charged with notice of the defect, and he attempts to use it and is injured thereby, he cannot recover damages, as he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§ 233*)—INJURIES
TO SERVANT—USE OF DEFECTIVE TOOL.

A servant who negligently uses a defective tool when a suitable one is at hand, and is injured through such defect, cannot complain of the failure of the master to inspect the tool.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 701; Dec. Dig. § 233.*]

4. MASTER AND SERVANT (§ 201*)—INJURIES
TO SERVANT—ACT OF FELLOW SERVANT.

If an unsafe tool is furnished a servant, and another servant who has no knowledge of its condition is injured by such defect, the master is liable and is not excused because of concurring negligence of a co-servant of the injured

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

person, and the injured person did not assume the risk as he had no opportunity to inspect the tool in the hands of his co-servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.*]

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

Action by Albert Nachand against the American Car & Foundry Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to sustain motion of defendant for judgment in its favor on answers to interrogatories.

M. Z. Stannard, for appellant. J. K. Marsh and T. J. Brock, for appellee.

LAIRY, J. This is an action for damages for personal injuries. There was a verdict and judgment in the trial court in favor of appellee, and appellant brings the case to this court for review.

Sixty-one interrogatories were submitted to the jury and answered. The material facts disclosed by the answers to these interrogatories are as follows: The appellant was a private corporation engaged in the construction of railway cars in Clark county, this state. In its plant appellant operated what was known as the steel department, in which steel cars were constructed. The appellee was employed in the steel department and with two fellow workmen engaged in riveting parts of the cars together. These three workmen had been furnished a set of hand tools with which to perform their work. Among these tools was what was known as back-out punch, which was, at the time appellee was injured, in the hands of Henry Kopp, who was one of three workmen mentioned. The men were attempting to remove a rivet from the side of a car. Henry Kopp held the back-out punch against the rivet. Another workman struck the punch with a hammer. The back-out punch flew off of the handle and struck the appellee on the forehead, causing the injury complained of. The injury was caused by the defective condition of the back-out punch in its being loose upon the handle. This fact could have been discovered by a casual observation of the same, and it appears that Kopp had known of said defective condition for from two to three weeks before appellee was injured. A moment before the injury, and in the presence of appellee, Kopp attempted to tighten the back-out punch upon the handle, and appellee saw and appreciated that said tool was loose upon the handle and in a defective condition. The appellant maintained a toolhouse in connection with the car building plant in which there was, at and prior to the time of the injury, an ample supply of back-out punches which were in good repair. By appellant's regulations it was made the duty of the employes using the back-out punches,

if the same became defective, to take them to appellant's toolroom and surrender them to men in charge, whose duty it was in turn to have said back-out punches placed in good order, or to furnish to said employes other back-out punches which were in good repair and fit for use in the work in which said employes were engaged. Neither the appellant nor any of its agents had any actual knowledge of the defective condition of the back-out punch in question at any time before appellee was injured, and no inspection of the punch had been made by any foreman or other agent of appellant at any time after it became loose upon the handle.

The appellant filed a motion for a judgment in its favor on the interrogatories notwithstanding the general verdict, which motion was overruled, and the appellant excepted. This question was properly saved and is one of the errors relied on for a reversal of this case on appeal. The decision of this question must depend upon a proper determination and application of the rules of law governing the duties which the master owed to the servant under the facts disclosed by the answers to the interrogatories.

The tool which was being used by the fellow servant of appellee, and the defect in which caused the injury complained of, was a hand tool of simple construction. It is the duty of the master, in furnishing such a tool to his servant, to inspect it and see that it is in good condition and safe and suitable for use at the time it is so furnished. If a master furnishes such a tool to a servant, and it is defective or unfit for the use intended, and the servant is injured by reason of such defect, the master becomes liable unless the defect is open and obvious; but, if the defect is so open and obvious as to charge the servant with notice thereof, and he attempts to use it and is injured by reason of such defect, he is held to have assumed the risk, and he cannot recover. When, however, such a tool is placed in the hands of a servant to work with, which is safe and suitable at the time it is furnished, and, while so in his possession, it becomes unsafe or defective through use, the master cannot be held liable for injuries to the servant using said tool, or to a fellow servant, caused by reason of such defect. There is no duty resting upon the master to inspect such tools while they are in the possession and use of the servant, and his failure to make such inspection for the purpose of discovering defects caused by use is not negligence. Under such circumstances, where the master is not shown to have actual notice of such defect, he cannot be charged with constructive notice on the ground that he did not inspect the tool while in the possession of the servant for the purpose of discovering defects caused by use, and that such an inspection, if made, would have disclosed the defect. *Miller v.*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Erie, etc., R. Co., 21 App. Div. 46, 47 N. Y. Supp. 235; Gulf, etc., R. Co. v. Larkin, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. (N. S.) 944; Towne v. United Electric, etc., Co., 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; O'Brien v. Mo., etc., R. Co., 36 Tex. Civ. App. 523, 82 S. W. 319; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56. The reason for the rule above stated is that, where the tool is simple in construction so that defects therein can be discovered without special skill or knowledge and without intricate inspection, the servant is as well qualified as any one else to detect defects and to judge of the probable danger of using such tool while defective; and, the tool being in the possession of the servant, his opportunity for inspection is better than that of the master. The application of the rule, however, is no broader than the reason for the rule, and it does not apply to machinery of an intricate nature even though it is in the possession or control of the servant. Gulf, etc., R. Co. v. Larkin, supra; Wachsmuth v. Shaw, etc., Co., 118 Mich. 275, 76 N. W. 497; Garnett v. Phoenix Bridge Co. (C. C.) 98 Fed. 192.

In this case it appears from the answers to interrogatories that neither the appellant nor any of the foremen had any knowledge of the defective condition of the tool which caused the injury to appellee; that the back-out punch was a hand tool, of simple construction; that Henry Kopp, the person with whom appellee was working and who had said back-out punch in his possession, had known of the defect which caused the injury for two or three weeks. Under these facts so found, the appellant could not be charged with negligence on account of its failure to inspect said tool while in the possession and use of Henry Kopp, as it owed no duty to the plaintiff or any one else to make such inspection to discover defects caused by use. The answers to the interrogatories further show that appellant maintained a toolroom in connection with its plant, which was in charge of two men whose duty it was to repair back-out punches when they needed new handles; that at all times when the plant was in operation there was on hand in this toolhouse a supply of good handles for tools of this kind and also an ample supply of back-out punches which were in good repair and fit to be used in driving rivets out of steel cars; that by the rules of appellant it was made the duty of the employé using back-out punches, in case they became defective, to take them to the toolhouse and surrender them to the men in charge, whose duty it was to have such tool repaired and placed in good condition or to furnish such employé with another back-out punch which was in good repair and fit for use. A servant who uses a defective tool or an improper implement, when a suitable one is at hand, cannot complain of the failure of the master to inspect the appliance used. Hefferen v. Northern, etc., R. Co., 45 Minn. 471, 48 N.

W. 1, 526; Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350; O'Brien v. Missouri, etc., R. Co., supra.

It is suggested by appellee that this rule does not apply where the person injured is not the servant using the defective tool, but a coemployé of such servant, and that the injured servant under such circumstances cannot be held to assume the risk of a defect in a tool which he is not using and has had no opportunity to inspect, even though the defect is in a hand tool of simple construction and the defect is open and obvious. It is true that an employé, under such circumstances, does not assume the risk of injury caused by a defect in a tool in the hands of a co-servant unless he has actual knowledge of such defect, and he cannot be denied a recovery on the grounds of assumption of risk. In such cases a recovery is denied on the ground that the injury is not due to any negligence on the part of the master. If the master furnishes a safe tool in the first instance and places it in the possession of a workman, he is under no duty to inspect it while so in the possession of his servant for the purpose of discovering defects caused by use; and if it becomes defective during such use without the actual knowledge of the master, and the servant in whose possession it is continues to use it, and by reason of such defect a fellow workman is injured, the negligence, if any, is that of a fellow servant, and not that of the master. If, on the other hand, a master provides a tool which is unsafe when furnished to a servant, and while it is being used in such defective condition another servant who has no knowledge of its condition is injured by reason of such defect, the master is liable for his negligence in providing a defective tool, and he is not excused because there may have been concurring negligence of a co-servant of the injured party. The injured servant, in such a case, is not precluded from recovery on the ground of assumption of risk for the reason that he has had no opportunity to inspect the tool in the hands of his co-servant. Thompson on Negligence, § 4708; Daly v. Lee, 39 App. Div. 188, 57 N. Y. Supp. 293; Baltimore, etc., R. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854.

It is claimed by appellee that the law which imposes upon the master the duty to inspect machinery and appliances to see that the same are kept in safe condition and fit for use applies also to hand tools of simple construction, and imposes upon the master the duty of inspecting such tools while in the possession of his servants to see that they do not become defective through use or by natural deterioration. Three cases are cited from this court as sustaining this proposition: Baltimore, etc., R. Co. v. Amos, 20 Ind. App. 378, 49 N. E. 854; Indiana, etc., Gas Co. v. Marshall, 22 Ind. App. 121, 52 N. E. 232; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 N. E. 730.

The first two cases relied on can be distinguished. In the case of *Baltimore, etc., R. Co. v. Amos*, supra, the facts showed that the hammer furnished to the servant was defective at the time it was so furnished; that the handle of the hammer was a hickory stick with the bark on it; and that it was worm-eaten and decayed under the bark so as to render it weak and unsafe for use. The person injured was not the servant who was using the hammer, but was one of his co-workman who had never used the hammer or had an opportunity to inspect it. As we have before said, it is the duty of the master to furnish safe tools to his servants, and it is his duty to inspect them at and before the time he furnishes them to see that they are fit for use. In the case under consideration, the facts showed that the master was negligent in failing to discharge this duty, and that the servant was free from fault, and that he had not assumed the risk. In such a case the master is clearly liable.

In the case of *Indiana, etc., Gas Co. v. Marshall*, supra, the facts showed that the spurs furnished by the master to the servant were defective at the time they were furnished, and that the servant was inexperienced and could not and did not discover the defect. Under the circumstances, the servant was held not to have assumed the risk, and the master was held to have been negligent in furnishing defective spurs. There is some language used in the opinions of both of the cases just referred to which would seem to indicate that a master who furnishes a hand tool to a servant is under the duty not only to inspect it for the purpose of seeing that it is safe and fit for use at the time it is furnished, but that this duty is a continuing one which requires him to inspect such tools while in the possession of his servants to see that they do not become defective and unfit for use through use or deterioration. It was not necessary to extend the rule of inspection to this extent in deciding either of these cases. We do not think the language employed in these opinions, which seems to indicate that it is the master's duty to inspect simple hand tools while in the possession of his servants to see that they do not become defective while in their possession, contains an accurate statement of the law. We think that the better reason and the great weight of authority is on the other side of this proposition. *Miller v. Erie, etc., R. Co.*, 21 App. Div. 46, 47 N. Y. Supp. 285; *Gulf, etc., R. Co. v. Larkin*, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A. (N. S.) 944; *Towne v. United Electric, etc., Co.*, 146 Cal. 766, 81 Pac. 124, 70 L. R. A. 214; *O'Brien v. Mo., etc., R. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319; *Marsh v. Chickering*, 10 N. Y. 396, 5 N. E. 56; *Wachsmuth v. Shaw, etc., Co.*, 118 Mich. 275, 76 N. W. 497; *Garnett v. Phoenix Bridge Co. (C. C.)* 98 Fed. 192; *Hefferen v. Northern, etc., R. Co.*, 45 Minn. 471,

48 N. W. 1, 526; *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350; *Oregan v. Marston et al.*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854; *Webber v. Piper et al.*, 109 N. Y. 496, 17 N. E. 216; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; *Carroll v. Western Union Tel. Co.*, 160 Mass. 152, 35 N. E. 456; *Labatt on Master & Servant*, §§ 590, 603; *Bailey*, vol. 1, § 268, p. 82.

In the case of *Baltimore, etc., R. Co. v. Walker*, supra, this court seems to have followed the dictum in the two cases to which we have just referred. The court was therefore led to an erroneous conclusion. That case was referred to with disapproval in an opinion by Roby, Justice, in the later case of *Indiana Stove Works v. Howden*, 44 Ind. App. 658, 90 N. E. 16. We are unable to reconcile the case of *Baltimore, etc., R. Co. v. Walker*, supra, with the decisions of other courts on this subject which state the law as announced in this decision, and we are not able to distinguish it to our own satisfaction. If that case correctly holds that the employé who was sent to procure the tool from the toolhouse stood in the place of the master, and that his act in procuring the cold-chisel was the furnishing of a tool by the master, then the case is correctly decided, for the reason that it would be the duty of the master, under such circumstances, to inspect the tool to see that it was safe for the use, before furnishing it. But, if the master had originally furnished a number of safe and suitable cold-chisels to employés for use which afterward and up to the time of the injury remained in the exclusive custody and control of said employés and none of which had ever been returned for repair to the master or any one representing him in providing said tools, and if some of said tools became defective through use, and said employés intermingled the defective cold-chisels with those which were fit for use in a common receptacle known as a toolhouse, which toolhouse was not in the custody of any person in the service of the master whose duty it was to provide a tool of this character, and if one of the sectionmen who was not charged by the master with any duty to look after or provide tools of this character was sent to this toolhouse to get a cold-chisel, and he selected one that was defective and unfit for use, then the master could not be deemed guilty of negligence because it had not inspected said tools while so in the possession of its servants. There is nothing in the facts disclosed in that case which shows that the cold-chisel which caused the injury was defective when furnished, or that it had not been in the exclusive control of the workmen from the time it was furnished until the time of the injury, or that the toolhouse where it was kept was in charge of any person in the service of the master whose duty it was to provide a tool of this char-

acter, or that there was not safe and suitable cold-chisels in said toolhouse which might have been selected instead of the defective one which caused the injury. We do not think that the facts disclosed in that case were such as to show that the master owed a duty to inspect the cold-chisel, and we disapprove of the reasoning of that opinion in so far as it is based upon the negligence of the master in failing to inspect the tools while in the possession of the servant.

By the general verdict in the case at bar, the jury found that appellant was guilty of negligence, as averred in the complaint, in failing to inspect the back-out punch while in the possession of Kopp, who was the fellow servant of appellee. In view of the law as heretofore stated, the answers to the interrogatories are in irreconcilable conflict with the general verdict on this question. The answers of the jury to the interrogatories clearly show that appellant owed no duty to appellee in this respect, and that it was guilty of no negligence. The trial court should have sustained the motion of appellant for judgment on the interrogatories notwithstanding the general verdict.

In the third instruction the jury was told that it was the duty of the master to exercise reasonable supervision over such tools, and to exercise ordinary care to keep them in reasonably safe condition for the use of the servant; that the master was required to take notice, not only of the deterioration of tools or appliances by continued use, but also of such deterioration by natural or ordinary decay as may be discovered by reasonable inspection in any material which may be provided by him as tools or parts thereof; that the servant had a right to rely upon the master's observance of these requirements and performance of these duties. In the view we take of the law as stated in this opinion, this was not a proper instruction in this case.

The fourth instruction contains a proper statement of the law as an abstract proposition, but as applied to the facts in this case it was misleading and erroneous.

The judgment is reversed, with directions to the trial court to sustain the motion of appellant for judgment in its favor on the answers to the interrogatories.

(43 Ind. App. 304)

NORRIS et al. v. KENDALL.¹ (No. 7,246.)

(Appellate Court of Indiana, Division No. 2.
Feb. 24, 1911.)

1. NEW TRIAL (§ 173*) — STATUTORY NEW TRIAL AS OF RIGHT — SEVERAL CAUSES OF ACTION.

Where a cause of action on which judgment is rendered is one as to which a new trial is not allowable as a matter of right, that it includes another cause of action in which such

a new trial is allowable does not call for a new trial as matter of right, though a cross-complaint is filed seeking to have title to land quieted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 354, 355; Dec. Dig. § 173.*]

2. TRUSTS (§ 95*) — "CONSTRUCTIVE TRUST."

One who obtains the legal title to property by fraud or by violating a fiduciary relation, or by any other unconscientious means, holds it under a "constructive trust" for the person in good conscience entitled thereto (citing 2 Words and Phrases, p. 1476).

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

3. NEW TRIAL (§ 178*) — NEW TRIAL AS OF RIGHT — NATURE OF ACTION — CONSTRUCTIVE TRUST.

The complaint in an action to compel a reconveyance alleged that defendant's father, upon defendant's advice and for a certain purpose, conveyed land to him without consideration upon his oral promise to reconvey, and that the deed should be made in escrow, and not be recorded until a pending suit was settled, but defendant obtained the deed from the escrow holder shortly after it was executed; that after the purposes for which the deed was executed were accomplished a demand was made upon defendant for a reconveyance, which was refused, and that defendant immediately claimed the land and is now in possession thereof, without right, excluding plaintiff and that his claim is unfounded and without right and adverse to plaintiff's interests. Held, that the suit was to annul the conveyance and reinvest title in plaintiff, and directly put the title in issue, so that a new trial should be granted as a matter of right to the losing party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 350-352; Dec. Dig. § 178.*]

4. NEW TRIAL (§ 176*) — STATUTORY NEW TRIAL AS OF RIGHT.

The statute requiring a new trial as a matter of right in actions where the title to land is directly involved is mandatory.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 356; Dec. Dig. § 176.*]

Appeal from Circuit Court, Rush County; L. L. Broadus, Judge.

Action by Bessie E. Norris and another against Marcus A. Kendall. From a judgment for defendant, plaintiff named appeals. Affirmed.

Watson, Tittsworth & Green, Douglas Morris, A. J. Ross, L. B. Ewbank, and Henley, Matson & Gates, for appellant. Claude Cambern, B. L. Smith, D. L. Smith, J. H. Kiplinger, and J. D. Megee, for appellee.

IBACH, J. This is an action brought originally by appellant, Alfred Kendall, against appellee, Marcus A. Kendall, to compel said Marcus A. Kendall to reconvey to appellant certain lands in Rush county, Ind., and that his title thereto be quieted. The complaint is in two paragraphs. The first paragraph alleges that the lands described in the complaint were owned by plaintiff and by him were conveyed to said Marcus A. Kendall without consideration, and under a promise that he would reconvey the same to Alfred Kendall after certain trust purposes had been performed; that such trust purposes had been accomplished, and that he had repeat-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes.
¹Rehearing denied. Transfer to Supreme Court denied.

edly demanded a reconveyance of the land to him by the said Marcus A. Kendall, but that said Marcus refused to make such conveyance; that said Marcus Kendall immediately laid claim to the land, and he is now in control and in possession of the same, without right, and keeps plaintiff out of the same; that his claim is unfounded and without right, and adverse to plaintiff's interest therein.

The second paragraph of complaint is an action to quiet title in the usual form. Issue was joined by an answer in general denial, also by a special answer addressed to the first paragraph of complaint, which pleads matters in bar of appellant's right to recover upon the first paragraph of his complaint. The defendant also filed a cross-complaint, alleging title in himself to the land, and asking to have his title quieted therein. After the cause was tried, on motion of appellee, a new trial as of right was granted.

Upon the conclusion of the first trial, a commissioner was appointed by the trial court to convey the land to Alfred Kendall, and as soon as a conveyance had been made to him he at once conveyed the land to Bessie Norris, one of the parties to this appeal. As soon as she obtained title, she filed her petition in the court below to be permitted to appear in said cause, which petition was granted, and she immediately filed a motion to set aside the order which the court had theretofore made, granting this appellee a new trial as of right, which motion was overruled, and exceptions duly taken. The issues were then reformed, the cause proceeded to trial with such new party, and a second trial resulted in a judgment for appellee.

The appellant in this case insists that the order of the court granting a new trial as a matter of right in said original cause was erroneous, and earnestly argues that the case was not one in which the losing party was entitled to a new trial as a matter of right. We agree that the rule is "where a cause of action proceeds to judgment, which embraces a substantive cause of action, in which a new trial as a matter of right is not allowable, then, even though it embraces other causes in which a new trial as of right is allowable, the policy of the law is to regard that cause of action as controlling in which a second trial as of right is not permitted, notwithstanding the cross-complaint in which one of the parties asks to have his title quieted." We cannot agree with appellant, however, that the cause at bar comes within the rule here announced. In the case at bar, the land in question was conveyed to Marcus A. Kendall for a specific, definite purpose, without consideration, and upon an oral promise to reconvey when the purpose of such deed was fulfilled. There is no direct allegation of fraud in the complaint, but it appears therein that appellee Kendall was the son of the grantor of the

deed in question, and occupied a confidential relation with his father; that the conveyance in question was made upon the advice of said son, for a definite purpose, without consideration, and upon his oral promise to reconvey, with the further agreement on his part that such deed was to remain in escrow with a third party until a certain suit then pending was disposed of, and the said deed was not to be placed on record, but instead the said Marcus obtained said deed from the party to whom it had been delivered to be held in escrow, and had it recorded shortly after it was executed. It also appears that after the purposes for which the conveyance was made were accomplished a demand was made for the reconveyance of said property in accordance with the terms of the original conveyance, which was refused, and a claim of title was asserted to the property by the said Marcus A. Kendall.

It is a well-settled rule of law that when a party obtains the legal title to property, not only by fraud or by violation of confidential or fiduciary relation, but in any other unconscientious manner, so that he cannot equitably retain the property, which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered, in equity, the beneficial owner. 2 Words and Phrases, 1476, and cases there cited.

Neither is the complaint an ordinary one to set aside a fraudulent conveyance of land for the benefit of creditors, but is a suit to annul a conveyance and revest the title in an owner who had been induced to part with it by impositions and undue means. It appears that the judgment rests upon the first paragraph of this complaint. Under this paragraph, the title to the land was directly in question, and it seems to have been so considered by both appellee and appellant in the trial of the cause, in the court below, and the title was necessarily adjudicated by such trial. The case therefore comes fully within the doctrine declared in the case of *Physio-Medical College v. Wilkinson*, 89 Ind. 23.

The statute providing for a new trial as a matter of right in all cases where the title to land is directly in question is mandatory, and the court has no discretion, and must grant a new trial to the losing party, upon a strict compliance with the provisions of such statute. *Anderson et al. v. Anderson et al.*, 128 Ind. 254, 27 N. E. 724; *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Warburton v. Orouch*, 108 Ind. 83, 8 N. E. 634; *Tomlinson v. Tomlinson*, 162 Ind. 532, 70 N. E. 881.

The statute referred to, in very express terms gives the right to new trials as a matter of right in cases of this nature, and it would have been error for the court to have

refused the application of appellee. This is the only question presented by this appeal, and since we have concluded that the title to the property was at all times involved in the controversy, and was the principal issue in the case, the court committed no error in granting such motion for a new trial as a matter of right to appellee.

It appears that, since the filing of this appeal, Alfred Kendall has died, and the court below having committed no error in granting the motion for a new trial as a matter of right, this cause is affirmed, as of date of submission.

(47 Ind. A. 189)

SNOW v. INDIANAPOLIS & E. RY. CO.
et al. (No. 7,068.)

(Appellate Court of Indiana, Division No. 2.
Feb. 22, 1911.)

1. RAILROADS (§ 333*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

There can be no recovery for injury to a traveler at an electric railroad crossing if he voluntarily attempted to cross in front of an approaching car or could have seen the car had he looked.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1080-1083; Dec. Dig. § 333.*]

2. RAILROADS (§ 320*)—TRAVELERS AT CROSSINGS—RIGHTS OF MOTORMAN.

A motorman can assume that a traveler seen approaching a crossing sees or hears the cars approach and will use ordinary care to avoid danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014-1016; Dec. Dig. § 320.*]

3. RAILROADS (§ 309*)—TRAVELERS AT CROSSINGS—DUTIES.

As to liability to travelers at road crossings, there is no difference between a steam railway and an interurban line operating on its own private right of way or outside the traveled part of a highway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 981; Dec. Dig. § 309.*]

4. TRIAL (§ 295*)—MISLEADING INSTRUCTIONS.

That instructions tend to mislead when considered separately does not show error, where, when considered together and with other instructions, there is no misleading tendency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. RAILROADS (§ 325*)—TRAVELERS AT CROSSINGS—CARE REQUIRED.

A traveler who is partly deaf in crossing a railroad track must use his other senses to avoid danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1030; Dec. Dig. § 325.*]

6. RAILROADS (§ 327*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.

It was proper to instruct that there could be no recovery if decedent drove upon the track so close to the car which struck him that a collision was unavoidable, and, if he had looked with care proportionate to his surroundings, he could have avoided the car.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

7. RAILROADS (§ 301*)—CROSSINGS—RELATIVE RIGHTS.

The rights of highway travelers and railway companies at crossings are equal, neither having an exclusive right to use it, but the company has the right of prior passage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. § 301.*]

8. RAILROADS (§ 322*)—CROSSINGS—RIGHTS OF MOTORMAN.

A motorman may assume that one approaching a crossing is in the possession of his faculties until the contrary appears.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1018; Dec. Dig. § 322.*]

9. RAILROADS (§ 351*)—CROSSING ACCIDENTS—INSTRUCTIONS.

In a suit for death of a traveler at a railway crossing, an instruction that the railroad company had the right to operate its car over the road when decedent was injured, as averred in the complaint, was not erroneous as being misleading.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1193; Dec. Dig. § 351.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE—LAST CLEAR CHANCE.

In a suit for death of a traveler at a railway crossing, an instruction on the doctrine of last clear chance was properly refused, where the evidence did not raise that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

11. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS—MATTER COVERED.

An instruction covered by one given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 650-659; Dec. Dig. § 260.*]

12. RAILROADS (§ 351*)—CROSSING ACCIDENTS—INSTRUCTIONS.

In a suit for death of a traveler at a railway crossing, an instruction that if defendant negligently operated its car, and such negligence proximately caused the death, plaintiff should recover, was properly refused as being incomplete.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1215; Dec. Dig. § 351.*]

13. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION.

Instructions should be considered as an entirety.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

14. RAILROADS (§ 316*)—INTERURBAN ROADS—SPEED.

There is a certain standard of speed at which interurban cars may be safely run on a public highway, and whether a certain speed is negligent depends upon the surrounding circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1006-1008; Dec. Dig. § 316.*]

15. TRIAL (§ 198*)—INVASION OF JURY'S PROVINCE—RAILWAY CROSSING ACCIDENTS—MATTERS OF LAW.

An instruction that one driving upon a railroad track without looking for approaching cars in such close proximity to a car that he is injured is guilty of contributory negligence was not erroneous as invading the jury's province.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467-470; Dec. Dig. § 198.*]

16. RAILROADS (§ 348*)—CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE—EVIDENCE — WEIGHT.

Evidence held to show that death of a traveler at a railway crossing was caused by his own negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1144-1149; Dec. Dig. § 348.*]

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Action by Henry Snow, Administrator, against the Indianapolis & Eastern Railway Company and another Judgment for defendants, and plaintiff appeals. Affirmed.

Charles L. Tindall, for appellant. W. W. Cook and W. H. Latta, for appellees.

IBACH, J. This is an action brought by appellant, administrator of the estate of Wesley Addison, deceased, in the Hancock circuit court, to recover damages on account of the alleged negligence of appellee, causing the death of said Addison, and for the benefit of his next of kin. The complaint, to which a demurrer for want of facts was overruled, is in one paragraph, and, omitting the formal parts, discloses that on the 12th day of October, 1906, plaintiff's decedent was at the residence of Alonzo Tyner, who lived along a public highway in Hancock county, known as the "National Road"; on said day plaintiff's decedent started to return from Tyner's residence to his own home in a buggy, and drove north on the private way leading from said Tyner's residence to the traveled portion of said National Road, and in order to reach said road it was necessary to recross the tracks of said defendant; that west of the driveway, between the house of said Tyner and the defendant's tracks, there were a number of trees and bushes, and trolley poles and telephone poles, which obstructed decedent's view of the tracks; that plaintiff's decedent approached defendant's tracks in a buggy at a slow trot, and attempted to cross the said tracks at the said crossing, and while on the tracks defendant, Indianapolis & Eastern Railway Company, by its servant, carelessly and negligently approached from the west, with one of its cars, at a high and dangerous rate of speed, and negligently ran the same upon and against the decedent's buggy, thereby killing him.

It is also charged that the defendant's servants in charge of the car negligently failed to keep the same under proper control, and negligently failed to look ahead on said public road for persons who might be traveling thereon, and that defendant's servants negligently ran said car upon decedent, without giving any signal or warning whatever, in time so that decedent could, in the exercise of ordinary care, have avoided said injury; that owing to the said obstructions, decedent could not see nor hear defendant's car in time to avoid said collision, and that he

was unaware of the approach of the car until he was upon the tracks at the crossing, at which time decedent's position was suddenly and unexpectedly rendered perilous; that he urged his horse forward, attempting to clear the track, and did everything in his power to convey himself to a place of safety, but that he was unable to do so on account of the high and dangerous rate of speed; that through the negligence of the defendant decedent was killed; that the defendant, Terre Haute, Indianapolis & Eastern Traction Company, has taken over to itself all the property, the rights and franchises of the Indianapolis & Eastern Railway Company, and is now in possession of and owns said railroad; that said decedent left surviving him his widow, Elizabeth J. Addison, and his daughter, Anna Shimm, formerly Addison, aged 29 years, both of whom were living with said decedent as members of his family at the time of his death, and dependent upon him for support; that decedent earned \$1,000 per annum prior to his death; that by reason of the facts aforesaid his said widow and child have been damaged in the sum of \$10,000, for which the plaintiff demands judgment. Upon the issues formed by general denial, the cause proceeded to trial. A verdict in favor of appellee was returned, and save the motion of appellant for a new trial, judgment was rendered against appellant that he take nothing by his action, and for costs.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. The grounds therefor, relied upon for reversal, are that the court erred in giving and refusing to give certain instructions, and in the exclusion of certain evidence offered by appellant.

The following facts are revealed by the evidence in the case: The deceased had been at the home of a neighbor, and was returning to his own home, driving north along the private way leading from such neighbor's home to the main road. He was acquainted with the road and crossing over the track where he was injured. There was nothing present at the time to attract his attention from the surroundings. He undertook to cross in the daytime over this crossing where there was a clear track, nothing to obstruct his view of an approaching car for a long distance both to the east and west from the point of crossing, and for several feet before driving upon the crossing. The country surrounding the point was open and unobstructed, the track running east and west, and he was driving to the north. His horse was traveling at a "dog trot." He did not change the gait of the horse until after the horse got on the railroad track; then deceased got up in the buggy and slapped the horse with the lines in order that he might hurry over, but at no time did he stop the

horse prior to driving upon the track. It is testified by some of the witnesses that he did not even look toward the car before driving upon the track. Other witnesses state that he did look some distance before he entered upon the track, and then it was that he began to hurry his horse over. It appears that at any point, for some distance away from the crossing, before going upon the track, he could have seen the car had he looked. Some of the witnesses testify that the whistle was sounded 600 or 700 feet from the crossing; that the top of decedent's buggy was half down; that the motorman upon approaching the place of accident, blew the ordinary crossing whistle, then several quick whistles were given, then the motorman reversed the car. At that time, the horse and buggy were just coming upon the track. The car at that time was from 50 to 100 feet away when he came upon the track.

It thus appears that the deceased was familiar with the location of the track and the surroundings; that it was in the daytime on a clear bright day with nothing of consequence to obstruct his view to the west in the direction of the approaching car; that he had an unobstructed view for some considerable distance away from the crossing, before going upon the track, at any point of which he could have seen the car had he looked, and that the whistle was sounded 600 or 700 feet away from the crossing. Under such a state of facts, it has been held as a matter of law that a person attempting to cross would be guilty of negligence defeating a recovery. *Mann v. Belt Ry.*, 128 Ind. 143, 26 N. E. 819; *Wilcox v. Rome, etc., Ry. Co.*, 39 N. Y. 358, 100 Am. Dec. 440; *Young v. Citizens' St. Railway Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142.

If decedent attempted to cross over the track, when he knew the approaching car was nearby, he thereby incurred the risk. When one voluntarily attempts to cross a track in front of a moving car, which was seen, or could have been seen if the party had looked, and which was approaching not far distant from the crossing, and a collision occurs, he cannot recover. *Ohio, etc., Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; *Cadawallader v. Llewellyn*, 128 Ind. 518, 27 N. E. 161. Appellee's servants saw deceased while he was traveling along the private road, leading to the crossing, and they had the right to assume that he saw or heard the car approaching. The car was at all times within his view, when he was near enough to the crossing, to make it necessary for him to learn for his own safety whether a car was about to cross over the same, when he himself was attempting to cross. They also had the right to assume that he would not voluntarily throw himself in a place of danger, but he would make use of all of his faculties, and use ordinary care, at least, to observe the

approach of a car, and they had the right to run the car and operate the same upon these presumptions.

In a well-considered case, the Supreme Court say: "The conduct of the deceased when first seen on the highway, driving toward the crossing, was apparently that of an ordinary person. There was nothing to show that he was not endowed with and possessed all the senses and faculties ordinarily possessed by a human being. Appellant's servant had the right, under the circumstances to presume that the deceased, before reaching the crossing, would exercise proper caution to prevent injury to himself; that he would not only listen, but also look in each direction for approaching trains before attempting to cross the track, and, if he did so, he would see the train and be warned, and stop at the last moment before entering upon the track." *Cleveland, etc., Ry. Co. v. Miller*, 149 Ind. 503, 504, 49 N. E. 445.

There has been much confusion over the rights and duties of an operator of an interurban railway, as distinguished from a steam railway. This is no doubt due to the fact that an interurban railroad partakes somewhat of the character of a street railway when the tracks are laid in the street, but when we consider an interurban railroad operated on its own private right of way, or outside of the traveled portion of a public highway, there appears no reason for distinction, and there is none. The Supreme Court of Ohio say: "It seems reasonably clear that while operating the cars of an interurban railroad within a municipality, the regulations and powers of a street railroad company are applicable, but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads. The danger is the same in either case, and where there is no difference in danger, there should be no difference in the care required, nor in the rights and liabilities flowing from the neglect to observe the proper care." *Electric Street Railroad Co. v. Lohr, Adm'r*, 68 Ohio St. 101, 67 N. E. 161, 67 L. R. A. 637.

The second, eighth, twelfth, and sixteenth instructions, given at the request of the appellee, and which are objected to, may properly be considered together. It is claimed that the use of the words "private crossing" in each of said instructions was misleading. These instructions informed the jury relative to the care required in approaching private railroad crossings. The use of the words objected to was not erroneous when applied to the issues and the evidence in the case. These instructions might possibly be inclined to mislead the jury, when considered separately and alone, but when considered to-

gether, and in connection with other instructions given on the same subject, they were not misleading, and were properly given.

Instruction No. 4, given at the request of appellee, over the objection of appellant, told the jury that if deceased was hard of hearing, then the law required him to make use of his other senses to avoid danger. This instruction was applicable to the evidence, and the court did not err in so charging the jury.

Instruction No. 6, requested by appellee, was objected to also. It told the jury if they found from the evidence that the deceased drove upon the track in such close proximity to the car that a collision was unavoidable, and if he had looked with care proportionate to his surroundings, he could have seen and avoided said car, then he could not recover. By this instruction the jury were told if the deceased failed to exercise ordinary care, and such failure caused his injury, he was then not entitled to recover. This is a correct statement of the law, and there was no error on the part of the court in so instructing the jury.

It has been repeatedly held by the courts of this state, as well as other states, "that the rights of travelers and a railroad company upon a highway crossing are equal. Neither has an exclusive right to use it, and both are bound to do what the law requires of them. The right of the company is, however, superior in one respect; that is, the right of priority of passage. Of necessity this must be true, since it cannot be legally possible that cars must be brought to a stop at every highway crossing, in order to allow travelers to pass over." *Louisville, etc., Ry. Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155. Mr. Beach says of a traveler who is about to cross a railroad track: "He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption." *Beach, Contributory Negligence*, 191.

The ninth instruction was also objected to. It instructed the jury that a motorman may assume that a person attempting to or about to cross the track of a railroad at a crossing, is in the possession of his faculties, until something appears to the contrary. This instruction is correct, and is supported by the case of *Ohio, etc., Railway Co. v. Walker*, *supra*.

Objection is made to the instruction No. 16½, requested by appellee, which is as follows: "I instruct you that defendant had the right to operate its car over the National Road at the time and place where the decedent was injured, as averred in the complaint." Counsel for appellant insists that this instruction was misleading; that it instructed the jury that the appellee had the right to operate its car in the highway as alleged in the complaint; and that the complaint alleges negligence in the operation of

the car in many particulars. The position taken by the appellant is not correct. The instruction relates to the time and place of the accident, and not the manner in which the car was operated.

Instruction No. 1, requested by appellant and refused, involved the doctrine of the last clear chance, and was not applicable to the facts in the case, and it was therefore properly refused.

Instruction No. 8, requested by appellant, so far as applicable, was covered by other instructions given.

Instruction No. 11, requested by the appellant and refused, would have told the jury if they found that the appellee negligently operated its said car, and such negligence was the proximate cause of the death of the decedent, then they should find for the plaintiff. This instruction was incomplete, and for this reason, the court did not err in its refusal. *Over v. Schiffline*, 102 Ind. 191, 26 N. E. 91; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885.

Objection is made to that part of instruction No. 15 given by the court of its own motion which told the jury that a car "may be run at a higher rate of speed over public highways in the country than on the streets of a city where travel is more numerous and the streets more crowded." It is a well-established rule that instructions are to be considered as an entirety, and not in fragments or portions. The language above quoted might, standing alone, be misleading, but when read as an entirety said instruction correctly advised the jury there was no certain standard of speed at which interurban cars might be safely run on a public highway in this state, but that in determining whether a given speed was negligence or not depended upon the circumstances in each particular case, and left the question to be determined by the jury, whether in the case at bar, the car was run at a dangerous and unsafe rate of speed, in view of the location and conditions surrounding the accident. This was one of the facts to be determined by the jury, and the instruction was properly given.

Instruction No. 18, given by the court upon its own motion, told the jury that if one drives upon a railroad track in a highway, without looking as to the approaching cars, and thereby drives in front of an approaching car in such close proximity that such person is injured by the car, that person would be guilty of contributory negligence. Appellant claims this was erroneous, because it was an invasion of the province of the jury. In view of the facts of this case, and in consideration of all of the other instructions given, we cannot conclude that the instruction was so erroneous, or that the error is one that will justify reversing this cause. The jury certainly could not have been misled by it. ✓

We have considered carefully all of the instructions which are objected to by appellant, and we conclude that there was no error on the part of the court in giving or refusing to give the instructions which have been questioned. We think it clear that the appellant's intestate was guilty of contributory negligence, and that such negligence was the cause of his death. The result reached in the trial in the court below, seems to have been proper, and we are unable to find any error in the record.

Judgment affirmed.

(48 Ind. App. 549)

HARROD v. BISSON. (No. 6,885.)
(Appellate Court of Indiana, Division No. 1.
Feb. 23, 1911.)

1. WITNESSES (§ 275*)—CROSS-EXAMINATION—SCOPE.

In an action against a physician for negligent treatment, where he testified on direct examination his treatment was proper, evidence that, after the suit was filed, he conveyed his real estate to his wife, was competent on cross-examination, though the matter was not touched on in his direct examination, as tending to show a feeling that he might not have properly treated the plaintiff.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 275.*]

2. EVIDENCE (§ 219*)—ADMISSIONS—ADMISSIONS BY CONDUCT.

In an action against a physician for negligent treatment, the conveying of his real property to his wife after the filing of the suit is admissible as an admission by conduct showing that he realized the plaintiff should prevail.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 219.*]

3. EVIDENCE (§ 268*)—ADMISSIONS—PROOF—RIGHTS OF OPPOSITE PARTY.

Where it was shown, as an admission by conduct, that a physician conveyed his real property to his wife after an action for malpractice was filed against him, he was entitled to explain the transaction, or to have an instruction limiting its application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1022-1027; Dec. Dig. § 263.*]

4. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR—EXAMINATION OF EXPERT WITNESS.

Where a medical expert had just testified as to his examination and to the condition of a wounded wrist, alleged to have been negligently treated, a question calling for his opinion, but not expressly limiting it to his previous testimony, will be presumed to have been based upon it, and under Burns' Ann. St. 1908, § 407, providing that errors not prejudicial shall be disregarded, and section 700, providing that no judgment shall be stayed where it appears the merits of the cause have fairly been tried, will be considered harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.*]

5. TRIAL (§ 253*)—INSTRUCTIONS—SCOPE.

A single instruction need not give all the law applicable to the case, but is sufficient if correctly stating the law applicable to its sphere.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

6. TRIAL (§ 253*)—MISLEADING INSTRUCTIONS.

Where a complaint consisted of several paragraphs, an instruction that the jury might find for the plaintiff if they found from the evidence that the material allegations of any one paragraph had been proved, sufficiently indicated to them that they might so find under the other instructions given, and was not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

7. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where the jury's answers to interrogatories show that no harm resulted from an erroneous instruction, it is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.*]

8. TRIAL (§ 234*)—INSTRUCTIONS—BURDEN OF PROOF.

An instruction that the burden of proving contributory negligence is upon the defendant and until he has shown it by a preponderance of evidence, etc., does not mean that it is necessary for his evidence to show it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538; Dec. Dig. § 234.*]

9. DAMAGES (§ 50*)—MEASURE—INJURIES TO PERSON—MENTAL SUFFERING—REMOTENESS.

Worry and mental pain resulting from the contemplation of a deformity caused by a negligent injury, or the humiliation of going through life in that condition, are too remote to be considered as damages, but personal disfigurement resulting from a negligent injury is an element of damage, and the mental distress reasonably flowing from it, such as may be experienced from the use of the injured member.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 50.*]

10. ACTION (§ 27*)—NATURE—TORT OR CONTRACT—ACTIONS FOR MALPRACTICE.

A complaint in an action against a physician for malpractice which set out the hiring, but averred no promise of careful treatment, and alleged that the injury was caused by the negligent, careless and unskillful treatment, is based on tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.*]

11. LIMITATION OF ACTIONS (§ 127*)—COMMENCEMENT OF ACTION—AMENDING COMPLAINT.

Where an amended complaint was based on the same theory as the first, it related back to it for the purpose of avoiding the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Appeal from Circuit Court, Allen County; E. O'Rourke, Judge.

Action by Mary Bisson against Morse Harrod. From a judgment for plaintiff, defendant appeals. Affirmed.

Fred Shoaff and Zollars & Zollars, for appellant. A. H. Bittinger and A. E. Houck, for appellee.

HOTTEL, J. This is an action against the appellant to recover damages alleged to have resulted from the negligent and unskillful manner in which he reduced and treated appellee's fractured and injured wrist and hand.

The amended complaint is in three para-

graphs. It will be necessary to set out the substance of the first only, which is as follows: "That on August 25, 1904, appellant was a practicing physician and surgeon; that on said day the appellee, Mary Bisson, fell from a chair and dislocated, bruised and injured the wrist of her left arm, and dislocated, bruised, broke and injured the bones in the wrist and hand on her left arm, and the appellant undertook faithfully, skillfully, and diligently to treat and set and endeavor to cure said hand, arm, and wrist, but the plaintiff avers that, on the contrary thereof, the said defendant conducted himself in and about his endeavoring to set said wrist and hand, and in and about curing the same, so unskillfully, negligently, and unprofessionally, that by reason of the improper treatment, and unskillful and negligent conduct of the defendant, said wrist and hand were not set, nor healed and cured, but were permitted to remain out of place for the space of six weeks and three days, until it became impossible to properly set or cure the same, whereby she is damaged in the sum of five thousand dollars."

A demurrer was filed to each of the paragraphs of amended complaint, which was by the court overruled and exceptions given appellant. The cause was then put at issue by answer in general denial, and a separate answer of the two-year statute of limitations to each of the paragraphs. The cause was tried by jury, and a verdict of \$1,000 for appellee returned with answers to interrogatories. A motion for new trial was overruled, and judgment rendered on the verdict for \$1,000, from which the appellant prayed an appeal to this court. The only error assigned, argued by counsel, is the overruling of the motion for new trial.

The first ground of this motion, urged by counsel, is one which relates to the admission of evidence. On cross-examination the appellant was asked the following question: "Doctor, did you convey your real estate to your wife after this suit was brought or just before?" And over the objection and exception of the appellant the doctor was permitted to answer the question, "Yes." Appellant's counsel insists that this was error; that the evidence "had no relation to any issue in the case," and especially that it was not admissible on cross-examination because there was no examination of the witness upon this subject in his examination in chief. As an independent fact, this conveyance by appellant of his real estate to his wife is foreign to any issue in the case, and it could be competent and material, if at all, but for one purpose, viz., it might disclose inculpatory facts and circumstances, or an admission by way of acts and conduct proper to be submitted to a jury, as tending to show that the appellant himself was conscious of having failed and neglected to treat the appellee's injured arm in that skillful and care-

ful manner which the law required under such circumstances, and feared that he might be required to respond in damages on account of such neglect and lack of skill. We assume that it was upon this theory that the court below admitted the evidence. The appellant testified in chief to his treatment of the broken arm, and in effect denied any act of omission or commission that it in any way tended to show any lack of professional skill, care or attention, but said in effect that he did everything that a careful, attentive, and skillful surgeon would have done under the same circumstances. This being the effect of appellant's testimony, it was proper on cross-examination for the appellee to elicit from appellant any admission, by way of words or conduct, that tended to contradict, destroy, weaken or discredit his said evidence in chief, and we think the evidence, or admission elicited by the question objected to, tended, in some degree, to have this effect, or at least was a question necessarily preliminary to other questions which might elicit answers having such tendency and effect, and that for this reason the evidence, if competent and proper at all, was proper on cross-examination.

There seems to be some conflict in the authorities in different states as to the admissibility of this character of evidence, but we think the weight of authority and the better reasoning of the same favors its admission. In the case of *Myers v. Moore*, 3 Ind. App. 226, 231, 28 N. E. 724, 726, this court said: "The appellant testified in his own behalf, and over his objection was asked upon cross-examination, and required to answer, about the disposition made by him of his property after the commission of the alleged assault and battery. This examination was competent for one purpose. It might disclose inculpatory facts and circumstances proper to be submitted to the jury. It might throw light upon the quality of the acts charged against the appellant in the complaint. It is upon this principle, or theory, that evidence of flight, escape, disguise, concealment, and the like may properly be considered in determining the guilt or innocence of the accused in a criminal case. Its weight would be a question for the jury. If the appellant wanted to avoid an improper application by the jury of this evidence, he should have prepared a charge upon that subject and requested the court to give it."

Wharton, in his law on Evidence, vol. 2, § 1081, says: "Admission may be by acts as well as by words. Silence itself may, as we shall soon more fully see, under certain circumstances, be proved as involving an admission; and a fortiori may such acts as are tantamount to an admission in words." To the same effect is the case of *Parker v. Monteith*, 7 Or. 277, 279. See, also, 1 Greenl. Ev. §§ 65, 170.

In the case of *Heneky v. Smith*, 10 Or. 349,

45 Am. Rep. 143, a deed had been admitted in evidence by the lower court showing a conveyance by defendant of several parcels of real estate, the consideration for which was \$12,000. This deed was executed 14 days after the shooting, and 6 days, as it appears from the record, after the action was commenced, and the summons served. The admission of this evidence was also duly objected to, and an exception taken to the ruling of the court admitting it to go to the jury. In discussing that case the Supreme Court of Oregon said: "In view of its character and the circumstances under which it was executed, we think it was properly admitted. The jury might reasonably infer from this act of the appellant, in view of all its surroundings, that it was prompted by a consciousness on his part that the shooting of the respondent was unjustifiable, and that he was legally liable for the damages occasioned by it. In this view, it would operate like an admission of liability, and be equally competent. 'Admissions may be by acts, as well as by words.' *Pennsylvania R. R. v. Henderson*, 51 Pa. 315. *Wigmore on Evidence*, 1, § 282, uses the following language: "The conveyance of property during litigation or just prior to it may be evidence of the transferor's consciousness that he ought to lose."

Counsel for appellant insist that in this state the most recent case upon this subject is the case of *Miller et al. v. Dill et al.*, 149 Ind. 326, 49 N. E. 272, which they say is directly in point and an authority against the admission of this evidence. We do not so construe that case. That case was one where the plaintiffs brought suit to cancel some promissory notes, claiming that they were forgeries. One of the plaintiffs testified in his own behalf, and upon cross-examination was asked if he then owned property, and if he did not convey property held by him at the time of the alleged execution of the notes, to which question the court sustained objections, and the Supreme Court said in reference thereto: "It is claimed that this question would have elicited the information that the witness had conveyed property held by him at the time of the alleged execution of the notes, and that he had no property at the time of the examination. The inferences sought to be drawn were that the conveyance was fraudulent, having been intended to defeat these notes, and therefore an act inconsistent with the evidence of the witness that he had not executed the notes, and had no knowledge of their existence. Whatever the legitimate inference from a fraudulent or voluntary conveyance, there can be no inference from the mere conveyance of one's property that he is a debtor, or that he does so to defeat a claim, the validity of which he denies."

It will be seen that the facts in this case, relied upon by counsel for appellant, were

entirely different from those in the case at bar. It was *plaintiff* and not the *defendant* who was asked the question, and the same inference was not warranted in the offered evidence in that case that would be warranted in the case at bar, and in that case the only question put was: "If he (the *plaintiff*) then owned property, and if he had not conveyed property held by him at the time of the alleged execution of the notes." There was no offer to follow this question up with other questions and answers showing that the conveyance was fraudulent. If the harm came from the question, which appellant insists probably resulted, it seems to us that it must have been due to the silence of appellant and the want of an explanation by him of the facts and circumstances connected with the conveyance. This the appellant could have prevented by such explanation, if in fact the conveyance was bona fide, and not made on account of a consciousness of his own inculpatory acts. After this question and answer, appellant was entitled, on a re-direct examination, to a full explanation and statement of all the facts and circumstances of the conveyance to the end that the jury might draw no improper inference from the admitted evidence. Appellant also had the further protection that the law affords of defining the application and purpose of the admitted evidence by tendering an instruction on the same. *Myers v. Moore*, supra; *Marks v. Jacobs*, 76 Ind. 216; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110.

Appellant's counsel also insist that a line of cases applying to the admission in evidence of changes in, and repairs of, machinery causing personal injuries are in point and controlling on this question. We think this line of cases are in point, but that instead of supporting appellant's position they, by inference at least, contradict it. An examination of those cases, which hold that you may not, in personal injury cases, introduce evidence of repairs or changes in the machinery or appliances after the injury, for the purpose of proving an admission on the part of the defendant that he had been a wrongdoer, will disclose that they, in fact, all recognize the general rule that such acts or conduct are competent as evidence of admission, but these cases are excepted from the rule as a matter of public policy, and because great harm would result in such cases from the observance of the rule and good would follow from its abrogation. The theory upon which these cases are put, among the exceptions to the rule, is that men should be encouraged to profit by their experience and apply the knowledge thus obtained. In the case of *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 19, 23 N. E. 965, 966 (7 L. R. A. 588, 18 Am. St. Rep. 303), the Supreme Court said: "True policy and sound reason require that men should be encouraged to improve, or repair, and not be deterred from it by the

fear that if they do so their acts will be construed into an admission that they had been wrongdoers."

Mr. Wigmore in his work on Evidence, § 283, upon this subject says: "That argument is that the admission of such acts, even though theoretically not plainly improper, would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury." We are of the opinion that no error was committed by the admission of this evidence.

Propositions numbered 3, 4, 5, 6, and 7 each relate to the admission of evidence and call in question certain rulings of the court relative thereto. In the testimony of appellee's witness, Dr. Barnett, the first ruling complained of is presented by the following question and answer: "Q. Now, Doctor, upon your examination of Mrs. Bisson's left arm and wrist and hand, you may state whether or not, from your examination of the same, it is held in the same position as it was when it was splinted? A. I think the hand, the bones, are in the same relationship that they were at the time it was dressed; that is my opinion." The objection to this question was that the witness was not asked to state any facts upon which his opinion was based. The question does not in fact, by its express terms, require the witness to base his opinion upon the facts which he had detailed to the jury, and in this respect the question is subject to the objection urged by counsel. *Burns v. Barenfield*, 84 Ind. 43-47; *Sauntman v. Maxwell*, 154 Ind. 114-126, 54 N. E. 397; *Bedford Belt Ry. Co. v. Palmer*, 16 Ind. App. 17-19, 44 N. E. 686. But an investigation of the record discloses that the witness had in fact, before this question was put to him, testified as to his examination of the injured arm and wrist and detailed the conditions which he found and observed. We think therefore that while it is true the question itself does not limit and confine the doctor's opinion to the facts which he had before detailed to the jury, yet it may be fairly presumed that the answer was based upon such facts.

Section 407, *Burns' Ann. St. 1908*, provides as follows: "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect."

Section 700, *Burns' Ann. St. 1908*, provides

as follows: " * * * Nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

The purpose of these two sections, if they are to be given any force or effect at all, is, we think, to prevent the reversal of a case for an alleged error of the kind now under discussion, where an examination of the record itself convinces the court that no prejudice resulted to the complaining party from the error complained of, and that no different result would have been reached if the error had not been committed. The force and effect of these two sections of the statute and their controlling influence has so often been recognized and declared by the Supreme Court and by this court that we deem the citation of authority thereon unnecessary. There can be no doubt but that the substance of the matter inquired about in the question complained of was proper, and that the question put, to which the objection is urged, could have been so framed in the lower court as to comply with the requirements of the law which appellant insists were disregarded. If the question had been so amended and put to the witness in the court below, we feel safe in saying, from our investigation of the record, that the same information and probably the identical answer would have been elicited to such amended question that was in fact obtained to the question put to which complaint is made. In such case this court will treat the error as harmless.

Propositions designated 4, 5, 6, and 7 by appellant's counsel in his brief, all relate to the admission of evidence, and the objections to this evidence are practically the same as those stated, with reference to proposition number three. In each of these objections there is in fact less reason for counsel's contention than there was in the case of proposition No. 3, and what we have said in connection with that "proposition" applies with equal or greater force to each of the objections presented by "propositions" 4, 5, 6, and 7.

Counsel next discuss proposition No. 8: "The court erred in giving to the jury instruction No. 2, asked by appellee." The language of the instruction objected to is as follows: "And if you find from all the evidence in this case that the plaintiff has proven the material allegations of any of the three paragraphs of her complaint, by a preponderance of the evidence, then you *may* find for the plaintiff." The language of this instruction is that the jury *may* find for the plaintiff and not that they *must* so find. The purpose and intent of this part of the instruction was to advise the jury merely that to entitle the plaintiff to a recovery she was not required to prove the material allegations of all of the paragraphs of her com-

plaint, but that the proof of the material allegations of any one paragraph was sufficient. No single instruction is required to contain all of the law applicable to the case; but if it be correct as to the statement of the law, with reference to the matter upon which it purports to advise the jury, it is sufficient. *L. N. A. & Co. Ry. Co. v. Jones*, 108 Ind. 551-570, 9 N. E. 476; *Hamilton v. Love*, 152 Ind. 641-646, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; *Slevers v. Peters Box & Lumber Co.*, 151 Ind. 642-661, 50 N. E. 877, 53 N. E. 399. We think that the language of the instruction clearly indicated to the jury that, under the conditions mentioned therein, they might find for the plaintiff subject to the condition and rules of law announced in the other instructions given; and when taken in connection with the other instructions given in the case, we do not think that the jury could have been misled by the language of this instruction, and that therefore no harm could have resulted from the giving of the same. But no error could be predicated upon the giving of this instruction that would entitle the appellant to a new trial in any event, because an examination of the record makes certain the fact that no harm resulted from the giving of the same.

There were 110 interrogatories answered by the jury, and these answers find and show conclusively that appellee was free from contributory negligence. They further affirmatively and positively find that the appellant, in reducing and setting the bones of appellee's fractured wrist and hand, never in fact got the bones in position or alignment, but that they were left from the beginning as appellant found them immediately after the accident. These answers to interrogatories conclusively show that appellee's injuries were caused wholly by appellant's negligence, and that appellee in no wise contributed thereto. Where the answers to interrogatories show conclusively that no harm resulted from the giving of an instruction, the giving of the same, though erroneous, will not be ground for a new trial. *Indianapolis St. Ry. Co. v. Hockett*, 159 Ind. 677, 681-682, 66 N. E. 39; *Ellis, by Next Friend, v. City of Hammond*, 157 Ind. 267-271, 61 N. E. 565.

The next proposition, No. 9 in appellant's brief, relates to instruction No. 9. The same objection is urged to this instruction that was urged to No. 2, and what we have said supra applies with equal force to this instruction, and we might add that the objection to No. 9 is without merit because the instruction expressly provides that the plaintiff must be without fault before she is entitled to recover.

Counsel next object to instruction No. 5 asked by appellee, and quote as the objectionable feature of the instruction the following language: "The burden of proving

contributory negligence is upon the defendant, Morse Harrod, and, unless *he has shown the same* by a preponderance of the evidence, your finding as to this question should be for the plaintiff." Counsel then added: "It was not necessary for appellant to show by *his* (our italics) evidence that there was contributory negligence on the part of appellee." We might add that the instruction does *not* say that it was necessary for appellant to show by *his* evidence, etc., but what we have said supra as to what the answers to interrogatories show disposes of the objections to this instruction, and renders the error, if any, unavailable on appeal.

Objection is urged also to instruction No. 4, counsel insisting that it authorized the jury to take into account, in estimating damages, the worry and annoyance of the appellee, on account of contemplation of her deformity. There is no doubt but that counsel for appellant are supported by the weight of authority in their contention that any annoyance, worry, or mental pain resulting merely and solely from the contemplation of a deformed member of the body, and the humiliation of going through life in such a crippled condition, are too remote to be considered as elements of damage. *Maynard v. Oregon Ry. Co.*, 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477; *Lake St. Elevated Ry. Co. v. Gromley*, 108 Ill. App. 59; *Chicago Ry. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366; *Southern Pacific R. Co. v. Hetzer*, 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288.

On the other hand, it is well settled in Indiana that personal disfigurement or deformity resulting from negligent injury is a proper element to be considered in estimating damages, and such "anxiety and distress of mind as are fairly and reasonably the plain consequences of the injury complained of" are proper elements of damage. *Pittsburgh, etc., R. Co. v. Montgomery*, 152 Ind. 1, 26, 49 N. E. 532, 69 L. R. A. 875, 71 Am. St. Rep. 301; *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Cox v. Vankerleed*, 21 Ind. 164; *Fisher v. Hamilton*, 49 Ind. 341.

In the case of *Southern Pac. Co. v. Hetzer*, supra, 135 Fed. at page 274, 68 C. C. A. at page 28, 1 L. R. A. (N. S.) 288, the court said: "The rule which has been adopted by this court, however, and the rule which seems to us the better one, is that in actions for personal injury the plaintiff may recover for the bodily suffering and the mental pain which are inseparable, and which necessarily and inevitably result from the injury. But mortification or distress of mind from the contemplation of the crippled condition and of its effect upon the esteem of his fellows, that mental pain which is separable from the physical suffering caused by the injury, is too remote, indefinite, and intangible to constitute an element of the damages in such a case, and evidence of it is inadmissible."

Under the authorities supra it was entirely proper that the jury, in estimating the damages in the case at bar, should take into account any personal deformity resulting to appellee from her injuries, and it was proper also that they might consider any mental pain, suffering, "worry," or "anxiety" experienced by appellee in the actual use of the injured wrist and hand that was the direct result of the deformed condition, and we think that it was in this sense that the instruction complained of authorized the jury to take into account such elements of "worry" and "anxiety," and not that the jury should consider any "anxiety" or "worry" resulting from the humiliation that came from the contemplation of the deformed condition. While the instruction is not carefully drawn in this regard, we think the meaning we have given it is evidently the one intended by the court and accepted by the jury. We think it evident from the answers to the interrogatories and the amount of the verdict, that the jury were in nowise misled by the instruction. Appellant tendered 29 instructions, all of which were by the court given to the jury, and we think that, taking the instructions as a whole, the law of the case was stated as favorably to appellant as the authorities warrant, and that no harm resulted to him from instructions given in the case.

Counsel next insist that the evidence shows that "the cause of action relied upon by the appellee, arose more than two years before the filing of the amended complaint." If the original complaint filed in this case is based upon tort, and not upon contract, there is nothing in this objection, because it is conceded that the original complaint was filed before the two years were up; but it is insisted that it was predicated upon contract, and that the amended complaint being predicated upon tort was in effect a new action and did not relate back to the time of the filing of the original complaint.

We have examined the original complaint with care, and are clearly of the opinion that counsel's assumption that this complaint is predicated upon contract is not warranted by the facts stated in the complaint. The allegations are entirely different from those of the cases cited and relied upon by appellant. There is no allegation of a promise on the part of appellant, and the mere fact that the appellee alleges that she employed the appellant for a certain reward is not controlling where the other averments of the complaint conclusively show that recovery is sought for injury and damages resulting from the careless, negligent, and unskillful treatment of the appellant. We are of the opinion the original complaint in this case was based upon tort and not upon contract. This opinion we think is supported by the

following authorities: *Goble v. Dillon et al.*, 86 Ind. 327, 44 Am. Rep. 308; *Boor, Adm'r, v. Lowery*, 108 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *De Hart v. Haun*, 128 Ind. 378, 26 N. E. 61.

The original complaint being based upon tort, the amended complaint unquestionably related back to the time of the filing of the original which is conceded to be before the expiration of the two years.

We have examined all the questions presented and argued by appellant in his brief, and find no error authorizing the granting of a new trial.

Judgment affirmed.

(83 Oh. St. 204)

WINDER et al. v. SCHOLEY et al.
(Supreme Court of Ohio. Dec. 20, 1910.)

(Syllabus by the Court.)

1. TRUSTS (§ 96*)—TRUSTS EX MALEFICIO.

Where a testator is induced to make an apparently absolute legacy by a promise, express or implied, on the part of the legatee that he will transfer the legacy to another, although no express trust is created, and although the legatee at the time of the promise intended no fraud, a court of equity may interfere to prevent a wrong, and declare the legatee a trustee ex maleficio for the protection of the testator's intended beneficiary.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 148; Dec. Dig. § 96.*]

2. TRUSTS (§ 109*)—ESTABLISHMENT—PAROL EVIDENCE.

A trust in an absolute legacy may be established by parol evidence, and the contemporaneous declarations of the testator, and subsequent declarations of the legatee, that the bequest was made for the benefit of a third person upon the promise of the legatee to hold it in trust, are admissible for that purpose.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 159; Dec. Dig. § 109.*]

3. TRUSTS (§ 109*)—ESTABLISHMENT—TRUST IN ABSOLUTE JOINT LEGACY.

Where such legacy is a joint legacy, the trust may be established as to all of the legatees by proof that the promise was made by one in behalf of all, and the subsequent declarations of either of the legatees are admissible against all.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 159; Dec. Dig. § 109.*]

4. TRUSTS (§ 96*)—TRUSTS EX MALEFICIO—ESTABLISHMENT.

Where a testator, desiring to leave his property to his lodge, was advised by his lawyer that he could not do so directly, but that he could will it to three members of the lodge in whom he had confidence that they would do with it what he delegated to them to do, namely, to turn it over to the lodge, and he does so bequeath it to the three upon the promise of one made in behalf of all that they will transfer it to the lodge, equity may interfere to prevent the legatees from converting the property to their own use, and will declare them trustees ex maleficio.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 148; Dec. Dig. § 96.*]

5. LIMITATION OF ACTIONS (§ 27*)—ACTION ON CONTRACT NOT IN WRITING—ACTION TO HAVE LEGATEES DECLARED TRUSTEES EX MALEFICIO.

An action to have such legatees declared trustees ex maleficio is not an action upon a contract not in writing, either express or implied, and as such barred in six years by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 27.*]

Error to Circuit Court, Montgomery County.

Action by one Scholey and others, Trustees of the Miami Lodge No. 82, Knights of Pythias, against John H. Winder and others, executors of John O'Kell. Judgment for plaintiffs, and defendants bring error. Affirmed.

Carr, Allaman, Kennedy & Retter and McMahon & McMahon, for plaintiffs in error. Gottschall & Turner, for defendants in error.

SUMMERS, C. J. John O'Kell, an old bachelor, had been for many years a member of Miami Lodge at Dayton, Ohio. He had been a daily visitor at the rooms of the lodge, and had spent most of his time there, and considered it his home. He became sick, and, having no heirs of his body and his relatives all being in good circumstances, he desired to will his property to the lodge. In November, 1898, he requested the plaintiff in error A. Ferris Smart, who was one of the trustees of the lodge, to write his will. Smart persuaded him to have it done by a lawyer, and by direction of O'Kell went to a lawyer and requested him to draft a will giving the property to the lodge. The lawyer, learning that O'Kell probably would not live a year, under the mistaken notion that in that event the bequest would be void under the charitable bequests statute, on that ground advised that O'Kell make an immediate transfer of his property to the lodge. Smart communicated the lawyer's advice to O'Kell, and later returned to the lawyer with the statement that O'Kell was unwilling to make an immediate transfer, as he might get well and need the property. The lawyer then suggested that what O'Kell wished might be effected by his making a will giving the property to two or three members of the lodge whom he would trust to give it to the lodge. Smart again went to consult O'Kell and returned to the lawyer, and stated that his advice would be acted upon, and gave him three names, his own and those of John H. Winder and Lewis P. Williams, two of the other plaintiffs in error. A will was immediately drafted by the lawyer and executed by O'Kell, giving all of his property to the three persons named, and naming them as executors. In December O'Kell died, his will was probated, the three friends were appointed executors, and in January, 1899, they filed their first and final account showing that they had received more than \$5,-

000 and had something more than \$4,000 for distribution. At different times shortly after O'Kell's death the executors, severally and to different members of the lodge, made statements of the purport that O'Kell had given his property to them for the lodge, and that it would be turned over after the time had expired in which his heirs could contest the will. Nothing ever was turned over, and in 1906 this action was commenced to recover from the defendants the fund on hand for distribution, together with interest. The common pleas court found for the lodge, and on error in the circuit court its judgment was affirmed.

Counsel for defendant say that there is no reported case in Ohio in which a trust has been ingrafted on a will by parol, and contend that a beneficiary under a will can be declared a trustee ex maleficio only when the testator was influenced by the legatee's actual intentional fraud. Pomeroy on Equity, § 1054, is cited as follows: "There are a few cases which seem to hold that a trust will arise under these circumstances from a mere verbal promise of the devisee or legatee to hold the property for the benefit of another person. This position is clearly opposed to settle principle. The only ground upon which such a trust can be rested, and is rested by the overwhelming weight of authority, is actual intentional fraud." In a note to this section, in the second edition of that work, it is said: "A majority of the recent decisions do not insist on an actual fraudulent intention on the part of the legatee or devisee as necessary to the creation of a trust of this nature."

It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the statute of frauds or the statute of wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise. The result of his refusal or failure to do so is the same in either case and equally fraudulent. The earlier cases are cases in which the devisee or legatee had a fraudulent intention at the time the promise was made, but by the weight of authority in this country, if not also in England, it is well settled that it is immaterial when the intention was formed. An examination of a great many cases shows that the law is well stated in the opinion of Vann, J., in the case of Trustees of Amherst College et al. v. Ritch et al., 151 N. Y. 282-323, 45 N. E. 876, 887 (37 L. R. A. 305) [1897], as follows: "While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the mat-

ter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. On the other hand, if the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. *O'Hara v. Dudley*, 95 N. Y. 403 [47 Am. Rep. 53]; *Brown v. Lynch*, 1 Paige [N. Y.] 147; *Dowd v. Tucker*, 41 Conn. 197; *De Laurencel v. De Boom*, 48 Cal. 581; *Browne v. Browne*, 1 Har. & J. [Md.] 430; *Church v. Ruland*, 64 Pa. 432; *Towles v. Burton* [Rich. Eq. Cas. (S. C.) 146], 24 Am. Dec. 409; *McLellan v. McLean*, 2 Head [Tenn.] 684; *Russell v. Jackson*, 10 Hare, 204; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennegal*, 1 Ves. Sr. 124; *Wallgrave v. Tebbs*, 2 K. & J. 321; *McCormick v. Grogan*, L. R. [4 Eng. & Ir. App.] 82. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him. *Williams v. Fitch*, 18 N. Y. 546; *Grant v. Bradstreet*, 87 Me. 583 [33 Atl. 165]; *Glpatrick v. Glidden*, 81 Me. 137 [16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245]. The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made and, hence, the person promising is bound in equity to keep it, as to violate it would be fraud. While a promise is essential, it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As was said by this court in the *O'Hara Case*, supra: 'It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the

testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told, also, that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where, in such cases, the legatee even by silent acquiescence encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise.' The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee ex maleficio, to turn over the gift to them. The law, not the will, fastens the trust upon the fund by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved, but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience. As was well said in *Wallgrave v. Tebbs*, supra: 'Where a person, knowing that a testator in making a disposition in his favor intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such a case the court will not allow the devisee to set up the statute of frauds—or rather the statute of wills, by which the statute of frauds is now in this respect superseded—and for the reason that the devisee by his conduct has induced the testator to leave him the property; and, as Lord Justice Turner says in *Russell v. Jackson*, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute, but for the same end, namely, prevention of fraud, ingrafts the trust on the devise by admitting evidence, which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it.'

In the above case, as well as in the earlier case—*O'Hara et al. v. Dudley et al.*, 95 N. Y. 403, 47 Am. Rep. 53—which in its facts bears a striking resemblance to the instant case, there was no fraud on the part of the devi-

sees or legatees in procuring the will, but it was held that by reason of the act of the testator and the promise of the devisee or legatee the law fastens upon the devisee or legatee a trust which equity, in case of his refusal to perform, will enforce on the ground of fraud. In the latter case the testatrix, by her will, gave the bulk of her estate to three persons, who were her lawyer, her doctor, and her priest, absolutely as tenants in common. It was not intended by her to give to them any beneficial interest, but her design was to devote the property to certain charitable purposes. This she was advised could not be done by an express provision in her will, but only by such an absolute gift to individuals, to whose honor she could confide the execution of her purpose. It was held that the gift could not be sustained as an absolute one to the persons named, as this would be a fraud upon the testatrix. In that case it was expressly found by the trial judge that the devisee practiced no fraud. In the opinion by Finch, J., it is said (95 N. Y. 413, 47 Am. Rep. 53): "Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the deviser which equity will not endure." Cases are cited, and he then continues: "In the last of these cases (Williams v. Fitch, 18 N. Y. 546) the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff, and the English cases were cited with approval and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert*, 102 Mass. 40, 3 Am. Rep. 418. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligation under cover of the statute.' These cases are followed and approved in *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 666, 83 Am. St. Rep. 620 (1902), where it is held: "Where a deed is executed for the purpose of effecting a distribution of the grantor's property, upon the express promise of the grantee to pay certain sums to others, though no express trust is created, a court of equity may interpose to prevent a

wrong, and declare the grantee a trustee *ex maleficio* for the protection of the grantor's intended beneficiaries."

In *Ransdel et al. v. Moore et al.*, 153 Ind. 393, 408, 53 N. E. 767, 772 (53 L. R. A. 753), it is expressly held that an actual fraudulent intention on the part of the grantee or devisee is not necessary to the creation of a trust of this nature. In the opinion in that case the cases are reviewed, and many, if not all, of the cases, both English and American, are cited, and it is said by Monks, C. J.: "An actual fraudulent intention on the part of the heir or devisee is not necessary to the creation of a trust of this nature. The great weight of authority in England, and in this country, in such a case is that after the death of the testator or intestate equity will convert the devisee or heir into a trustee, whether when he gave his assent he intended fraud or not; the final refusal of himself, if living, or if dead, of his heirs or devisees, to execute such trust, having the effect to consummate the fraud." To the same effect is *Gilpatrick v. Glidden*, 81 Me. 187, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245, where the cases are also reviewed.

In *McCormick v. Grogan*, 4 Eng. & Ir. App. 82 (1890), the Lord Chancellor (Lord Hatherly) and Lord Westbury do seem to rest the jurisdiction of equity upon the ground of personal fraud in procuring the instrument, but later as well as earlier English cases to the contrary are cited in *Ransdel v. Moore*, *supra*, as well as many American cases, and what was said, by Lord Westbury is here explained, as it is also in *Gilpatrick v. Glidden*, *supra*, and by Hall, vice chancellor, in *Re Fleetwood*, 15 Ch. 594 (1880), where many cases are reviewed. In *Cassels v. Finn*, 122 Ga. 33, 49 S. E. 749, 68 L. R. A. 80, 106 Am. St. Rep. 91, it is held that failure to perform a verbal promise cannot make the promisor a trustee *ex maleficio* in the absence of actual fraud, but in the note to that case, by the learned editor of the American State Reports, it is said that that case could not have been carefully considered, and that it is opposed to all the cases cited in the note and in contravention of correct and sound equitable principle.

Next it is contended that Winder and Williams made no promise, and that the court erred in rendering judgment against them. In *Russell v. Jackson*, 10 Hare, 204, where the bequest was to William Jackson and Thomas Aston Jackson, the vice chancellor, Turner, said: "But, whether Thomas Aston Jackson was present or not, the evidence is, I think, clear that the gift would not have been made to him but for the promise given by William Jackson that the intentions of the testator should be carried into effect; and I fully agree to the principles laid down in *Huguenin v. Baseley*, 14 Ves. 239, followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party

may be, if the original transaction is tainted with fraud, that taint runs through the derivative interest, and prevents any party from claiming under it." In *Moss v. Cooper*, 1 J. & H. 352 (1861), Vice Chancellor Sir W. Page Wood said (367): "The only material distinction between a will made on the faith of a previous promise and a will followed by a promise is this: If, on the faith of a promise by A., a gift is made in favor of A. and B., the promise is fastened on to the gift to both, for B. cannot profit by A.'s fraud. But if the will is first made in favor of A. and B., and the secret trust is then communicated only to A., the gift will be fixed with a trust with respect to A., but not so as regards B., because in this case the gift to B. is not obtained by the procurement of A., and is not tainted with any fraud in procuring the execution of the will. That is the sole distinction between the case of a will made on the faith of a promise, and that of a will followed by a subsequent promise." In *Re Stead*, 1 Ch. 237 (1900), it is said by Farwell, J. (241): "If A. induces B. either to make or to leave unrevoked a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not bound (*Tee v. Ferris*, 2 K. & J. 357); the reason stated being that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case the trust binds both A. and C. (*Russell v. Jackson*, 10 Hare, 204; *Jones v. Badley*, L. R. 3 Ch. 362), the reason stated being that no person can claim an interest under a fraud committed by another. In the latter case A. and not C. is bound (*Burney v. Macdonald*, 15 Sim. 6, and *Moss v. Cooper*, 1 J. & H. 352), the reason stated being that the gift is not tainted with any fraud in procuring the execution of the will. Personally I am unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes." There is no joint tenancy in this state, and the distinction made in the English cases cannot be made here. The reason for the distinction would apply here only in cases of separate devises or bequests. In the present case the bequest is a joint bequest of all the testator's property to the three persons named. It was all intended for the lodge and made to the three upon the promise of one that they would give it to the lodge. The question was considered in the two New York cases already referred to, in one of

which there was a joint tenancy and in the other a tenancy in common. In *Trustees of Amherst College et al. v. Ritch et al.*, 151 N. Y. 282, 327, 45 N. E. 876, 888 (37 L. R. A. 305), it is said by Vann, J.: "The intention of the testator being thus clear, the secret trust was completed by the promise made by or on behalf of the residuary legatees. As the gift was to them as tenants in common, a promise that bound all was necessary in order to include each of the three shares. That Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters, and statements to the testator that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee, the question would be more serious, but he was not. The trial court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The General Term, in its opinion, went farther, and declared that there was an understanding between Mr. Bulkley and the testator to the same effect, but the evidence to sustain this conclusion is meager, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his cotenants in making the promise for him, as that would be a fraud. He was not a purchaser. He furnished no consideration. There was no contract for his benefit. He was in the attitude of accepting a gift pure and simple, but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise and fairly take that which came to him solely on account of the promise, even if it was not made or authorized by him? We think not, because his title came through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift or accept the responsibility. While the cases are not uniform, the weight of authority sustains this conclusion. *Hooker v. Axford*, 33 Mich. 453; *Moss v. Cooper*, 1 J. & H. 367; *Tee v. Ferris*, 2 K. & J. 357; In re *King's Estate*, L. R. [21 Ir.] 273; *O'Hara v. Dudley*, supra. In the case last cited this court said: 'So far, then, as McCue is concerned, he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates by asserting its necessity, and promising faithfully to carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one.' Although the devise in that case was to joint tenants,

the principle that 'all must get their rights through the result accomplished by one' is broad and equitable, and should not be limited to the technicality of a joint tenancy as distinguished from a tenancy in common, where, as in this case, the promise was made by two in behalf of themselves and another, and a devise thus obtained to the three. This rule prevents fraud, which is the primary object of the courts in enforcing secret trusts, while any other would promote fraud. We thus reach the conclusion that there was a secret trust that bound all of the residuary legatees."

It is further contended that the court erred in admitting the separate admissions of the several defendants, made after the death of the testator and not in the hearing of each other. A trust in an absolute devise may be established by parol evidence of contemporaneous declarations of the testator and subsequent declaration of the devisee in possession that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold it in trust. After such evidence of the devisee's active or passive agency in procuring the devise, he will be declared a trustee *ex maleficio*, and the trust will be enforced against him. See cases cited in the note to *Cassels v. Finn*, supra, 106 Am. St. Rep. 91-99. In *Harvey v. Gardner*, 41 Ohio St. 642, it is held that in this state it is competent to prove an express trust in land by parol evidence, and that the contemporaneous declarations of the creator of the trust are admissible in evidence, and, further, that the acceptance of the trust may be presumed from acts of the grantee at or subsequent to the time of the grant. See, also, *Russell et al. v. Bruer et al.*, 64 Ohio St. 1, 59 N. E. 740; 1 *Jarman on Wills*, 390. In *Church v. Ruland*, 64 Pa. 432-442, it is said: "Indeed, it is not easy to see how such a trust ever could be made out except by parol evidence, and, if this is not competent, a statute made to prevent frauds would become a most potent instrument whereby to give them success. That this doctrine is applied to cases arising under wills where a person procures a devise to be made in his favor on the distinct declaration or promise that he will hold the land in trust either in whole or in part for another may be seen in the cases. It is not affected by the statutory provisions on the subject of wills. The proof offered is not of any alteration, revocation, or cancellation, which must be evidenced in a particular manner. It gives full effect to

the will and every word of it, and to the conclusiveness of the probate, where it is conclusive. It fastens upon the conscience of the party having thus procured a will, and then fraudulently refusing or neglecting to fulfill the promise on the faith of which it was executed, a trust or confidence, which a court of equity will enforce by compelling a conveyance when the proper time for it has arrived."

It is next contended that the action was barred by the six years' statute of limitations. The six years' statute bars an action upon a contract not in writing, either express or implied. This is not an action upon a contract. It is an action for relief on the ground of fraud. Such actions are barred within four years, but it is expressly provided that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, and it is not suggested that the lodge discovered the fraud more than four years before the commencement of the action.

It is next contended that the trial court disregarded the rule laid down in *Russell et al. v. Bruer et al.*, supra, that "the declaration of such trust must be contemporaneous with the deed, and the evidence beyond a reasonable doubt as to the existence of the trust, and must be clear, certain, and conclusive as to its terms and conditions." Without reviewing the evidence we deem it sufficient to say that it does not leave a reasonable doubt that the testator intended to give his property to the lodge, that he was induced to will it to the defendants by the advice of the lawyer upon the promise of Smart that he and the other legatees would give it to the lodge. The lawyer so testifies, and his testimony was corroborated in many ways, and no reason is apparent why the testator should give his property to the defendants, and they suggest none; and there is evidence that each of them, immediately after the testator's death and before avarice had found time to suggest that they divide the estate between themselves, admitted that it was intended for the lodge. The terms and conditions are clear, certain, and conclusive. There are none, excepting that it was to be turned over to the lodge. We reaffirm the rule, and also the statement in *Collins et al. v. Hope et al.*, 20 Ohio, 493, that in such cases courts will act with the extremest caution.

Judgment affirmed.

CREW, SPEAR, DAVIS, and PRICE, JJ., concur.

(300 N. Y. 473)

SHIPMAN v. TREADWELL et al.

(Court of Appeals of New York. Jan. 27, 1911.)

CORPORATIONS (§ 263*)—STOCKHOLDERS' LIABILITY — ENFORCEMENT — NONRESIDENT STOCKHOLDERS.

The rule that where a foreign statute which creates the liability of a stockholder also provides for a remedy for the enforcement thereof, such remedy is exclusive, and our courts will not interfere to enforce it, applies where the stockholder is a resident of this state and a non-resident of the state which is the domicile of the corporation, but where the only remedy of the state where the corporation is domiciled is the right of the court to authorize the receivers to prosecute the liability of stockholders in other jurisdictions, there is no remedy if it cannot be prosecuted in the state where the stockholder resides, and the rule does not apply.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 831, 1085; Dec. Dig. § 263.*]

Action by Leonard H. Shipman, as receiver of the F. Gray Company, against George O. Treadwell and another. From a judgment of the Appellate Division (134 App. Div. 991, 119 N. Y. Supp. 1144) affirming a judgment overruling defendants' demurrer to the complaint, defendants appeal. Affirmed.

James F. Tracey, for appellants. Andrew J. Nellis, for respondent.

WERNER, J. This is an action brought by a receiver of an Ohio corporation to recover from stockholders thereof residing within this state their equal and ratable proportion of a deficiency in corporate assets with which to pay the corporate debts. The appeal is from the affirmance of a final judgment entered after an interlocutory judgment overruling the defendants' demurrer to the complaint. The demurrer was based upon two grounds: (1) That there is a defect of parties defendant. (2) That the complaint does not state facts sufficient to constitute a cause of action. As the first of these grounds is not urged upon this appeal, we shall proceed at once to a consideration of the second.

The complaint is so voluminous that we cannot attempt to paraphrase, much less to reproduce, it in detail, and we shall simply summarize its most salient and essential features. It first sets forth the organization of the corporation under the laws of the state of Ohio, and its continuance until about April 16, 1901, when proceedings for its dissolution eventuated in a decree to that end made by a court of competent jurisdiction; that the defendants, at some time prior to December, 1900, became stockholders of the corporation under an agreement that the laws of the state of Ohio then existing and thereafter to be enacted with reference to domestic corporations in that state, their or-

ganization, the liability of stockholders, the ascertainment thereof, the dissolution of the corporation, and the application of its assets, including the liability of stockholders under and pursuant to the laws of that state, should be taken as part and parcel of the agreement whereby the defendants severally agreed to become members of the corporation; that under the laws of Ohio stockholders in domestic corporations are liable to the creditors of such corporations over and above the stock owned by them, and any amount unpaid thereon, to a further sum at least equal in amount to such stock, equally and ratably, and not one for another; that prior to December 10, 1900, a majority of the stockholders of said corporation instituted a proceeding for the dissolution of said corporation in a court of general jurisdiction in that state, in which the corporation and its stockholders, including these defendants, were parties; that pursuant to the practice which obtains in that state the court appointed a receiver and a master commissioner, the one to take and hold the assets of the corporation, and the other to take such proofs as might be necessary to determine whether the corporation was solvent or insolvent, the extent and value of its assets, and the nature and amount of its indebtedness; that such proceedings were had that the corporation was declared insolvent and that an assessment would have to be made upon the stockholders to satisfy the corporate debts; that under the direction of the court an assessment was made upon each of the stockholders, including the defendants, of \$61.92 per share upon the stock owned by them; that such assessment against the defendant Treadwell amounted to \$4,458.24 and against the defendant Collins to \$3,096, these amounts representing the pro rata shares which each of these defendants had been adjudged liable to pay for the purpose of making good the deficiency in the corporate assets necessary to satisfy the corporate debts; and that there are no creditors of the corporation residing within this state; that all the tangible assets within the state of Ohio have been used in the payment of the corporate debts, and that it is necessary for the plaintiff as receiver, representing both corporation and creditors, to proceed against these defendants to compel them to contribute their equal and ratable share toward the payment of the still remaining indebtedness of the corporation. The prayer of the complaint is that plaintiff be permitted in this state to enforce against the defendants the contracts thus entered into by them in the state of Ohio; that the amount of the deficiency remaining after the application of all the other assets of the said corporation to the payment of its debts be ascertained; that it be determined that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

expenditures in the conversion of assets and the collection of claims and accounts of the said corporation, made within the state of Ohio and elsewhere, including legal and other incidental expenses, were not unreasonable or extravagant, and that plaintiff be permitted to recover of the defendants the respective amounts assessed against them with interest and costs.

All of the proceedings which we have thus sketched in barest outline are recited in the complaint in voluminous detail, supplemented by allegations concerning the statutes of Ohio which are germane to the subject and the construction given to such statutes by the courts of that state.

In the comparatively recent case of *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725, this court decided that a receiver of an insolvent corporation in another state, who is a quasi trustee invested with all the rights possessed by its creditors and entitled to commence an action involving its property, funds, and assets, including the right to enforce the liability of stockholders for its debts imposed by the statutes of the state where the corporation had its domicile, would be permitted, in the interest of interstate comity, to bring an action in this state to enforce such liability against a resident stockholder, where it appears that the same liability has been determined as to all the stockholders in the foreign court, and the remedy sought does not involve any departure from our practice, nor conflict with public policy, nor result in injustice to any of our citizens.

A comparison of the allegations of the complaint in the case at bar with the opinion in the *Howarth* Case clearly shows that this complaint does state facts sufficient to constitute a cause of action unless the pleader here has stated too much rather than too little. That seems to be the theory upon which this demurrer was interposed, for the learned counsel for the appellants argues that it appears upon the face of the complaint that the proceedings therein pleaded as having been pursued in the courts in the state of Ohio, and the statutes of that state under which they were taken, provide a distinct and complete remedy of which the plaintiff has availed himself, and which, under the doctrine of the *Howarth* Case, must be held to be exclusive.

It is doubtless the rule that where a foreign statute which creates the liability of a stockholder also provides a remedy for the enforcement of that liability, such remedy is exclusive and our courts will not intervene to enforce it. *Lowry v. Inman*, 46 N. Y. 119; *Christensen v. Eno*, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; *Howarth v. Angle*, supra. But it is also obvious that the remedy referred to in these cases is the remedy against the stockholder who is a

resident of this state and a nonresident of the state which is the domicile of the corporation, for if it were not so no proceeding could be instituted against stockholders residing in the domicile of a corporation without cutting off any right of action against stockholders who reside outside of that domicile. The complaint herein does recite certain proceedings in the Ohio courts to which all the stockholders, including the defendants, were parties, but it is also set forth that the defendants were served by publication and did not appear in the foreign tribunal, so that as to them the proceedings there were in rem and not in personam.

As to these defendants the only remedy which seems to have been provided by the statutes of Ohio is the right of the court to authorize and direct the receiver to prosecute the stockholders' liability in other jurisdictions, and that is the precise remedy which the plaintiff is pursuing. It is true that neither the provisions of the foreign statute, nor the orders of the foreign courts have any extraterritorial force, but it is equally true that the remedy thus provided is in fact no remedy if it cannot be prosecuted in the state where the stockholder resides. For all practical purposes this case is no different from one in which it appears that the foreign statute has provided no remedy and the foreign court has made no direction, and such a case falls directly within the rule of *Howarth v. Angle*. In view of the very ample consideration of the subject in that case, we deem it unnecessary to continue this discussion, since the only difference between the two cases seems to be that the case at bar comes to us upon demurrer, and the *Howarth* Case was affirmed upon the merits.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, HISCOCK, and COLLIN, JJ., concur.

Judgment affirmed.

(200 N. Y. 390)

NIBLOCK v. SPRAGUE.

(Court of Appeals of New York. Jan. 10, 1911.)

1. **BILLS AND NOTES (§ 64*)—CONDITIONS—VALIDITY.**

A note may be delivered on a condition, observance of which is essential to its validity as between the original parties.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 104; Dec. Dig. § 64.*]

2. **BILLS AND NOTES (§ 473*)—CONDITIONS—VALIDITY.**

An agreement, pleaded by a maker of a note, that payment should depend on an event

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes
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within the maker's control, cannot be regarded as incredible, as a matter of law.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 473.*]

3. EVIDENCE (§ 420*)—PAROL EVIDENCE AFFECTING NOTE—ADMISSIBILITY.

Conditional delivery of a note can be shown by parol evidence to defeat liability for nonfulfillment of the condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944; Dec. Dig. § 420.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Peter Niblock against Homer Sprague. From a judgment of the Appellate Division (134 App. Div. 910, 118 N. Y. Supp. 1127), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

M. Fillmore Brown, for appellant. Walter W. Chamberlain, for respondent.

WILLARD BARTLETT, J. This is an action by the payee against the maker of two promissory notes, for \$150 each, payable three months after the date thereof, which was October 1, 1901, and alleged in the complaint to have been made, executed, and delivered to the plaintiff on that date.

The answer denies the making, execution, and delivery of the notes as alleged in the complaint, but admits that the defendant signed the notes and delivered the same under the following circumstances: The parties to this action had been copartners in the business of farming. The partnership was dissolved on December 31, 1900, by a paper writing which is stated to be attached to the answer, but does not appear in the record. The plaintiff and defendant thereafter entered into a further agreement whereby, in consideration of whatever the defendant owed the plaintiff for work done since the dissolution, the defendant agreed to turn over, and the plaintiff agreed to receive, a pair of horses, a lumber wagon, a double harness, a pair of blankets, and a mow of hay. In addition, the defendant agreed to give the plaintiff \$300, which, however, was not to be paid until all the partnership debts were paid by the defendant. The defendant was to execute and deliver to one Oliver Velzey the promissory notes set forth in the complaint, which were to be held by Velzey until the payment of the partnership debts by the defendant, when, at the defendant's direction, Velzey was to indorse and deliver them to the plaintiff; but "the said notes were to have no inception until the plaintiff had kept his agreement, said partnership debts were paid, and a direction by the defendant to said Velzey to deliver said notes to the plaintiff." The answer further alleges that the notes were executed and delivered to Velzey accordingly; that the plaintiff removed all the property which has been mentioned, and likewise a wagon worth \$50, without the de-

fendant's knowledge or consent; that the plaintiff refused to return this wagon, whereupon defendant notified him that he had failed to keep his agreement, and the defendant would not pay the \$300; but that thereafter, in May, 1906, the plaintiff wrongfully, and without the defendant's knowledge or consent, obtained possession of the promissory notes. Finally, there is an averment that a portion of the partnership indebtedness remains unpaid, and a denial of the allegation in the complaint that the plaintiff is the owner of the notes in suit.

Upon the trial counsel for the plaintiff offered the notes in evidence and rested. Counsel for the defendant outlined his defense, as pleaded, to the jury, whereupon plaintiff's counsel moved for judgment, on the ground that the opening stated no defense. After a short discussion the trial judge directed a verdict for the plaintiff in the sum of \$430.33, upon the rendition of which an exception was taken in behalf of the defendant.

I think this exception suffices to raise the question whether the plaintiff was entitled to the direction of a verdict. The answer contains an explicit denial of the delivery of the promissory notes as alleged in the complaint. It avers a delivery to a different person upon a condition which has not been fulfilled. A promissory note may be delivered upon a condition, the observance of which is essential to its validity as between parties to the paper. *Bookstaver v. Jayne*, 60 N. Y. 146. The condition here pleaded may be regarded as extraordinary, and one to which the plaintiff would not be likely to agree; but we are not concerned on this appeal with the truthfulness of the pleader, but with the sufficiency of his plea. If the agreement between these parties was what the answer says it was, there was never any authorized delivery of the notes, and they had no valid inception. The defendant is not endeavoring to alter the contract evidenced by the notes. He is merely asserting that the contract which the notes express was never entered into at all, because the contingency upon which the notes were to be delivered has never occurred. He should have been allowed to lay before the jury such proof as he had to sustain his contention in this respect. It may be conceded that it is unusual for a creditor to agree that payment shall depend upon some act or event wholly within the control of his debtor; but we cannot hold as matter of law that such an agreement is incredible. Where the maker of a promissory note, in a suit against him by the payee, pleads a conditional delivery of the note and the nonfulfillment of the condition, such conditional delivery may be proved by parol, and the parol proof is not deemed to be an attempt to vary or contradict the written contract between the parties. *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32.

In my opinion, this case was erroneously disposed of below, and the defendant is entitled to a reversal and new trial; costs to abide event.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur.

Judgment reversed, etc.

(201 N. Y. 76)

JACKSON v. GREENE et al.

(Court of Appeals of New York. Feb. 7, 1911.)

1. MASTER AND SERVANT (§ 246*)—INJURY TO SERVANT—LIABILITY.

Where a passenger elevator stopped between the sixth and seventh floors, because the fuse located in the basement blew out, and no injury threatened the operator while remaining in the elevator, and he voluntarily attempted to crawl out of the elevator and was killed, the master was not liable under the rule that, where no emergency has arisen calling on one to choose between two apparent alternative dangers, the master is not liable for the death or injury of a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 789-794; Dec. Dig. § 246.*]

2. MASTER AND SERVANT (§ 217*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a passenger elevator stopped between the sixth and seventh floors because the fuse located in the basement blew out, and while the elevator was stalled the operator attempted to crawl out, but fell and was killed, held, that the operator assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 288*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where the notice under the employer's liability act (Consol. Laws, c. 31, §§ 200-204) is insufficient, and plaintiff must rely on her common-law cause of action, assumption of risk, available as a defense, is not necessarily a question of fact.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 288.*]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Annie L. Jackson, administratrix of Robert Jackson, deceased, against Margaret H. Greene and others. From a judgment of the Appellate Division (184 App. Div. 918, 118 N. Y. Supp. 980), affirming a judgment for plaintiff entered on the verdict of the jury, defendants appeal. Reversed, and new trial ordered.

James J. Mahoney, for appellants. Thomas J. O'Neill, for respondent.

CULLEN, C. J. The action was brought by the personal representative of the deceased employé against the employers, to recover damages for the former's death through al-

leged negligence on the part of the defendants. The deceased had at some time prior to the accident been an engineer in a building owned by the defendants, and was an electrician by trade. In the absence of the employé whose duty it was to run a passenger elevator in the building, the deceased had for some two weeks operated the elevator. On the day of the accident, as the deceased was taking two passengers up on the elevator, the fuse blew out, and the car stopped between the sixth and seventh floors of the building. He called down to Wilson, who ran the freight elevator and was on the basement floor at the time, that the fuse had given out. One of the occupants of the car, a witness for the plaintiff, testified that Wilson then called for him to come down, though this is denied by other witnesses. After waiting a few minutes, the deceased opened the elevator door and started to crawl out of the car through an opening between the floor of the car and the ceiling of the sixth floor. In doing so his hands slipped and he fell down the shaft, receiving injuries from which he died. The two passengers remained in the car until a new fuse was installed, when the elevator was again operated, and the passengers got out. There was evidence tending to show that such stoppages of the elevator had been of frequent occurrence prior to the accident, and the subject of complaint by various tenants in the building. It seems to have been assumed, and probably was the fact, that the cause of such stoppages was the burning out of the fuse. The case was submitted to the jury by the learned trial judge on the sole theory that they might infer negligence on the part of the defendants from the defective character of the fuses. The jury returned a verdict for the plaintiff.

Assuming that the jury properly found the fuses defective, we think that, as is clearly pointed out in the dissenting opinion of Mr. Justice Burr below, such defect was not the cause of the accident to the plaintiff. The fuse, as proved by the evidence, is a safety appliance intended to burn out when an excessive current is placed on the electric motor, or when the elevator itself is subjected to an excessive load. The effect of the burning of the fuse is to entirely cut off the power, and thereafter the elevator cannot be moved, at least, upward. It is easy to be seen that a fuse might be insufficient to carry the electric current that might be necessary, even in the proper operation of the elevator. But the only result of such a defect would be to at once arrest the movement of the elevator. The fuse was located in the basement, where Wilson was. As was said in the dissenting opinion below: "It is apparent that, had the deceased remained at his station in the elevator, he would not have been injured. No injury threatened him while there. He was in absolute safety, and the dangerous posi-

tion in which he knowingly and voluntarily placed himself was not required by his employment, or in the discharge of his duty. No emergency had arisen calling upon him to choose between two apparent alternative dangers, * * * and it is well settled that under such circumstances a master is not liable for the death or injury of his servant." *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437, 9 N. E. 430, 57 Am. Rep. 760; *Hunter v. Cooperstown & Susquehanna Valley R. R. Co.*, 112 N. Y. 871, 19 N. E. 820, 2 L. R. A. 832, 8 Am. St. Rep. 752; *McCue v. Nat'l Starch Mfg. Co.*, 142 N. Y. 106, 36 N. E. 809.

The counsel for the respondent contends that the statement cited ignores two facts: First, that the deceased was called to come down to the basement by Wilson; and, second, that while he was getting down the elevator moved. We think neither is controlling in the disposition of this case. Wilson was not the superior of the deceased. The new fuse was to be installed in the basement, and, so far as it appears in the evidence, Wilson had done such installation whenever necessary. There was no reason why the presence of the deceased in the basement was necessary, nor could the deceased be under any misapprehension as to what was the difficulty which had caused the elevator to stop. He was an expert electrician, and knew far more on the subject than did Wilson, who was not an electrician or mechanic. The testimony of the witness, that while the deceased was trying to get out of the elevator it moved up and down a foot and a half, is, on the evidence in the case, incredible as a matter of law. It is conceded that when the fuse burned out the power was cut off. It may be possible to believe that in some unexplained way the elevator might have slipped down; but, on the record before us, it is not possible to imagine how, with the power cut off, the elevator could have moved up. If there was any motion in the elevator at the time of the accident, it must have been occasioned by the movements of the deceased himself in endeavoring to get out of the elevator to the floor below.

Though the plaintiff alleged a cause of action under the employer's liability law (Consol. Laws, c. 31, §§ 200-204), the notice served is substantially of the same character as that condemned by this court in *Logerto v. Central Building Company*, 198 N. Y. 390, 91 N. E. 782, and the plaintiff must rely on her common-law cause of action, under which the assumption of risk is not necessarily a question of fact. We think that the deceased in this case, when, entirely conversant with the whole situation, under no stress either of duty or of danger, he voluntarily sought to climb out of the elevator onto the floor below, assumed the risk attendant upon his action.

The judgment below should be reversed,

and a new trial ordered; costs to abide the event.

GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

(200 N. Y. 443.)

PEOPLE v. ZERILLO et al.

(Court of Appeals of New York. Jan. 24, 1911.)

1. CRIMINAL LAW (§ 1017*)—APPEAL—RIGHT OF REVIEW.

Appellate jurisdiction in criminal cases is purely statutory, and can never be assumed unless a statute expressly sanctions its exercise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2572-2576; Dec. Dig. § 1017.*]

2. CRIMINAL LAW (§ 1023*)—APPEAL AND ERROR—DECISIONS REVIEWABLE—OTHER REMEDY.

Under Code Cr. Proc. § 519, providing for appeals from a judgment or order of the Appellate Division to the Court of Appeals in criminal actions from a final determination affecting a substantial right of the defendant, the dismissal of an appeal by the Appellate Division, from an order of the Court of General Sessions, directing the Attorney General to submit to the grand jury a violation of Pen. Code, § 41, subd. 12, relating to the making of a false statement of the result of an election canvass, after a demurrer had been sustained to a former indictment for the same offense, is not appealable, since it is not a final determination; but there are two other ways in which the validity of the order could be raised, namely, by attacking the second indictment by a plea of former acquittal under Code Cr. Proc. § 354, subd. 2, or a motion in arrest on the ground that the prosecution was barred under section 327, and if that motion were denied, the action of the trial court could be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2596; Dec. Dig. § 1023.*]

Appeal from Supreme Court, Appellate Division, First Department.

Frank Zerillo, Dominick Dalessandro, James Elia, and Nicola Savignano were indicted for the crime of making a false statement of the result of the canvass of ballots cast at an election while they were inspectors of election. From an order directing that a charge against the defendants for violating subdivision 12 of section 41 of Penal Code should be submitted to the grand jury, defendants appealed to the Appellate Division where the appeal was dismissed (125 N. Y. Supp. 1187), and from the order of dismissal this appeal is taken. Appeal dismissed.

Edward R. O'Malley, Atty. Gen. (Lowen E. Ginn, of counsel), for the motion. Florence J. Sullivan, opposed.

WILLARD BARTLETT, J. On August 23, 1909, the Court of General Sessions of the Peace in and for the county of New York made an order directing that a charge against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendants for violating subdivision 12 of section 41 of the Penal Code should be submitted to the grand jury. The papers upon which this order was made showed that this charge had already been the subject of an indictment against the defendants to which they had successfully demurred. From the order directing a resubmission of the charge the defendants appealed to the Appellate Division where their appeal was dismissed (125 N. Y. Supp. 1137). "No appeal lies from such an order in a criminal case," said that court, "but the question must be presented on the appeal from the final judgment"—citing *Matter of Montgomery*, 126 App. Div. 72, 110 N. Y. Supp. 793; *Id.*, 193 N. Y. 659, 87 N. E. 1123. The defendants have now appealed to this court from the order of dismissal by the Appellate Division; and here, also, the special deputy Attorney General moves to dismiss their appeal.

It is necessary to state briefly the history of the case. The defendants were indicted on April 14, 1908, for the crime of making a false statement of the result of the canvass of the ballots cast at an election while they were inspectors of election. They interposed a demurrer to the indictment which was allowed by Judge Crain, and judgment was duly entered in their favor on June 11, 1908. At that time no direction was given by the court that the case should be resubmitted to the same or another grand jury. More than a year later, however, upon August 23, 1909, an order was made at a term of the Court of General Sessions held by Judge Rosalaky, directing that the Attorney General submit to the grand jury of the county of New York the violation of the Penal Code alleged to have been committed by the defendants herein. Under that order another indictment has been found which the defendants have unsuccessfully moved to dismiss. The purpose of the defendants upon the present appeal is to review the jurisdiction of the Court of General Sessions to make an order directing the resubmission of the charge to another grand jury under the particular circumstances of this case; that is to say, months after the decision upon the demurrer, and when a different judge was presiding over the court.

The Appellate Division has been unable to find any statutory authority for such an appeal to that court. I can find none, nor does it seem to me that the order is reviewable here. Section 519 of the Code of Criminal Procedure specifies the cases in which an appeal may be taken from a judgment or order of the Appellate Division to the Court of Appeals in criminal actions. These are (1) from a judgment affirming or reversing a judgment of conviction; (2) from a judgment affirming or reversing a judgment for the defendant on a demurrer to the indictment, or from an order affirming, vacating or reversing an order of the court arresting

judgment; and (3) from a final determination affecting a substantial right of the defendant. The third category is the only class in which this case could possibly be included in any point of view. It is argued that the dismissal of the appeal by the Appellate Division is in effect a final determination that the defendants may be prosecuted under an order for the resubmission of the charge against them to a second grand jury where the direction for such resubmission was not given by the court at the time of the allowance of their demurrer, and that a determination of this character affects a substantial right.

The answer to this argument is that the determination is not necessarily final. In view of the fact that a second indictment has been found under the order permitting a resubmission of the case to the grand jury, it is difficult to see how a reversal of the order for the resubmission would now inure to the benefit of the defendants, for the second indictment would be left still standing. There appear to be two ways, however, in which the defendants can raise the question of the validity of the order to resubmit, which was made so long after the determination of the demurrer and by another judge. They could treat the allowance of the demurrer unaccompanied by any order for a resubmission of the case as equivalent to an acquittal, and could interpose to the second indictment the plea of a former acquittal of the same crime under subdivision 2 of section 354 of the Code of Criminal Procedure. On the other hand, upon the trial of the new indictment, the defendants, if convicted, might move in arrest of judgment upon the ground that the prosecution was barred under section 327 of the Code of Criminal Procedure, and if that motion were denied could review the action of the trial court upon appeal. *People ex rel. Scharff v. Frost*, 198 N. Y. 110, 91 N. E. 376. These suggestions must not be understood as intimations that the objection of the defendants to the order of resubmission is well taken. They are made only to show that other methods of procedure exist by which the question can be raised both in the trial court and upon appeal. It has repeatedly been held that the appellate jurisdiction of the courts of this state in criminal cases is purely statutory; and, of course, such jurisdiction can never be assumed, unless a statute can be found which expressly sanctions its exercise. There is no such statute applicable to the case of these defendants as now presented. It follows that the Appellate Division was right in dismissing their appeal and that their appeal to this court must also be dismissed.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur.

Appeal dismissed.

(200 N. Y. 478)

EAGEN v. BUFFALO UNION TERMINAL R. CO.

(Court of Appeals of New York. Jan. 27, 1911.)

MASTER AND SERVANT (§ 180*)—RAILWAYS—FELLOW SERVANTS — "SUPERINTENDING CONTROL."

A locomotive engineer and a switchman whose duty it was to give signals to control movement of a train in the making of a coupling by a conductor were fellow servants of the conductor, and not vice principals, as having superintending control within Railroad Law (Laws 1890, c. 565, as amended by Laws 1906, c. 657) § 42a.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 363-367; Dec. Dig. § 180.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 6793.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Agnes Eagen, George Eagen's administratrix, against the Buffalo Union Terminal Railroad Company. From a judgment of the Fourth Appellate Division (134 App. Div. 995, 119 N. Y. Supp. 1123), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

See, also, 197 N. Y. 559, 91 N. E. 1112.

Alfred L. Becker, for appellant.

Joseph A. Wechter, for respondent.

CHASE, J. Plaintiff's intestate was injured while employed as the conductor of a train used, among other things, in transporting molten slag or dross from the furnaces of the Buffalo Union Furnace Company to a place where the slag was deposited called "the dump." The train in use at the time the intestate was injured consisted of an engine to which was attached in front a flat car, a side dump car known as a "Weimar kettle," and an end dump car known as a "Hartman kettle," in the order named. The crew consisted of four persons, an engineer, a fireman, the intestate, who was the conductor and the person in charge of the train, and a helper or switchman.

On the day of the accident the Hartman kettle was filled with molten slag and taken to the dump and emptied. The empty kettle car was then removed from the immediate place where it had been emptied and uncoupled from the other cars making up the train. It had been coupled to the next car by means of a heavy iron bar 14 feet 2 inches long and 3¼ inches in diameter, and which weighed about 420 pounds. One end of the bar was left connected with the Hartman kettle, and the other end was temporarily upheld by a standard placed under it upon the ground. Subsequently the Weimar kettle was taken over another side track to the dump and emptied. In making up the train of empty cars, the engine, flat car, and the Weimar kettle were returned by way

of a switch to the side track upon which the unloaded Hartman kettle had been left.

The plaintiff's intestate proceeded in advance of the train to the end of the bar, which was sustained by the standard, for the purpose of inserting it into the opening of the drawhead of the Weimar kettle trucks when that car should reach the place on the side track where a coupling could be made. The engineer and fireman were upon the engine, and could not see the intestate as he stood at the end of the bar. The intestate's helper walked along by the side of the Weimar kettle in plain sight of the engineer as the train was pushed toward the place where the intestate was standing. It was the usual practice for such helper to give the necessary signals with his hands to the engineer, so that the movement of the train could be controlled by the engineer in making a coupling with the Hartman kettle. The train was running on an upgrade of 2 or 3 per cent., and at a speed of about 1½ miles per hour. As the train approached the intestate he lifted the end of the bar, which required him to hold a weight of about 210 pounds. It was necessary to lift and then lower the bar, because the end as it rested upon the standard was 2½ inches too high to enter the opening of the drawhead of the Hartman kettle. As he lifted the bar from the standard, the standard fell upon the ground, and, for some reason that does not appear, before the Weimar kettle reached the place where the bar could be inserted into the drawhead, the intestate fell across the tracks with the end of the bar to some extent upon him. The helper testified that when the wheels of the approaching car were eight feet from the intestate he saw that "the bar had the best of him," and he gave the ordinary stop signal and continued such signal to stop the train until he saw that the intestate was falling and the engineer had failed to obey his signals, and the wheels of the Weimar kettle were within about one foot of the intestate, and that he then called out to the engineer to stop, and the train was stopped, but not until one of the wheels had run partially upon the body of the intestate and so injured him internally that he died a few hours thereafter. The engineer testified in substantial corroboration of the intestate's helper, except that he testified that the helper did not give him any signal with his hands to stop prior to his calling out "whoa," and that, when the helper so called to him, he stopped the train before it proceeded more than one foot.

The only witness who actually saw the wheel of the car run upon or against the intestate was the helper, and the only witnesses sworn that had personal knowledge of the accident were the helper and the engineer. Each of these two witnesses testified, in substance, that the accident occurred by reason

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the lack of care of the other. They were at common law each fellow servants of the intestate. It is provided by section 42a of the railroad law that "In all actions against a railroad corporation, foreign or domestic, doing business in this state, * * * for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation, * * * arising from the negligence of such corporation, * * * or employes, and every employe, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation * * * or employes, as are now [1906] allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state * * * who are entrusted by such corporation * * * with the authority of superintendence, control or command of other persons in the employment of such corporation * * * or with the authority to direct or control any other employe in the performance of the duty of such employe, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice principals of such corporation * * * and are not fellow servants of such injured or deceased employe." Laws 1890, c. 565, as amended by Laws 1906, c. 657.

The court in charging the jury in this case quoted from said statute, and then said: "Before this law was passed, gentlemen of the jury, it would have been impossible to bring this action and to have succeeded against the defendant, because under the old law this switchman, Mr. Donahue, and this engineer, Mr. Kelley, would have been known as coemployes or fellow servants, and the recovery, if any, would necessarily have to be procured against them, and not against this defendant. But this statute which I have read to you, and which I now desire to point out, especially exempts those individuals from the coemploye or fellow servant class and makes them vice principals. That is, they occupy for all purposes of responsibility the identical position of the defendant railroad company itself."

In *Hallock v. New York, Ontario & West Ry. Co.*, 197 N. Y. 450, 454-457, 90 N. E. 1124, 1126, the plaintiff's intestate was a station agent in the employ of the defendant. In front of the station where the intestate was employed, and running between the station and a main track of the defendant's railroad, was a side or switch track. On the side track there were standing certain freight cars. A short time before the accident, a freight train arrived on the main track in which was a car to be left at that station, and the plaintiff's intestate directed the conductor of the freight train to place such car

behind two of the cars then standing upon the side track. It necessitated several movements of the freight train, and, before the work of necessary switching had been fully completed, a passenger train arrived. The plaintiff's intestate left the station, and went toward the passenger train. On his way he met a third person, and entered into conversation with him for two or three minutes, and in so doing stood upon or near the side track. While so standing, he was struck by a car which was being backed down upon the side track by the freight engine, and he was so injured that he subsequently died. This court said: "The evidence showed that the rear brakeman saw the deceased on the side track at some distance from the point at which the accident occurred, as he says, either a car's length or two distant. The brakeman testified that he called out to the deceased and the man who was with him, and expected that they would move away. It is contended for the plaintiff that the warning given was insufficient, and the brakeman should have signaled the engineer to stop the train. If it be assumed that the evidence was sufficient to justify a finding of negligence on the brakeman's part, the question remains whether the defendant was responsible to this plaintiff for that negligence. The deceased and the brakeman were fellow servants, and, before the enactment of chapter 657 of the Laws of 1906 (sometimes called the 'Barnes Act'), concededly the defendant would not have been liable for injury to one servant by the negligence of a co-servant. That statute, however, changed the rule as to the liability for the misconduct of certain railroad employes. * * * The rear brakeman was not a vice principal within the provisions of this statute. His duty to signal or convey information to the engineer of when the train had approached the point at which it should be stopped, a thing which the engineer himself could not observe because of the position of the engine at the rear of the train, did not, in any proper sense of the term, give him authority to control or direct the engineer in the movement of the train. The direction and control referred to in the statute means that which is conferred by or proceeds from superior authority, not from the mere fact that the engineer had to rely on an inferior employe to discern something which he could not see for himself. * * * But the statute cannot be extended so as to include cases where the notice or information or warning conveyed by an employe to another employe is a mere incident of the employe's duty. In the movement of the cars in the making up of trains and the distribution of cars when the train has arrived at its destination, numberless notices, warnings, or signals, if they are to be called such, must be given by one trainman to the others and often finally to the conductor. Errors or negligence in these respects unfortunately, are most common causes

es of injuries to employes in the movements of railroads. If the Legislature had intended to make a railroad company liable in all such cases for injuries to its employes occasioned by the negligence of coemployes, the intent would have been very readily expressed by simple and clear language, while the present statute seems, on the contrary, to plainly confine liability for such injuries solely to negligence on the part of certain specified employes. We are of opinion, therefore, that the defendant was not liable for the negligence of the rear brakeman, if such negligence there was."

The facts in the Hallock Case, upon which the decision rests, are such as to make that decision controlling upon us in determining whether the court erred in charging the jury in this case that Donahue was a vice principal of the defendant. The charge of the court that Donahue was a vice principal of the defendant was erroneous, and for that reason the judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and COLLIN, JJ., concur.

Judgment reversed, etc.

(201 N. Y. 40)

FLUKER v. ZIEGELE BREWING CO.

(Court of Appeals of New York. Feb. 7, 1911.)
MUNICIPAL CORPORATIONS (§ 822*)—NEGLIGENCE—INSTRUCTIONS.

Plaintiff was playing around a pile of beer kegs, and they fell and injured him. The court instructed that the evidence warranted a finding that defendant had violated an ordinance in piling its kegs in the street without permission, but that such act, though a circumstance to be considered, was not sufficient to make out negligence on the part of defendant. Thereafter it withdrew that portion of the charge, and instructed that, in piling the barrels in the street, defendant violated the duty which it owed the public, including the boy. *Held* error, as leaving the jurors to understand that the violation of the ordinance was sufficient to make out negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 822.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Grant Fluker, by Edward Fluker, his guardian, etc., against the Ziegele Brewing Company. From a judgment for plaintiff (136 App. Div. 945, 121 N. Y. Supp. 1130), defendant appeals. Reversed, and new trial ordered.

Alfred L. Becker, for appellant. Charles M. Harrington, for respondent.

GRAY, J. The plaintiff brought this action to recover damages for personal injuries sustained by him under circumstances to be stat-

ed. As the complaint was originally framed, the defendant was charged with maintaining a nuisance, in the way in which it piled up beer kegs, partly upon its premises, and partly in the adjoining public alleyway. Upon the trial, however, the court permitted the complaint to be amended, so as to charge the defendant with negligence, and the case was submitted to the jury upon that theory only. The plaintiff recovered a verdict, and the judgment thereupon entered was affirmed at the Appellate Division, by a divided vote of the justices.

The defendant occupied with its brewery one side of an alley 15 feet in width, which ran between two streets in the city of Buffalo and was used as a public thoroughfare. It had no sidewalks, and on the brewery side was a recess, called an areaway, some 80 feet in length and of a depth of some 25 feet. The side opposite to the brewery was occupied by dwellings, in one of which the plaintiff, a boy 9½ years of age at the time of the accident, resided with his parents. It had been the custom of the defendant to pile up empty beer kegs in this areaway. That had been done early in the afternoon of the day in question, and the pile of kegs was suffered to remain through the evening and night. As piled up, they extended some distance into the alley. The kegs weighed, each, 90 pounds and were stacked three high, either in pyramidal form, or vertically, one upon the other; the evidence varying in that respect. In the evening, when not yet dark, the plaintiff was playing with two other boys a game of "tag," in which they would chase each other about or around the pile of kegs. The plaintiff happened to strike one of the kegs on a corner of the pile, and caused two to fall upon him. He was knocked down, and his arm was broken. The evidence permitted the jurors to infer, either that the kegs were negligently piled upon each other, or that they were piled safely in the ordinary form of a pyramid. The plaintiff also relied upon an ordinance of the city of Buffalo, which prohibited any persons from using "any part of a public street, or alley, or any public grounds for the deposit of any building, paving, or sewer materials, or any other materials, except for the immediate transfer of the same to the premises fronting on the portion of said street so occupied," or from allowing the same to remain thereon "longer than sundown of the same day, under penalty of not less than ten dollars or more than fifty dollars." The ordinance authorized the superintendent of streets to permit substances to be deposited by the property owner, under certain conditions. The defendant does not claim, in this case, that it had procured any such permit to use the alley.

The trial judge instructed the jurors fairly with respect to the inquiry as to the neg-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ligence of the defendant, as well as to the contributory negligence of the plaintiff. After adverting to the facts, he put the question of the defendant's negligence in this way: "Would an ordinarily prudent person be impressed that the plaintiff would be liable to play about there, and the kegs be liable to tumble on him, and he receive an injury?" * * * The theory of the plaintiff is that any prudent person would be impressed that it was dangerous, and therefore negligent, to leave those kegs piled as here disclosed." When referring to the municipal ordinance, he assumed that the evidence warranted the finding that the defendant had violated it, in piling its kegs in the street without obtaining permission; but with respect to such a violation he instructed them as follows: "That, in and of itself, is not sufficient to make out negligence against the defendant in this case. It is a circumstance to be taken into account in connection with the manner in which the kegs were piled in the alley, and to be considered as a circumstance bearing on the question of negligence on the part of the defendant." At the conclusion of the charge the plaintiff excepted to the portion of it which has just been quoted, and then requested the court to charge "that in piling the barrels in the street it [the defendant] violated a duty which it owed to the public, including this boy." Thereupon the court made this ruling: "I withdraw my charge, and charge as requested, and give the other side an exception."

In this there was grave error, for the commission of which the judgment should be reversed, and a new trial should be had. The theory of the plaintiff's case, as it went to the jury, was that the defendant's servants had been negligent in piling up the kegs, and in leaving them to stand partly in the public street, for that length of time. The jurors had been carefully instructed, upon the question of the defendant's negligence, that they must find on its part the omission of some duty owing to the plaintiff, and that the violation of the municipal ordinance, though not of itself sufficient to create a liability, was a circumstance to be taken into account. This was a correct instruction. The violation of the ordinance did not subject the wrongdoer to a civil liability for damages; but its disregard was something which, in connection with the other facts of the case, furnished some evidence for the consideration of the jury in passing upon the question of the liability of the defendant. That is to say: Were the kegs negligently deposited and allowed unduly to remain in a public street, where persons, rightfully there, might, innocently on their part, be exposed to injury? The facts bearing upon their handling and the place where deposited all entered into the question; no one being

conclusive, however strongly evidential it might be.

The case of *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488, was one, where a violation of a municipal ordinance, in leaving a horse attached to a vehicle in a street unattended, or unsecured, was charged by the trial court to be "necessarily negligence." The action was for negligently causing death, and the plaintiff's judgment was reversed by this court, upon the ground that the judge went too far in holding that the "violation of the ordinance was negligence of itself." The rule was there stated, as the result of the decisions, that such a violation "is some evidence of negligence, but not necessarily negligence." The authority of that case has been repeatedly recognized. The rule itself had been previously asserted in *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522. See *McRikard v. Flint*, 114 N. Y. 222, 226, 21 N. E. 153, and *Donnelly v. City of Rochester*, 166 N. Y. 315-319, 59 N. E. 989.

The trial judge, in withdrawing his charge upon the effect of a violation of the municipal ordinance, and in charging as requested by the plaintiff, left the jurors with an erroneous impression, which must have well-nigh, if not quite, foreclosed the defendant's chances of a favorable consideration. This final instruction to the jurors was tantamount to the judge's saying to them that he had been wrong in instructing them that the violation of the ordinance was not sufficient to make out negligence. In what condition of mind could the jurors have left the courtroom? Plainly, that they were instructed, as the law of the case, that the defendant's violation of the ordinance was the violation of a duty owing to the plaintiff, and was conclusive evidence of negligence.

For these reasons, I advise that the judgment appealed from be reversed, and that a new trial be ordered, with costs to abide the event.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

Judgment reversed, etc.

(200 N. Y. 464)

HICKOK v. AUBURN LIGHT, HEAT & POWER CO.

(Court of Appeals of New York. Jan. 27, 1911.)

1. APPEAL AND ERROR (§ 1094*)—QUESTIONS REVIEWABLE—EVIDENCE.

The Court of Appeals, on appeal from a judgment of the Appellate Division, affirming by a divided court a judgment for plaintiff suing for negligent death, must determine whether there is any evidence to support the findings of actionable negligence and freedom from contributory negligence, and where there is such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence, the judgment must be affirmed; but otherwise it must be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322-4352; Dec. Dig. § 1094.*]

2. ELECTRICITY (§ 15*)—INJURIES INCIDENT TO PRODUCTION—CARE REQUIRED—VOLUNTEERS—TRESPASSERS.

An electric light company contracted with a county to light its public buildings, and agreed to furnish new lamps on presentation of any burned out. The deputy sheriff of the county attempted to install a new bulb on a pole in the courtyard. The existing bulb had not been burned out. While doing the work, he came in contact with heavily charged wires on the pole and was killed by electric shock. *Held*, that the deputy sheriff was a volunteer, if not a trespasser, to whom the company owed no duty to keep the wires on the pole safe, because, under the contract, he was not authorized or required to ascend the pole under the circumstances.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8; Dec. Dig. § 15.*]

3. ELECTRICITY (§ 18*)—INJURIES INCIDENT TO PRODUCTION—CONTRIBUTORY NEGLIGENCE.

One familiar with electrical installations was killed by an electric shock while attempting to install an incandescent bulb. He knew that the pole was surmounted with a network of wires, some of which carried powerful currents. He failed to have the current turned off, and drew himself up in a position where his body was surrounded with the wires, and where contact with one or more of them was almost inevitable. *Held*, that he assumed the risk as a matter of law.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 10; Dec. Dig. § 18.*]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Caroline A. Hickok, as executrix, against the Auburn Light, Heat & Power Company. From a judgment of the Appellate Division (136 App. Div. 907, 120 N. Y. Supp. 1128) affirming by divided court a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

See, also, 132 App. Div. 944, 117 N. Y. Supp. 1136.

William H. Harding, for appellant. Hull Greenfield, for respondent.

WERNER, J. In June, 1908, the plaintiff's testator was a deputy sheriff of Cayuga county, and the defendant was furnishing electric light for the courthouse and other adjacent county buildings in the city of Auburn. In a small square or courtyard, which was flanked on the north by the courthouse, on the south by the jail, on the west by the county clerk's office, and on the east by the county stable, there was an electric light pole about 30 feet in height, surmounted by a frame and hood originally equipped with an arc lamp, but in June, 1908, containing a single 16 candle power incandescent bulb which was used in lighting the courtyard. In that month the sheriff had a conversation with the plaintiff's testator about the insufficiency of the light on that pole, and the sug-

gestion was made that, if the latter would find a 32 candle power bulb, the former would attach it to the lamp at the top of the pole. No such bulb was to be found upon the premises, and the sheriff thereupon instructed plaintiff's testator to get one and put it on. Such a bulb was later procured, and the decedent was engaged in trying to put it on when he met his death under circumstances which clearly indicate that it was caused by a shock of electricity. The plaintiff, proceeding upon that theory, brought this action, the complaint charging the defendant with negligence in maintaining upon this pole several high tension wires and a transformer which had been carelessly and improperly arranged and connected, without sufficient insulation, thus permitting a dangerous current to escape with which the decedent came in contact while engaged in the work of changing or removing the bulb in the lamp at the top of the pole.

The defendant, in its answer, joined issue on the charge of negligence against it, and asserted that the decedent's own negligence was the cause of his death. Thus far the plaintiff has succeeded in convincing the courts and jury that the defendant was guilty of actionable negligence which caused the decedent's death, and that the latter was free from any negligence which contributed thereto. Since the judgment of the Appellate Division was not unanimous, it is our duty to search the record to see if there is any evidence to support the finding of negligence against the defendant and of freedom from contributory negligence in favor of the plaintiff, and if there is such evidence, the judgment must be affirmed. Of course, the logical corollary of this statement is that, if there is an absolute failure of evidence upon either of these essential features of the case, the judgment must be reversed. We think the plaintiff has failed upon both points, and that the judgment cannot stand. A somewhat more extended and critical survey of the facts will disclose the reasons for this view.

The defendant, a corporation engaged in producing and selling electric light, had a contract with the county of Cayuga for the furnishing of light and power to the courthouse and other public buildings in the city of Auburn. For the purpose of carrying out this contract, the defendant had erected the pole referred to in the courtyard, surrounded by the courthouse and the other county buildings above described. This pole, as we have observed, was surmounted by a frame and hood which had been originally used for an arc lamp, but the lamp had been removed and an incandescent bulb put in its place. Below the lamp frame there were two cross-arms, one extending north and south and the other east and west. The upper, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

north and south crossarm, held six pins and insulators, three of which were on the north side of the pole and the other three on the south. The wires attached to the two insulators farthest from the pole on either side were secondary wires carrying 110 volts for service purposes. The two wires nearest to the pole on the north half of the upper crossarm carried 500 volts, which were used to operate an electric ventilating fan in the courthouse. The two wires nearest the pole on the south half of this upper crossarm were primary wires, which carried 2,000 volts. These wires all extended westerly from the pole, but not easterly. On the lower crossarm which, as we have seen, extended easterly and westerly from the pole and at right angles with the upper crossarm, there was a transformer which was suspended on two iron brackets or braces, and there were also six wooden insulator pins. The pin nearest the pole on the east half of this crossarm had no insulator or wire attached. The second pin on the east side had a heavily insulated secondary wire running northerly to the courthouse. From the pin on the extreme east end of this crossarm, there extended a wire running southerly to the jail, and the west half of this crossarm carried wires to the jail and county clerk's office. From the arc frame, which was above both of these crossarms, there were two wires running easterly to the stables. From this description it is evident that the only wires running in an easterly direction from the pole were the two extending from the frame of the arc lamp to the stables. These two wires were apparently so much higher than the others, and were so placed, as to give a clear, open space of 30 to 32 inches in width and about 4 feet in length on the east side of the pole, between the crossarm and the wire running nearest to it. This was the physical situation when the decedent ascended the pole.

The only witness who saw him ascend was a mail carrier, who testified that the decedent placed a ladder against the east side of the pole, went to the top of the ladder, where he turned to the south side of the pole, and climbed upward as far as he could on the iron steps or braces which had been driven horizontally into the pole, and then he turned over to the west side, stepping over a telephone wire or guy wire until his shoulders were above and between the wires on the two crossarms which have been described, and he was reaching upward toward the lamp frame trying to reach the bulb or globe, when he gave a startled cry and fell to the ground. The medical testimony warranted the conclusion that the decedent had received an electric shock of sufficient intensity to cause his death, and several electrical experts were called, who testified that after the accident they made a magneto test of the wires and found a leakage in one of the

high power wires near the transformer, probably due to an untaped or unwound connection, and a loose cover on the transformer box. Upon this branch of the case it is sufficient to say that, if the defendant owed to the plaintiff's testator the duty to keep these high tension wires at the top of this 30-foot pole free from leakage of electricity, there was evidence from which the jury could have found that the defendant was negligent.

That is, however, one of the vital questions in the case. What duty did the defendant owe the decedent? The latter was a deputy sheriff, and the former had a contract with the county to light these public buildings. In the written contract there is a stipulation that the defendant "shall furnish at its own expense all incandescent bulbs now installed in said buildings, * * * and will furnish new incandescent bulbs of equal candle power with those now installed on presentation of any burned-out bulb delivered at its office in North street, and taken from the present equipment of said county or from any equipment hereafter installed. Said company will keep on duty a watchful force of inspectors and repair men." It is contended for the plaintiff that the foregoing excerpt from the contract contains the only agreement respecting the defendant's duty in the matter of installing or exchanging bulbs, and that under it the defendant was not obliged to remove the burned-out bulbs or to replace them with fresh ones; that this duty devolved upon the county; and therefore the sheriff or his deputy had not only the right, but were charged with the duty, of attending to that detail. On behalf of the defendant it is claimed that it had been orally agreed between its representative and the county officials that the defendant should remove from the county buildings all burned-out bulbs and replace them with new ones when necessary. There was evidence to support this latter contention for the defendant, and the learned trial court charged the jury that, if that was the contract, the plaintiff could not recover, for in that view of the case the plaintiff had no right to ascend the pole for the purpose of making an exchange of bulbs. We think that even under the written contract the decedent was not authorized, or at least not required, to ascend this pole under the circumstances. The uncontradicted testimony is that the bulb at the top of the pole had not been burned out; that it was giving light both before the accident and for a number of months after that. It is to be noted, moreover, that in the clause of the contract referred to there is no special reference to this pole, and it does not follow that because the employees of the county may have been charged with the duty of removing and replacing bulbs within the buildings, there was any corresponding duty as to the light on this pole, surrounded as it was by a net-

work of dangerous wires. The record is barren of evidence to indicate what the custom had been in looking after the bulbs within the buildings, and if the plaintiff relied upon the previous usage to justify the conduct of her testator, that should have been affirmatively established as part of her case. Even such proof would fail to justify the assumption that the intestate was called upon or authorized to climb into the place of danger where he met his death. As the case stands, therefore, the decedent was a volunteer, if not a trespasser, to whom the defendant owed no duty to keep the wires at the top of the pole safe and free from danger. *Hector v. Boston Electric Light Co.*, 161 Mass. 558, 87 N. E. 773, 25 L. R. A. 554; *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. (N. S.) 595; *Sterger v. Van Sicklen*, 132 N. Y. 409, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 393, 4 N. E. 752, 54 Am. Rep. 718. A very different situation would have been presented if, by defendant's negligence in placing these wires or by a lack of care in maintaining them, the pole had become pervaded with electricity so near the ground as to injure the decedent while engaged in the lawful use of the courtyard. But that is not this case. The decedent, under the circumstances disclosed by the evidence, had no more right at the top of this pole than the county clerk or any other county official or employé would have had, and the correlative of this proposition is that the defendant owed neither him nor them any duty to keep the wires at the top of this pole in a safe condition.

The failure of the plaintiff to prove her testator's freedom from contributory negligence is even more marked than her inability to establish actionable negligence on the part of the defendant. It is not going beyond the boundaries of the proof to say that the plaintiff's affirmative case conclusively established her testator's own negligence. Assuming, for the purposes of the discussion, that he had the right or was charged with the duty to replace the bulb at the top of the pole, the fact remains that he was a man of sufficient intelligence to serve as deputy sheriff, which office he had held for several years prior to his death. He was familiar with electrical installations in and about the county buildings, and must be presumed to have had the average knowledge of electric wiring and its dangers. He knew that this pole was surmounted with a network of wires, some of which carried a very powerful current of electricity. Ordinary prudence should have suggested to him the necessity of reaching the top of the pole without coming into contact with these wires, if that could be done, or, if that were impossible, of having the current turned off while he essayed to make an exchange of bulbs. The

evidence clearly shows that he observed neither of these simple precautions. According to the testimony of the only witness who saw him ascend the pole, he drew himself up in a position where his body was surrounded with these wires, and where contact with one or more of them was almost inevitable.

Upon this record the defendant's motion for a nonsuit should have been granted, and the exception taken to the ruling in this behalf necessitates a reversal of the judgment and the granting of a new trial, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, HISCOCK, and COLLIN, JJ., concur.

Judgment reversed, etc.

MEMORANDUM DECISIONS.

AMOS, Respondent, v. INTERNATIONAL RY. CO., Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 908, 112 N. Y. Supp. 1121), entered October 9, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through the defendant's negligence. Dana L. Spring and Charles B. Sears, for appellant. Charles W. Strong, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

A. SCHWOERER & SONS, Inc., Respondent, v. STONE, Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (130 App. Div. 796, 115 N. Y. Supp. 440), entered March 5, 1909, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover a balance alleged to be due for labor performed and materials furnished. Benjamin F. Feiner and Samuel M. Fischer, for appellant. Bertram L. Kraus, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

BOYER, Respondent, v. METROPOLITAN SEWING MACH. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment entered July 31, 1908, upon an order of the Appellate Division of the Supreme Court in the First Judicial Depart-

ment (128 App. Div. 458, 112 N. Y. Supp. 817), affirming an interlocutory judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term in an action to compel a reassignment of a certain invention and of certain patent rights for the reason of a failure to pay royalties and for an accounting. See, also, 126 App. Div. 917, 110 N. Y. Supp. 1123. Louis Marshall, for appellant. Benjamin N. Cardozo, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Scott, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

BOZOVSKY, Respondent, v. BUFFALO & LAKE ERIE TRACTION CO., Appellant. (Court of Appeals of New York. Dec. 18, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 944, 117 N. Y. Supp. 1129), entered May 10, 1909, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for the death of a horse alleged to have been occasioned by the defendant's negligence. Edward H. Letchworth, for appellant. Elton D. Warner, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and COLLIN, JJ., concur. HISCOCK, J., not voting.

BROWN, Respondent, v. NEWELL, Appellant. (Court of Appeals of New York. Nov. 22, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (132 App. Div. 548, 116 N. Y. Supp. 965), entered May 15, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover upon a written agreement. Vasco P. Abbott, for appellant. D. B. Lucey, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. VANN, J., not voting.

BUELLESBACH et al., Respondents, v. HENDERSON, Appellant. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 901, 115 N. Y. Supp. 1114), entered March 25, 1909, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action to recover on contract. See, also, 130 App. Div. 880, 114 N. Y. Supp. 1121. Joseph W. Middlebrook and Henry C. Henderson, for appellant. Claude V. Pallister, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

BURKE, Appellant, v. LONDON GUARANTY & ACCIDENT CO., Respondent. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (126 App. Div. 933, 110 N. Y. Supp. 1124), entered May 13, 1908, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to recover

the amount of a judgment for personal injuries theretofore recovered against an insolvent corporation which at the time was insured by defendant against such liability. See, also, 127 App. Div. 912, 111 N. Y. Supp. 1111. Ernest P. Seelman, for appellant. Frederick Hulse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

BURNHAM et al., Respondents, v. BURNHAM, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (132 App. Div. 937, 116 N. Y. Supp. 1132), entered May 11, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury in an action to set aside a deed of real property. James W. Verbeck and Horace E. McKnight, for appellant. Charles O. Lester, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

CARPENTER, Respondent, v. HAWES, Appellant. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal, by permission, from an order of the Appellate Division of the Supreme Court in the first Judicial Department (139 App. Div. 902, 123 N. Y. Supp. 1109), entered June 17, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for services alleged to have been rendered. The motion was made upon the ground that the appeal had been taken from the order and not from the judgment of affirmance. See, also, 125 N. Y. Supp. 1115. Harry Eckhard, for the motion. John G. Phell, opposed.

PER CURIAM. Motion granted, with costs of appeal and \$10 costs of motion, unless the defendant within 60 days procures an amendment of the order of the Appellate Division granting leave to appeal to this court, so that it shall appear that leave was granted to appeal from the judgment instead of the order of affirmance. If such amendment shall be obtained, the defendant is given leave to amend his notice of appeal accordingly on payment of \$10 costs.

CASEY, Appellant, v. DAVIS & FURBER MACH. CO., Respondent. (Court of Appeals of New York. Dec. 16, 1910.) Motion for leave to withdraw appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (138 App. Div. 396, 122 N. Y. Supp. 804), entered May 16, 1910, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. The motion was made upon the ground that the order of reversal was silent as to whether it was based upon the law or the facts. See, also, 126 N. Y. Supp. 1124. Clarence Z. Spriggs, for the motion.

PER CURIAM. Motion granted, on payment, within 20 days, of costs up to date, and \$10 costs of motion. Upon failure to make such payment, the motion is denied, with \$10 costs.

In re **CHAPMAN'S ESTATE**. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (138 App. Div. 923, 123 N. Y. Supp. 1110), entered May 9, 1910, which affirmed an order of the Kings County Surrogate's Court excluding from transfer taxation a trust fund given to the decedent for life, with testamentary power of appointment, and remainder over, subject to such power, to her issue. See, also, 196 N. Y. 561, 90 N. E. 1157. William W. Wingate, for appellant. James Allison Kelly, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and **HAIGHT, VANN, WERNER, WILLARD BARTLETT**, and **CHASE, JJ.**, concur.

HISCOCK, J., dissents.

In re **CITY OF BUFFALO**. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (138 App. Div. 918, 123 N. Y. Supp. 1111), entered May 25, 1910, which affirmed an order of Special Term directing payment by the appellant herein of counsel and witness fees incurred by landowners who appeared in the above-entitled condemnation proceeding. Clark H. Hammond, Corp. Counsel (William B. Frye, of counsel), for appellant. Roland Crangle, Henry W. Killeen, De Witt Clinton, John G. Cloak, and George H. Kennedy, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and **HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK**, and **CHASE, JJ.**, concur.

CLARK, Respondent, v. PIERSON, Appellant. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 929, 117 N. Y. Supp. 1131), entered June 1, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged conversion. Robert R. Reed, for appellant. Frank E. Blackwell, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, HAIGHT, VANN, WERNER, HISCOCK**, and **COLLIN, JJ.**, concur.

CLEMENT, State Commissioner of Excise, Respondent, v. BEERS et al., Appellants. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 962, 119 N. Y. Supp. 1120), entered November 5, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover on a liquor tax bond. Lucius A. Waldo and C. E. Hunter, for appellants. Albert O. Briggs and Herbert H. Kellogg, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, WERNER, HISCOCK, CHASE and **COLLIN, JJ.**, concur.

CULLEN, C. J., and **WILLARD BARTLETT, J.**, dissent.

CLEMENT, State Commissioner of Excise, Respondent, v. BERO et al., Appellants.

(Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (130 App. Div. 891, 114 N. Y. Supp. 1122), entered January 12, 1909, affirming a judgment in favor of plaintiff in an action to recover on a liquor tax bond. R. M. Moore and Lucius A. Waldo, for appellants. Samuel H. Salisbury and Russell Headley, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE** and **COLLIN, JJ.**, concur.

COLLINS, Respondent, v. FERGUSON CONTRACTING CO., Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (136 App. Div. 902, 120 N. Y. Supp. 1119), entered January 10, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to foreclose a lien for materials furnished. Albert R. Lesinsky, for appellant. J. W. Atkinson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE**, and **COLLIN, JJ.**, concur.

COLLINS, Respondent, v. VICTORIA PAPER MILLS CO., Appellant. (Court of Appeals of New York. Jan. 10, 1911.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (126 N. Y. Supp. 1126), entered November 23, 1910, which affirmed an order of the court at a Trial Term setting aside a prior direction dismissing the complaint and granting a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. The motion was made upon the ground that permission to appeal had not been obtained. James H. Mosher, for the motion. Jerome L. Cheney, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs, and \$10 costs of motion.

COMEY, Respondent, v. HARRIS, Appellant, et al. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 686, 118 N. Y. Supp. 244), entered July 19, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property. Maurice Simmons, for appellant. Edward E. Sprague, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK**, and **COLLIN, JJ.**, concur.

COOKMAN, Appellant, v. STODDARD et al., Respondents. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 485, 116 N. Y. Supp. 901), entered June 2, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term and

an order denying a motion for a new trial in an action against the sureties on an administrator's bond to recover an amount adjudged to be due plaintiff as legatee. C. S. Mereness, Jr., for appellant. B. H. Loucks and Frank Bowman, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

CURRIE et al., Appellants, v. SPRAGUE, Respondent. (Court of Appeals of New York. Oct. 18, 1910.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 900, 122 N. Y. Supp. 1042), entered May 13, 1910, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the answer in an action to recover the balance of an account. The following questions were certified: "(1) Is the separate defense of the amended answer, set forth under the caption 'For a further answer and defense to each and every of the causes of action set forth in the amended complaint,' sufficient in law upon the face thereof? (2) Does the counterclaim alleged in the amended answer state facts sufficient to constitute a cause of action?" Reargument denied, see *infra*. 123 N. Y. Supp. 1113. Walter W. Irwin, for appellants. Meier Steinbrink and Paul Eugene Jones, for respondent.

PER CURIAM. Order affirmed, with costs, and questions certified answered in the affirmative.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

CURRIE et al., Appellants, v. SPRAGUE, Respondent. (Court of Appeals of New York. Nov. 29, 1910.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 199 N. Y. 566, *supra*.

CURTISS, Respondent, v. JERB, Appellant. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 928, 122 N. Y. Supp. 1126), entered March 16, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover back money paid. The motion was made upon the ground that the judgment of the Appellate Division was unanimous and the exceptions frivolous. James McC. Mitchell, for the motion. Charles B. Sears, opposed.

PER CURIAM. Motion denied, with \$10 costs.

In re **DAVIS et al.** (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 931, 124 N. Y. Supp. 1114), entered October 10, 1910, which affirmed a decree of the Madison County Surrogate's Court directing the sale of real estate of George W. Davis, deceased, for the payment of his debts. E. O. Worden, for appellant. O. W. Underhill, for respondents.

PER CURIAM. Order affirmed, with costs. **CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.**

DEAN, Appellant, v. F. R. LONG CO., Respondent. (Court of Appeals of New York. Nov. 15, 1910.) Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 925, 116 N. Y. Supp. 1134), entered May 24, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for services alleged to have been rendered by plaintiff's assignor, a foreign corporation. The dismissal was upon the ground that plaintiff's assignor had not procured the required license to transact business within this state. See, also, 133 App. Div. 899, 118 N. Y. Supp. 1102. Henry H. Bowman and Harold H. Bowman, for appellant. Nelson Zabriskie, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

DILCHER, Respondent, v. NELLANY, Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (129 App. Div. 932, 114 N. Y. Supp. 1125), entered January 26, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action on contract. See, also, 125 App. Div. 904, 109 N. Y. Supp. 1128. Adelbert Moot, Helen Z. M. Rogers, and Edward W. Hatch, for appellant. Simon Fleischmann and Arthur H. Williams, for respondent.

PER CURIAM. Judgment affirmed, with costs, on the ground that there is no exception in the case which raises the objections the appellant has argued on this appeal.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

DILCHER, Respondent, v. NELLANY, Appellant. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 199 N. Y. 572, *supra*.

DOLLARD v. KORONSKY et al. In re **BLOCH.** (Court of Appeals of New York. Oct. 11, 1910.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 213, 123 N. Y. Supp. 11), entered May 20, 1910, affirming an order of the Appellate Term (67 Misc. Rep. 90, 121 N. Y. Supp. 987), which reversed an order of the City Court of the City of New York adjudging the respondent herein guilty of contempt of court. The following question was certified: "Where the court orders the release, pendente lite, of a challenged levy of execution, provided the debtor cause to be substituted in its place, for the creditor's protection, an undertaking conditioned for the payment of the supporting judgment and certain expenses in case the attack on the levy should ultimately fail; and where, to procure such release, such an undertaking, joint and several in form, is thereupon furnished, reciting in terms said order and its said protective provision; and where the sureties thereon are, at the time of qualifying, each worth double the amount of such undertaking; and where the levy is thereupon released; and such attack on such levy ultimately fails—is it a civil contempt of court for one of the sureties on such undertaking to willfully divest himself of all of his property for the deliberate and suc-

cessful purpose of rendering valueless any judgment which might be recovered against him upon said undertaking, thus destroying the protection granted to the creditor as a condition of releasing the levy of the execution and defeating, impeding and prejudicing the rights and remedies of the creditor?" See, also, 133 App. Div. 896, 118 N. Y. Supp. 1103; 134 App. Div. 953, 118 N. Y. Supp. 1108; 139 App. Div. 906, 123 N. Y. Supp. 1114. Yorke Allen, for appellant. Louis Marshall, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

DOYLE, Respondent, v. TILLOTSON et al., Appellants. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (126 App. Div. 922, 111 N. Y. Supp. 1117), entered June 4, 1908, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to establish title to certain premises and to restrain the cutting of timber thereupon. C. S. Mereness, for appellants. George S. Reed, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. WERNER, J., absent.

DRAKE et al., Respondents, v. WHITE SEWING MACH. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (133 App. Div. 448, 118 N. Y. Supp. 178), entered July 24, 1909, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action to recover money deposited as part payment for automobiles to be furnished under a contract of agency, which contract was thereafter terminated by the defendant. H. W. Coley, for appellant. E. L. Hunt, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

In re EDGEWATER ROAD IN CITY OF NEW YORK. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 203, 122 N. Y. Supp. 931), entered May 13, 1910, which reversed an order of Special Term denying a motion to confirm the report of commissioners of estimate and assessment in the above-entitled proceeding. Francis P. O'Connor and Edward W. Murphy, for appellant. Archibald R. Watson, Corp. Counsel (Joel J. Squier, F. W. Gahrman, and C. A. Molloy, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

FALIHIEE, Appellant, v. JOHN SIMMONS CO., Respondent. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 898, 115 N. Y. Supp. 1120), entered March 13, 1909, affirming a judgment in favor

of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for an alleged breach of contract. See, also, 122 App. Div. 924, 108 N. Y. Supp. 1132. Claude V. Pallister and Francis C. Reed, for appellant. J. Culbert Palmer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

FALK et al., Appellants, v. AMERICAN WEST INDIES TRADING CO., Respondent. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 892, 118 N. Y. Supp. 1106), entered June 24, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain an alleged infringement of a trade-mark. S. K. Lichtenstein and Henry M. Wise, for appellants. Isaac M. Aron, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

FAMULARO, Respondent, v. OIL WELL SUPPLY CO., Appellant. (Court of Appeals of New York. Dec. 16, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 907, 112 N. Y. Supp. 1128), entered November 12, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through the defendant's negligence. H. L. Howe, for appellant. Francis D. Culkin and D. P. Morehouse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

In re FARMERS' LOAN & TRUST CO. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 121, 122 N. Y. Supp. 936), entered May 6, 1910, which affirmed a decree of the New York County Surrogate's Court settling the accounts of the trustee herein and directing distribution of the trust fund. See, also, 127 N. Y. Supp. 1119. Arthur J. McClure, for appellants. George N. Whittlessey, Stanley W. Dexter, and Alexander L. Halliday, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Miller, J., below.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

FIRST NAT. BANK OF SING SING, Respondent, v. LARKIN, Appellant, et al. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 924, 120 N. Y. Supp. 1123), entered January 29, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover on a promissory note. John Larkin and

Alexander S. Andrews, for appellant. Smith Lent and A. W. Hendrickson, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

GARDINER'S BAY CO., Appellant, v. ATLANTIC FERTILIZER & OIL CO., Respondent. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (189 App. Div. 913, 123 N. Y. Supp. 1117), entered June 27, 1910, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain the commission of an alleged nuisance. The motion was made upon the ground that the exceptions were frivolous. Nathan D. Stern, for the motion. Percy L. Housel, opposed.

PER CURIAM. Motion denied, with \$10 costs.

GIRLING, Respondent, v. CITY OF NEW YORK, Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (184 App. Div. 927, 118 N. Y. Supp. 1108), entered October 11, 1909, upon an order which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directed the reinstatement of said verdict in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. See, also, 197 N. Y. 302, 90 N. E. 818. Archibald R. Watson, Corp. Counsel (James D. Bell, of counsel), for appellant. Frederick S. Martyn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

GLEASON, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 947, 117 N. Y. Supp. 1136), entered May 28, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Charles A. Pooley, for appellant. Irving L'Hommedieu, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

GOULD et al., Respondents, v. VILLAGE OF SENECA FALLS et al., Appellants. (Court of Appeals of New York. Dec. 6, 1910.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 417, 121 N. Y. Supp. 723), entered March 12, 1910, which affirmed an order of Special Term granting an injunction restraining the defendants from issuing certain village bonds and from levying a tax for the payment thereof. The following questions were certified: (1) On

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the 22d day of June, 1909, were women who resided in the village of Seneca Falls, N. Y., and were the owners of property in said village, assessed upon the last preceding assessment roll thereof, entitled to vote on the proposition submitted at the special election held on said date? (2) Did the addition of the following words at the end of said proposition make the same "a proposition to raise money by tax or assessment," within the meaning of article 3, section 41, subdivision 2, of chapter 64 of the Laws of 1909 (the village law): "And shall there be raised annually, by the levy and collection of a tax upon the taxable property in said village, a sum, which with the net revenue derived from said waterworks system, shall be sufficient to pay the principal and the interest on the said several bonds as such principal and interest shall mature and become due and payable?" See, also, 133 App. Div. 914, 123 N. Y. Supp. 1118. Clarence A. MacDonald and William H. Hurley, for appellants. J. N. Hammond, for respondents.

PER CURIAM. Order affirmed, with costs, and questions certified answered in the affirmative, on opinion of Williams, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

In re GRIFFIN et al. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (189 App. Div. 936, 124 N. Y. Supp. 1116), entered July 29, 1910, which affirmed a decree of the Suffolk County Surrogate's Court disallowing a claim against the estate of Henry L. Griffin, deceased, for services alleged to have been rendered by one of his executors during his lifetime. See, also, 126 App. Div. 938, 110 N. Y. Supp. 1130. George C. Hendrickson, for appellant. George F. Stackpole, for respondents.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., not voting.

GRIFFIN, Respondent, v. ERNST, Appellant, et al. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (130 App. Div. 877, 114 N. Y. Supp. 1129), entered January 13, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mechanic's lien. Edward Herrmann, for appellant. Franklin Pierce, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. WERNER, J., absent.

GRIFFIN v. McMAHON et al. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (131 App. Div. 925, 115 N. Y. Supp. 1123), entered April 6, 1909, affirming an interlocutory judgment in favor of plaintiff entered upon a verdict in an action of partition. Martha A. Mallory, in pro per. Thomas F. Rogers, for respondent Griffin. Frank J. Saxton, for other respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. WERNER, J., not voting. COLLIN, J., not sitting.

In re GROTE ST. IN CITY OF NEW YORK. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 69, 123 N. Y. Supp. 619), entered June 10, 1910, which affirmed an order of Special Term denying a motion by the appellant herein for an order directing the commissioners of estimate to determine the compensation to be made to her by reason of the closing of Kingsbridge road. See, also, 126 N. Y. Supp. 1131. Merle I. St. John and Thomas C. Blake, for appellant. Archibald R. Watson, Corp. Counsel (Joel J. Squier and James Regan Fitz Gerald, of counsel), for respondent City of New York. C. C. Ferris for respondent Hookey. Benjamin Trapnell and Joseph A. Flannery, for respondent Worthen.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

HALL, Appellant, v. NEW YORK, N. H. & H. R. CO. et al., Respondents. (Court of Appeals of New York. Dec. 18, 1910.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 488, 106 N. Y. Supp. 106), entered October 4, 1907, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's maintenance of a nuisance. The motion was made upon the ground of a failure to prosecute the appeal. Gustav R. Hamburger, for the motion. J. Henry Esser, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs, and \$10. costs of motion.

In re HAMMOND. (Court of Appeals of New York. Dec. 8, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (140 App. Div. 19, 124 N. Y. Supp. 406), entered July 12, 1910, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to reclassify the position of stenographer in the department of law in the city of Buffalo by placing it in the exempt class. Clark H. Hammond and Harry D. Sanders, for appellant. Adelbert Moot, John W. Ryan, and Ansley Wilcox, for respondents.

PER CURIAM. Order affirmed, with costs, on the ground that the state board of civil service commissioners was a necessary party to a proceeding to compel a reclassification under the civil service law, without passing on the merits.

CULLEN, C. J., and HAIGHT, WERNER, HISCOCK, and COLLIN, JJ., concur. GRAY, J., absent.

In re HEINE SAFETY BOILER CO. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 933, 121 N. Y. Supp. 1135), entered May 25, 1910, which affirmed an order of Special Term denying a motion for a writ of mandamus to compel the respondent herein to permit an inspection of its books. See, also, 125 N. Y. Supp. 1123. Ran-

som H. Gillet, for appellant. Amasa J. Parker, Jr., for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

HOLBROOK, Respondent, v. BUFFALO, R. & P. RY. CO., Appellant. (Court of Appeals of New York. Dec. 18, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 909, 118 N. Y. Supp. 1113), entered July 9, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Samuel N. Havens, for appellant. Ralph S. Kent, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

HOOD et al. v. WHITWELL et al. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (124 N. Y. Supp. 1117), entered July 28, 1910, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain the defendants from removing a certain building from plaintiff's premises, theretofore appropriated for canal purposes, and for damages. Edward R. O'Malley, Atty. Gen. (Andrew E. Tuck and Wilber W. Chambers, of counsel), for appellant. Gerald B. Fluhrer, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

HORTON, Appellant, v. BINGHAMTON PRESS CO., Respondent. (Court of Appeals of New York. Dec. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (122 App. Div. 332, 106 N. Y. Supp. 875), entered November 13, 1907, which affirmed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and granting a new trial in an action for libel. John P. Wheeler, for appellant. T. B. Merchant, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

HUNGERFORD, Appellant, v. VILLAGE OF WAVERLY et al., Respondents. (Court of Appeals of New York. Dec. 18, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (131 App. Div. 919, 115 N. Y. Supp. 1125), entered June 16, 1909, affirming a final judgment dismissing the complaint entered upon a prior order of said Appellate Division (125 App. Div. 311, 109 N. Y. Supp. 438) which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer in an action to recover for personal injuries alleged to have

been sustained through defendant's negligence. See, also, 127 App. Div. 934, 111 N. Y. Supp. 1124; 130 App. Div. 893, 114 N. Y. Supp. 1131. Charles C. Annabel, for appellant. Frank A. Bell, for respondents.

PER CURIAM. Judgment affirmed, with costs.

GRAY, HAIGHT, VANN, HISCOCK, and COLLIN, JJ., concur. CULLEN, C. J., dissents from affirmance as to respondent Bingham, on authority of *Bennett v. Whitney*, 94 N. Y. 302. WILLARD BARTLETT, J., not voting.

JOHN A. PHILBRICK & BRO. v. IGNATZ FLORIO CO-OP. ASS'N AMONG CORLEONESI et al. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 613, 122 N. Y. Supp. 341), entered April 8, 1910, which reversed an order of Special Term denying a motion to confirm the report of a referee in surplus money proceedings. Noah A. Standcliffe, for appellants. Otto C. Sommerich and Maxwell C. Katz, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Scott, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

JOHNSTON, Respondent, v. GARVEY, Appellant. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 659, 124 N. Y. Supp. 278), entered July 19, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract to purchase real property. The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous and that the record presented no exceptions which could be reviewed by the Court of Appeals. See, also, 125 N. Y. Supp. 1151. Benjamin E. Messler, for the motion. Joseph G. Engel and Isaac V. Schavrien, opposed.

PER CURIAM. Motion denied, with \$10 costs.

JONES, Appellant, v. SEAMAN et al., Respondents. (Court of Appeals of New York. Dec. 16, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (133 App. Div. 127, 117 N. Y. Supp. 283), entered June 15, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action of replevin. See, also, 137 App. Div. 902, 122 N. Y. Supp. 1132. Henry J. McCormick, for appellant. Waldo G. Morse, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

KELLER, Respondent, v. LEHIGH VALLEY R. CO., Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 946, 117 N. Y. Supp. 1138), entered May 29, 1909, affirming a judgment in favor of plaintiff entered upon a ver-

dict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. John Taber and John M. Brainard, for appellant. Frank C. Sargent, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

KNICKERBOCKER TRUST CO., Respondent, v. ALTMAYER, et al., Appellants. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 892, 118 N. Y. Supp. 1118), entered June 24, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action upon a contract of guaranty. See, also, 126 App. Div. 915, 110 N. Y. Supp. 1134. B. F. Einstein, for appellants. Julien T. Davies and Julien T. Davies, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

LANCASTER TRUST CO., Appellant, v. FLINT, Respondent, et al. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 901, 115 N. Y. Supp. 1128), entered March 26, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover on a contract of underwriting. Romeyn Berry and Frank L. Crocker, for appellant. Myron N. Tompkins, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

LESLIE, Respondent, v. FIREMEN'S INS. CO. OF NEWARK, N. J., Appellant, et al. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 892, 118 N. Y. Supp. 1120), entered June 21, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on a policy of fire insurance. See, also, 125 App. Div. 919, 109 N. Y. Supp. 1136; 126 App. Div. 910, 110 N. Y. Supp. 1135. Frank Walling and S. J. Rosenblum, for appellant. John M. Coleman, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur. WERNER, J., absent.

McMAHON, Respondent, v. DELAWARE, L. & W. R. CO., Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 944, 117 N. Y. Supp. 1140), entered May 8, 1909, affirming a judg-

ment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Louis L. Babcock and Evan Hollister, for appellant. Edward R. O'Malley, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

MALLOY et al., Respondents, v. O'BRIEN et al., Appellants. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (129 App. Div. 906, 113 N. Y. Supp. 1189), entered December 18, 1908, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an action for a partnership accounting. See, also, 126 App. Div. 915, 110 N. Y. Supp. 1137. William Hepburn Russell and William Beverly Winslow, for appellants. Claude V. Pallister and Francis C. Reed, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

MALLOY et al., Respondents, v. O'BRIEN et al., Appellants. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (129 App. Div. 906, 113 N. Y. Supp. 1189), entered December 18, 1908, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover the rental value of certain machinery alleged to have been hired from the plaintiffs by the defendants. See, also, 126 App. Div. 915, 110 N. Y. Supp. 1137. William Hepburn Russell and Joseph A. Burdeau, for appellants. Claude V. Pallister and Francis C. Reed, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

MALONEY, Appellant, v. LESTERSHIRE LUMBER & BOX CO., Respondent. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 593, 123 N. Y. Supp. 50), entered May 26, 1910, affirming a judgment of the Broome County Court in favor of plaintiff entered upon a verdict in an action to recover for goods sold and delivered. The motion was made upon the ground that the Court of Appeals had no jurisdiction of the appeal; the action having been commenced in the City Court of Binghamton, and permission to appeal not having been obtained. Charles H. Hitchcock, for the motion. Frank L. Wooster, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion, on authority of *Sidwell v. Greig*, 157 N. Y. 30, 51 N. E. 267.

MANSON et al., Respondents, v. METROPOLITAN SURETY CO. et al., Appellants. (Court of Appeals of New York. Nov. 15,

1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 577, 112 N. Y. Supp. 886), entered November 19, 1908, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of insurance against burglary. John Burlinson Coleman and Edward R. Finch, for appellants. George Ryall, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

MARRUS et al., Respondents, v. ALTER-ISE, Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (129 App. Div. 922, 114 N. Y. Supp. 1136), entered January 4, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a contract to purchase real property. James A. Sheehan, for appellant. I. Gainsburg, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

MATTISON, Respondent, v. MATTISON, Appellant. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment entered March 31, 1910, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 918, 122 N. Y. Supp. 1136), affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for divorce. The motion was made upon the grounds that the Appellate Division had unanimously decided that the findings of the trial court were supported by the evidence, that the exceptions were frivolous, and that no question of law was involved. Edmund L. Mooney, for the motion. Edward Hymes, opposed.

PER CURIAM. Motion denied, with \$10 costs.

In re MILLER et al. (Court of Appeals of New York. Oct. 11, 1910.) Cross-appeals from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (138 App. Div. 885, 122 N. Y. Supp. 1136), entered April 22, 1910, which modified, and affirmed as modified, a decree of the Kings County Court settling the accounts of the executors of Mary F. Farnham, deceased, as executrix of Stephen H. Farnham, deceased. Charles H. Studin and William Reeda, for appellants Farnham and others. Henry W. Jessup, for appellant Truslow. Augustus Van Wyck, for respondent.

PER CURIAM. Order affirmed, without costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

MILLER, Respondent, v. SENECA RIVER POWER CO. et al., Appellants. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of

the Supreme Court in the Fourth Judicial Department (132 App. Div. 948, 118 N. Y. Supp. 1125), entered June 1, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover on contract. Charles E. Cooney, for appellants. John W. Hogan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

MILTON SCHNAIER & CO., Appellant, v. GRIGSBY, Respondent. (Court of Appeals of New York. Oct. 25, 1910.) Appeal, by permission, from a judgment entered June 10, 1909, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 854, 117 N. Y. Supp. 455), which affirmed, with direction for judgment absolute, a determination of the Appellate Term reversing a judgment of the New York City Court in favor of plaintiff, and granting a new trial in an action to foreclose a mechanic's lien. The principal question involved was as to whether the plaintiff corporation could lawfully engage in the business of plumbing. See, also, 133 App. Div. 899, 118 N. Y. Supp. 1125. Milton Mayer, for appellant. L. Laffin Kellogg and William K. Hartpence, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion of Scott, J., below.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re MOHEGAN AVE. IN CITY OF NEW YORK. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 942, 122 N. Y. Supp. 1137), entered April 8, 1910, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment in the above-entitled proceeding. See, also, 133 App. Div. 911, 123 N. Y. Supp. 1129. George E. Baldwin, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly, Joel J. Squier, and F. W. Gahrman, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

In re MONROE, Commissioner. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (131 App. Div. 872, 116 N. Y. Supp. 334), entered April 23, 1909, which affirmed an order of Special Term confirming an award of commissioners of appraisal in the above-entitled proceeding. Archibald R. Watson, Corp. Counsel (Frederick W. Sherman, of counsel), for appellant. Wilson Brown, Jr., for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

In re MT. VERNON AVE. IN CITY OF NEW YORK. (Court of Appeals of New York. Oct. 11, 1910.) Cross-appeals from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App.

Div. 897, 122 N. Y. Supp. 1137), entered May 6, 1910, which modified and affirmed as modified an order of Special Term in so far as it allowed interest on certain awards made in the above-entitled proceeding. See, also, 127 App. Div. 650, 111 N. Y. Supp. 895; 123 N. Y. Supp. 1129. Reargument denied, see *infra*. Archibald R. Watson, Corp. Counsel (Theodore Connolly, Joel J. Squier, and G. E. Draper, of counsel), for City of New York. Merle I. St. John, for Hutter and others.

PER CURIAM. Order affirmed, without costs. The language of section 1001 of the charter of New York City, which limits the right to interest in regular course to the period of six months, unless within that time a demand shall be made, has no application to the period following a demand made after the expiration of six months, and does not forbid the allowance of interest in the latter case from the time when a proper demand is made.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

In re MT. VERNON AVE. IN CITY OF NEW YORK. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for rearargument denied, with \$10 costs. See 199 N. Y. 559, *supra*.

MOYNAHAN, Respondent, v. CITY OF NEW YORK, Appellant (two cases). (Court of Appeals of New York. Jan. 10, 1911.) Motions to dismiss appeals from judgments of the Appellate Division of the Supreme Court in the First Judicial Department (125 N. Y. Supp. 1132), entered October 28, 1910, affirming judgments in favor of plaintiff entered upon verdicts directed by the court in actions to recover for services as stenographer in the Supreme Court. The motion was made upon the ground that the action was one for services, the decision of the Appellate Division unanimous, and the appeal frivolous. L. Laffin Kellogg, for the motions. Archibald R. Watson, Corp. Counsel (Clarence L. Barber, of counsel), opposed.

PER CURIAM. Motions denied, with \$10 costs, because the services were rendered by a public officer under the obligation of official duty.

MULLER, Appellant, v. GUICHARD, Respondent. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 944, 118 N. Y. Supp. 1126), entered July 16, 1909, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover for an alleged breach of contract of sale. Morris J. Hirsch and Herbert R. Limburg, for appellant. Chester A. Jayne and John L. Wilkie, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE v. MULVEY. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 948, 121 N. Y. Supp. 1140), entered November 9, 1909, which modified, and affirmed as modified, an order of Special Term vacating the order above mentioned. Frank M. Avery

and Joseph V. Mitchell, for appellant. Edward R. O'Malley, Atty. Gen. (Amos H. Stephens, of counsel), for the People.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

MURRAY, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Dec. 16, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 893, 118 N. Y. Supp. 1126), entered July 8, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by the defendant's negligence. Robert A. Kutschback, Alex. S. Lyman, and Charles C. Paulding, for appellant. Raymond D. Thurber and Frank F. Davis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

NATIONAL METAL EDGE BOX CO., Respondent, v. GOTHAM, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 947, 117 N. Y. Supp. 1142), entered June 14, 1909, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover a sum of money paid by plaintiff in settlement of a suit against it for having used in its business patented articles unlawfully manufactured and sold to it by defendant. Henry Purcell, for appellant. Horace Stern, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

NATIONAL PARK BANK OF NEW YORK, Respondent, v. RANDO, Appellant. (Court of Appeals of New York. Oct. 3, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court of the First Judicial Department (135 App. Div. 914, 119 N. Y. Supp. 1136), entered December 8, 1909, affirming a judgment in favor of plaintiff. The motion was made upon the ground that the appellant failed to perfect his appeal by filing the required undertaking. Louis F. Doyle, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

NEUMEYER et al., Respondents, v. HOOKER et al., Appellants. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 592, 116 N. Y. Supp. 204), entered April 13, 1909, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover on an alleged contract of sale. See, also, 119 App. Div. 891, 105 N. Y. Supp. 1133. Nelson E. Spencer, for appellants.

Walter Carroll Low and Henry Hoelljes, for respondents.

PER CURIAM. Judgment affirmed, with costs.

GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. CULLEN, C. J., not voting.

NEW YORK CENT. & H. R. R. CO. v. FEDERAL SUGAR REFINING CO. OF YONKERS et al. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (139 App. Div. 938, 124 N. Y. Supp. 1123), entered July 29, 1910, which affirmed an order of Special Term awarding interest on an award made in condemnation proceedings. John F. Brennan and Albert H. Harris, for appellant. Arthur M. Johnson, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur. WILLARD BARTLETT, J., dissents.

In re NEW YORK INDEPENDENT TELEPHONE CO. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 635, 118 N. Y. Supp. 290), entered July 13, 1909, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to issue to the relator a permit to run a cable through a certain subway. Elihu Root, William H. Page, G. H. Crawford, and Joseph W. Taylor, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Clarence L. Barber, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of Clark, J., below.

HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. CULLEN, C. J., and GRAY, J., not sitting.

O'CONNOR et al., Respondents, v. BAUER, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (127 App. Div. 854, 111 N. Y. Supp. 869), entered July 27, 1908, in favor of plaintiffs upon the submission of a controversy pursuant to section 1279 of the Code of Civil Procedure, as to whether the defendant is bound by certain covenants in his title to refrain from erecting any building on a strip of land that may obstruct windows in plaintiffs' adjoining building. See, also, 127 App. Div. 949, 112 N. Y. Supp. 1138. Horace J. Tuttle, for appellant. Joseph M. Feely, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

O'CONNOR, Respondent, v. FORTY-SECOND ST. M. & ST. N. AVE. RY. CO., Appellant, et al. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 901, 115 N. Y. Supp. 1135), entered March 23, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence.

Bayard H. Ames, John Montgomery, and James L. Quackenbush, for appellant. Joseph Fischer and Louis J. Vorhaus, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

OISHEI v. D'ANCONA et al. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 929, 117 N. Y. Supp. 1142), entered June 5, 1909, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to enforce an attorney's lien. Reargument denied, see infra. Nelson L. Keach and Achille J. Oishei, for appellant. Thomas M. Rowlette and F. Herbert Wadsworth, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

OISHEI v. D'ANCONA et al. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 199 N. Y. 538, supra.

PAGE, Appellant, v. DEMPSEY, Respondent. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (121 App. Div. 924, 106 N. Y. Supp. 1139), entered October 29, 1907, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover for injuries to plaintiff's building alleged to have been caused by blasting operations of defendant on adjoining premises. William F. Clare, for appellant. Morgan J. O'Brien and Edward D. Dowling, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEASE, Respondent, v. PENNSYLVANIA R. CO., Appellant. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 929, 122 N. Y. Supp. 787), entered March 23, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through defendant's negligence; also motion to dismiss an appeal from an order of said Appellate Division (137 App. Div. 458, 122 N. Y. Supp. 784), entered March 23, 1910, which affirmed an order of Special Term denying a motion for a new trial on the ground of newly discovered evidence. The first motion was made upon the ground that the judgment of the Appellate Division was unanimous, and therefore not appealable to the Court of Appeals; the second, upon the ground that the order of the Appellate Division was not appealable to the Court of Appeals. George D. Forsyth, for the motions. Ernest C. Whitbeck, opposed.

PER CURIAM. Motion to dismiss appeal from judgment denied, with \$10 costs. Motion

to dismiss appeal from order granted, and appeal dismissed, with costs and \$10 costs of motion.

PEOPLE, Respondent, v. ALBERT, Appellant. (Court of Appeals of New York. Jan. 10, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (136 App. Div. 224, 120 N. Y. Supp. 875), entered January 12, 1910, which affirmed a judgment of the Erie County Court rendered upon a verdict convicting the defendant of the crime of violating section 331 of the Penal Code relating to pool-selling and bookmaking. E. W. McIntyre, for appellant. Wesley C. Dudley, Dist. Atty. (Guy B. Moore, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. ANTICO, Appellant. (Court of Appeals of New York. Jan. 10, 1911.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 938, 118 N. Y. Supp. 1129), entered October 12, 1909, which affirmed a judgment of the Court of Special Sessions of the City of New York convicting the defendant of the crime of extortion. The motion was made upon the ground of failure to prosecute the appeal. Samuel H. Evans, Dist. Atty., for the motion.

PER CURIAM. Motion granted.

PEOPLE, Respondent, v. HUFF, Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 995, 119 N. Y. Supp. 1139), entered November 30, 1909, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover a penalty for an alleged violation of the forest, fish, and game law. Amasa J. Parker, for appellant. Charles P. Ryan, for the People.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, HISCOCK, CHASE, and COLLIN, JJ., concur. WILLARD BARTLETT, J., dissents.

PEOPLE, Respondent, v. JAMES BUTLER, Inc., Appellant. (Court of Appeals of New York. Dec. 16, 1910.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 151, 118 N. Y. Supp. 849), entered October 8, 1909, reversing a judgment of the Municipal Court of the city of New York in favor of defendant and granting a new trial in an action to recover a penalty for an alleged violation of sections 164 and 165 of chapter 338 of the Laws of 1893, as amended by chapter 524 of the Laws of 1903 and chapter 100 of the Laws of 1905. John H. Rogan, for appellant. Edward R. O'Malley, Atty. Gen. (Taylor More, of counsel), for the People.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. NELSON, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 893, 118

N. Y. Supp. 1131), entered June 18, 1909, which affirmed a judgment of the Court of General Sessions in the County of New York rendered upon a verdict convicting the defendant of the crime of rape in the second degree, and also affirmed an order denying a motion for a new trial. Clark L. Jordan, for appellant. Charles S. Whitman, Dist. Atty. (Robert S. Johnstone, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. GRAY, J., absent.

PEOPLE, Appellant, v. OTIS, Respondent. (Court of Appeals of New York. Dec. 16, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 428, 121 N. Y. Supp. 810), entered March 17, 1910, which reversed a judgment of the Jefferson County Court rendered upon a verdict convicting the defendant of a violation of subdivision 2 of section 1427 of the Penal Law (Consol. Laws, c. 40) and granted a new trial. Fred B. Pitcher, for the People. Edgar V. Bloodough, for respondent.

PER CURIAM. Appeal dismissed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE, Respondent, v. POOLE, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 122, 111 N. Y. Supp. 258), entered June 12, 1908, which affirmed a judgment rendered at a Trial Term upon a verdict convicting the defendant of the crime of murder in the second degree, and also affirmed an order denying a motion for a new trial. Charles E. Le Barbier, for appellant. Franklin A. Coles, Dist. Atty., for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE, Respondent, v. ROOF, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 633, 122 N. Y. Supp. 677), entered March 8, 1910, which affirmed a judgment of the Chenango County Court rendered upon a verdict convicting the defendant of the crime of robbery in the first degree. William H. Sullivan, for appellant. James P. Hill, Dist. Atty., for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE, Respondent, v. SONNENBERG, Appellant. (Court of Appeals of New York. Jan. 10, 1911.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (125 N. Y. Supp. 1137), entered October 21, 1910, which affirmed a judgment of the Onondaga County Court rendered upon a verdict convicting the defendant of the crime of criminally receiving stolen prop-

erty. W. B. Matterson, for appellant. George W. Standen and George H. Bond, for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

PEOPLE ex rel. CITY OF NEW YORK v. STILLINGS et al. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (134 App. Div. 480, 119 N. Y. Supp. 298), entered November 19, 1909, which sustained a writ of certiorari and reversed a determination of the defendant commissioners awarding damages to the appellant herein for a change of street grade in front of his premises. Barclay E. V. McCarty, Jared G. Baldwin, Jr., and John M. Harrington, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly and Charles J. Nehrbas, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. HANSON, Appellant, v. EDWARDS, Respondent. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 902, 123 N. Y. Supp. 1135), entered June 17, 1910, which dismissed a writ of certiorari to review the determination of the defendant in dismissing the relator from the department of street cleaning in the city of New York. Theron Davis, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly and Harry Crone, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. LONG ACRE ELECTRIC LIGHT & POWER CO., Respondent, v. PUBLIC SERVICE COMMISSION FOR FIRST DISTRICT OF STATE OF NEW YORK et al., Appellants. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for reargument of motion to dismiss appeal denied, with \$10 costs. See 199 N. Y. 254, 92 N. E. 629.

PEOPLE ex rel. MATHESON LEAD CO., Appellant, v. KELSEY, State Comptroller, Respondent. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (132 App. Div. 939, 116 N. Y. Supp. 1144), entered May 20, 1909, which dismissed a writ of certiorari and confirmed the proceedings of the defendant in assessing franchise taxes against the relator for the years 1894, 1897, and 1898. George H. Mallory and Henry G. Fritzsche, for appellant. Edward R. O'Malley, Atty. Gen. (Edward H. Letchworth, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. POOR et al., Respondents, v. O'DONNELL et al., Appellants. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (189 App. Div. 83, 124 N. Y. Supp. 36), entered June 24, 1910, which affirmed an order of Special Term canceling an assessment for taxation for the year 1906 on real estate known as Gramercy Park. Archibald R. Watson, Corp. Counsel (Curtis A. Peters and R. M. de Acosta, of counsel), for appellants. Roy C. Gasser and Henry B. Anderson, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Dowling, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. POOR et al., Respondents, v. WELLS et al., Appellants. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (189 App. Div. 83, 124 N. Y. Supp. 36), entered June 24, 1910, which affirmed an order of Special Term canceling an assessment for taxation for the year 1908 on real estate known as Gramercy Park. Archibald R. Watson, Corp. Counsel (Curtis A. Peters and R. M. de Acosta, of counsel), for appellants. Roy C. Gasser and Henry B. Anderson, for respondents.

PER CURIAM. Order affirmed, with costs, on opinion of Dowling, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. UTICA SUNDAY TRIBUNE CO. v. WILLIAMS et al. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (140 App. Div. 58, 124 N. Y. Supp. 328), entered July 14, 1910, which annulled, on certiorari, the proceedings of the defendants in designating a newspaper to publish the Session Laws for the year 1910. D. Francis Searle and Albert J. O'Connor, for appellants. E. D. Lee, for respondent.

PER CURIAM. Order reversed, and writ quashed, with costs in both courts, on authority of *People ex rel. Republican & Journal Co. v. Wiggins*, 199 N. Y. 382, 92 N. E. 789.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PEOPLE ex rel. VICTOR KOEHL & CO., Appellant, v. KELSEY, State Comptroller, Respondent. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (138 App. Div. 932, 123 N. Y. Supp. 1137), entered May 27, 1910, which dismissed a writ of certiorari and confirmed a determination of the defendant in assessing a tax upon the relator, a foreign corporation, under section 182 of the tax law (Consol. Laws, c. 60). George H. Mallory and Henry G. Fritsche, for appellant. Edward R. O'Malley, Atty. Gen. (Everett E. Risley, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PERLEY, Appellant, v. SHUBERT, Respondent. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 925, 112 N. Y. Supp. 1143), entered November 10, 1908, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial in an action to recover for an alleged breach of contract. See, also, 126 App. Div. 953, 111 N. Y. Supp. 1140. Reargument denied, see *infra*. Franklin Bien, for appellant. Benjamin N. Cardozo and William Klein, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PERLEY, Appellant, v. SHUBERT, Respondent. (Court of Appeals of New York. Oct. 28, 1910.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 199 N. Y. 544, *supra*.

In re PHILLIPS. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (139 App. Div. 365, 124 N. Y. Supp. 60), entered September 14, 1910, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendants to certify a payroll containing the name of the relator as physician to the Kings county jail. See, also, 124 N. Y. Supp. 1126. Henry F. Cochrane and Hersey Egginton, for appellant. Edward R. O'Malley, Atty. Gen. (Everett E. Risley, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PINDAR, Appellant, v. JENKINS, Respondent. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (128 App. Div. 711, 113 N. Y. Supp. 588), entered December 30, 1908, affirming a judgment for nominal damages in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract of employment. L. B. McKelvey, for appellant. W. P. Butler, for respondent.

PER CURIAM. Judgment reversed, and new trial granted, costs to abide event, on dissenting opinion of Kellogg, J., below.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PRIME et al., Respondents, v. CITY OF YONKERS, Appellant. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (131 App. Div. 110, 115 N. Y. Supp. 805), entered March 9, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to recover damages to real property alleged to have been caused by defendant's interference with the flow of a stream. See, also, 116 App.

Div. 699, 102 N. Y. Supp. 118. Thomas F. Curran, Corp. Counsel (John F. Brennan, of counsel), for appellant. Henry Bacon and Ralph Earl Prime, Jr., for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion of Jenks, J., below.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

PRITCHARD, Appellant, v. RUPPERT, Respondent. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (122 App. Div. 922, 108 N. Y. Supp. 1145), entered February 3, 1908, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action by a tenant to recover from her landlord for personal injuries alleged to have been received through the fall of a ceiling. George B. Class, for appellant. Theodore H. Lord and Lyman A. Spalding, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re PUBLIC PARK, ETC., IN CITY OF NEW YORK. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (138 App. Div. 890, 122 N. Y. Supp. 1142), entered April 22, 1910, which affirmed an order of Special Term directing the comptroller of the city of New York to pay to the respondent herein a sum fixed as the cash disbursements caused said respondent by the discontinuance of the above-entitled proceeding. Archibald R. Watson, Corp. Counsel (Joel J. Squier and G. E. Draper, of counsel), for appellant. Charles Benner, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

REDINGTON, Respondent, v. HARTFORD, Appellant. (Court of Appeals of New York. Jan. 10, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (125 N. Y. Supp. 1141), entered November 23, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action on contract. The motion was made upon the grounds that the Appellate Division had unanimously decided that the verdict was supported by the evidence, and the exceptions presented no question of law for review. A. Burnham Moffat, for the motion. Martin Conboy, opposed.

PER CURIAM. Motion denied, with \$10 costs.

REINHARDT, Respondent, v. INTERNATIONAL RY. CO. et al., Appellants. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss the appeal of the appellant city of Buffalo from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (137 App. Div. 927, 121 N. Y. Supp. 1145), entered March 14, 1910, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion

for a new trial in an action to recover for personal injuries alleged to have been sustained through the negligence of defendants. The motion was made upon the ground that the exceptions of the appellant city of Buffalo presented no questions for review. Fred D. Russell, for the motion. Clark H. Hammond, opposed.

PER CURIAM. Motion denied, with \$10 costs.

RICE, Appellant, v. PRICE et al., Respondents. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (137 App. Div. 894, 121 N. Y. Supp. 1145), entered March 9, 1910, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to have certain deeds declared void. The motion was made upon the grounds that the Appellate Division had unanimously decided that the findings of fact were supported by the evidence, that no question of law was involved, and that the exceptions were frivolous. David F. Manning, for the motion. Robert P. Honeyman, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs, and \$10 costs of motion.

RIKER et al. Respondents, v. NORTH BRITISH & MERCANTILE INS. CO. OF LONDON & EDINBURGH, Appellant. (Court of Appeals of New York. Oct. 23, 1910.) Appeal from a judgment entered June 15, 1909, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (132 App. Div. 948, 117 N. Y. Supp. 1145), which overruled defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denied a motion for a new trial and directed judgment for plaintiffs upon the verdict in an action to recover upon a policy of fire insurance. Hiram R. Wood and Horace McGuire, for appellant. E. W. Hamm and Frederick W. Smith, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

RING, Respondent, v. RING, Appellant. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (127 App. Div. 411, 111 N. Y. Supp. 713), entered July 11, 1908, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to set aside a deed of real property. William L. Snyder, for appellant. Arthur M. Johnson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

ROUNDS, Respondent, v. SYRACUSE & S. R. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 15, 118 N. Y. Supp. 24), entered July 23, 1909, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover for personal injuries alleged to have been sustained through

defendant's negligence. Charles E. Spencer, for appellant. Joseph B. Murphy, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

ROY, Respondent, v. FLAXMAN et al., Appellants. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (123 N. Y. Supp. 1139), entered May 31, 1910, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to set aside a deed of real property. The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous and the exceptions frivolous. L. Harding Rogers, Jr., for the motion. N. E. Betjeman, opposed.

PER CURIAM. Motion denied, with \$10 costs.

RUDIGER et al., Appellants, v. COLEMAN et al., Respondents. (Court of Appeals of New York. Dec. 13, 1910.)

PER CURIAM. Motion for reargument, or to amend remittitur, denied, with \$10 costs. See 199 N. Y. 342, 92 N. E. 665.

RYDER v. LOTT et al. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (123 App. Div. 685, 108 N. Y. Supp. 46), entered January 15, 1908, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to determine the ownership of certain bonds and mortgages. Claude V. Pallister, Charles H. Kelby, Hersey Egginton, and George Eckstein, for appellants. Frederic B. Mygatt, John M. Bowers, and Frederick Van Wyck, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SALVATION ARMY IN THE UNITED STATES, Respondent, v. AMERICAN SALVATION ARMY, Appellant. (Court of Appeals of New York. Dec. 16, 1910.) Motion for leave to withdraw appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (135 App. Div. 268, 120 N. Y. Supp. 471), entered January 3, 1910, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term and granting a new trial; also motion for cancellation of undertaking. The motion was made upon the ground that the appeal was prematurely taken. See, also, 126 N. Y. Supp. 1145. Wilson Lee Cannon, for the motion.

PER CURIAM. Motion granted, without costs.

SCHEER v. LONG ISLAND R. CO. (Court of Appeals of New York. Jan. 3, 1911.) Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (134 App. Div. 939, 118 N. Y. Supp. 1140), entered October 14, 1909, affirming a judgment partly in favor of plaintiff and partly in favor of defendant, entered upon

the report of a referee in an action to restrain the defendant from trespassing upon certain land. David B. Ogden and Charles S. Noyes, for plaintiff. James W. Treadwell and Joseph F. Keany, for defendant.

PER CURIAM. Judgment affirmed, without costs.

WILLARD BARTLETT, HISCOCK, COLLIN, and CHASE, JJ., concur. HAIGHT and WERNER, JJ., dissent from affirmance of so much of the judgment as is in favor of the plaintiff. CULLEN, C. J., not voting.

SCHIEFER v. FREYGANG et al. (Court of Appeals of New York. Oct. 18, 1910.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (125 App. Div. 498, 109 N. Y. Supp. 848), entered April 22, 1908, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the answer and overruled such demurrer. The following questions were certified: "(1) Is the fifth separate defense contained in the answer herein of the defendants, the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, sufficient in law upon the face thereof? (2) Does the complaint herein state facts sufficient to constitute a cause of action as against the defendants the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company?" See, also, 127 N. Y. Supp. 1143. L. M. Berkeley, for appellant. Robert A. Kutschbock, Alex. S. Lyman, and Ira A. Place, for respondents.

PER CURIAM. Order affirmed, with costs, and second question certified answered in the negative; first question not answered.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

SCHNAIER v. ONWARD CONST. CO. et al. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (138 App. Div. 909, 123 N. Y. Supp. 1140), entered June 22, 1908, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to foreclose a mechanic's lien; also a motion to dismiss an appeal from an order of said Appellate Division, entered June 8, 1910, affirming three intermediate orders in the action. The motions were made upon the ground that the Court of Appeals had no jurisdiction to review the appeals. Milton Mayer, for the motion. L. Lafin Kellogg, opposed.

PER CURIAM. Motions denied, with \$10 costs.

SCHOONMAKER, Appellant, v. ERIE R. CO., Respondent. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (129 App. Div. 467, 113 N. Y. Supp. 1048), entered January 9, 1909, affirming a judgment in favor of defendant entered upon an order of the court at a Trial Term which set aside a verdict in favor of plaintiff and directed a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Lewis E. Carr, Abram F. Servin, and Rosslyn M. Cox, for appellant. Henry Bacon, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., not sitting.

SCHWAMANN, Appellant, v. DE LAND et al., Respondents. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (128 App. Div. 934, 113 N. Y. Supp. 1146), entered November 12, 1908, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury in an action to set aside a partition sale. Robert J. Landon and John F. Clute, for appellant. A. J. Dillingham, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

SOLUCCI, Respondent, v. DUFFY, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 925, 112 N. Y. Supp. 1148), entered November 12, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. I. R. Oeland and E. Sidney Berry, for appellant. Thomas J. O'Neill, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

SECURITY WAREHOUSING CO., Appellant, v. AMERICAN EXCHANGE NAT. BANK, Respondent. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 925, 116 N. Y. Supp. 1147), entered May 14, 1909, affirming a judgment in favor of defendant entered upon the report of a referee in an action for conversion. Samuel H. Ordway, for appellant. Benjamin N. Cardozo and Edgar J. Nathan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

SELIGMAN v. FRIEDLANDER. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for reargument denied, without costs, upon the ground that the erroneous statement of fact did not affect the result. See 199 N. Y. 373, 92 N. E. 1047.

In re SHAFFER. (Court of Appeals of New York. Dec. 6, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (138 App. Div. 35, 122 N. Y. Supp. 769), entered May 2, 1910, which affirmed an order of Special Term denying a motion for the reduction of an assessment for sewers on certain property in the borough of Brooklyn. Alexander McKinny, for appellant. Archibald R. Watson, Corp. Counsel (Theodore Connolly and George L. Sterling, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

SHINNECOCK HILLS & PECONIC BAY REALTY CO., Appellant, v. ALDRICH et al., Respondents. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (132 App. Div. 118, 116 N. Y. Supp. 532), entered May 6, 1909, affirming a judgment in favor of defendants entered upon a verdict directed by the court and an order denying a motion for a new trial in an action for trespass. J. Edward Swanstrom and Conrad S. Keyes, for appellant. Timothy M. Griffing and Thomas Young, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

SLATER v. GRANNEMANN et al. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (130 App. Div. 892, 114 N. Y. Supp. 1147), entered January 7, 1909, affirming a judgment in favor of defendants entered upon a decision of the court at a Trial Term without a jury in an action to set aside a deed of real property and for an accounting. See, also, 121 App. Div. 904, 106 N. Y. Supp. 1145; 124 App. Div. 98, 108 N. Y. Supp. 368; 124 App. Div. 918, 108 N. Y. Supp. 1147. Henry E. Miller, for appellant. A. J. Dillingham, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and CHASE, JJ., concur.

SPARKHAWK, Appellant, v. GILLIN PRINTING CO., Respondent. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 900, 115 N. Y. Supp. 1145), entered April 5, 1909, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial in an action to recover for goods alleged to have been sold and delivered. See, also, 197 N. Y. 556, 91 N. E. 1120. Henry Siegrist, Jr., for appellant. Wales F. Severance, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

STACK, Respondent, v. VILLAGE OF PHELPS, Appellant. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (134 App. Div. 908, 118 N. Y. Supp. 1144), entered July 12, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been sustained through defendant's negligence. Frank Rice, for appellant. W. Smith O'Brien, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

STEVENS, Respondent, v. EMPIRE STATE DEGREE OF HONOR, Appellant. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 915, 112 N. Y. Supp. 1148), entered November 30, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover upon a policy of life insurance. *Clare A. Pickard*, for appellant. *Warren J. Cheney*, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and COLLIN, JJ., concur.

In re STEVENSON (two cases). **In re KERNOCHAN.** (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (137 App. Div. 789, 122 N. Y. Supp. 664), entered May 19, 1910, which confirmed the report of a referee and directed that two funds, known respectively as the "surplus interest account" and the "contingent account," be consolidated as an indemnity fund for the relief of the petitioners and persons similarly situated. See, also, 139 App. Div. 909, 124 N. Y. Supp. 1131. *Edward R. O'Malley, Atty. Gen. (Frederick Tanner and Robert P. Beyer, of counsel)*, for appellants. *Harlan F. Stone and Chester E. Dewey*, for respondents.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

STRAUS et al., Appellants, v. AMERICAN PUBLISHERS' ASS'N et al., Respondents. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a final judgment entered May 20, 1909, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (127 App. Div. 935, 111 N. Y. Supp. 830), which affirmed an interlocutory judgment of Special Term in an action to enjoin defendants from acting under an agreement alleged to be in unlawful restraint of trade, whereby they bound themselves to sell books published by them only to booksellers who would agree to maintain a fixed retail price therefor. The appeal was taken from so much of the final judgment as refused equitable relief and damages arising from the refusal to sell copyrighted books. See, also, 128 App. Div. 908, 112 N. Y. Supp. 1148; 128 App. Div. 931, 113 N. Y. Supp. 1148. *Edmond E. Wise*, for appellants. *Stephen H. Olin*, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. GRAY, J., absent.

TOPKEN et al. v. STARIN et al. (Court of Appeals of New York. Dec. 13, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 839, 117 N. Y. Supp. 1149), entered July 2, 1909, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial in an action to recover on an alleged

breach of contract. *Edmund L. Mooney, Frederick A. Card, Joseph S. Frank, and George M. Albot*, for appellants. *Daniel P. Hays*, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, HISCOCK, and COLLIN, JJ., concur.

TOPPI, Respondent, v. McDONALD, Appellant. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (128 App. Div. 443, 112 N. Y. Supp. 821), entered November 12, 1908, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate alleged to have been occasioned by defendant's negligence. *Courtlandt V. Anable and Raymond D. Thurner*, for appellant. *Thomas J. O'Neill and L. F. Fish*, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

TRUSTEES OF REFORMED PROTESTANT DUTCH CHURCH OF MOTT HAVEN, Respondent, v. INTERBOROUGH RAPID TRANSIT CO. et al., Appellants. (Court of Appeals of New York. Sept. 27, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (131 App. Div. 898, 115 N. Y. Supp. 1147), entered March 11, 1909, affirming a judgment in favor of plaintiff entered upon the decision of the court on trial at Special Term in an abutting owner's action for an injunction to restrain the continuance of an elevated railway structure and for damages. *J. Osgood Nichols and James L. Quackenbush*, for appellants. *Eugene D. Hawkins and Edward W. S. Johnston*, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

UNION LUMBER CO., Respondent, v. CAFLISCH et al., Appellants. (Court of Appeals of New York. Oct. 23, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (128 App. Div. 917, 113 N. Y. Supp. 1149), entered December 9, 1908, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover for an alleged breach of contract of sale. See, also, 129 App. Div. 934, 115 N. Y. Supp. 1147. *W. S. Thrasher and V. E. Peckham*, for appellants. *James L. Weeks*, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re VAIL. (Court of Appeals of New York. Oct. 11, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (121 N. Y. Supp. 958), entered March 11, 1910, which reversed

an order of Special Term appointing a commission in lunacy. Frank E. Carstarphen, for appellant. De Witt Bailey, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, HISCOCK, and CHASE, JJ., concur. WILLARD BARTLETT, J., absent.

VAN SOHAICK, Respondent, v. HEYMAN et al., Appellants. (Court of Appeals of New York. Oct. 4, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (123 N. Y. Supp. 1148), entered May 9, 1910, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover for goods sold and delivered. The motion was made upon the grounds that the affirmance by the Appellate Division was unanimous and the exceptions frivolous. William H. Hamilton, for the motion. Arthur B. Hyman, opposed.

PER CURIAM. Motion denied, with \$10 costs.

VAUGHAN, Appellant, v. CITY OF TROY, Respondent. (Court of Appeals of New York. Oct. 4, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (124 N. Y. Supp. 1138), entered July 15, 1910, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint in an action to recover for personal injuries alleged to have been sustained through the negligence of the defendant. Ransom H. Gillet, for appellant. G. B. Wellington, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

In re VIVANTI'S ESTATE. (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 281, 122 N. Y. Supp. 954), entered May 6, 1910, which reversed an order of the New York County Surrogate's Court assessing a transfer tax on the estate of Ferruccio A. Vivanti, deceased. T. S. Jenkins, for appellant. Walter M. Rosebault, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

VIVIAN et al., Appellants, v. STEERS, Respondent. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (136 App. Div. 926, 120 N. Y. Supp. 1149), entered January 21, 1910, affirming a judgment in favor of defendant entered upon the report of a referee in an action on contract. The motion was made upon the grounds that the Appellate Division had unanimously decided that the findings of fact were supported by the evidence and that no questions of law were presented for review. Charles Thaddeus Terry, for the motion. Willard N. Baylis, opposed.

PER CURIAM. Motion denied, with \$10 costs.

WAGNER et al. v. WORTIS et al. (Court of Appeals of New York. Oct. 25, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (183 App. Div. 933, 118 N. Y. Supp. 1148), entered June 25, 1909, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in an action to determine conflicting claims to real property. Reargument denied, see infra. Robert H. Wilson, for appellants. Philip S. Dean and David B. Ogden, for respondents.

PER CURIAM. Judgment affirmed, with costs.

HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur. CULLEN, C. J., and WILLARD BARTLETT, J., dissent. GRAY, J., absent.

WAGNER et al. v. WORTIS et al. (Court of Appeals of New York. Nov. 22, 1910.)

PER CURIAM. Motion for reargument denied, with \$10 costs. See 199 N. Y. 571, supra.

WARD et al., Appellants, v. WARD et al., Respondents. (Court of Appeals of New York. Nov. 15, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (130 App. Div. 27, 114 N. Y. Supp. 326), entered March 23, 1909, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to impress a trust upon certain property. See, also, 133 App. Div. 73, 117 N. Y. Supp. 697. William G. Wilson, for appellants. Henry M. Ward and John L. Cadwalader, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

WARE, Respondent, v. BONTA, Appellant. (Court of Appeals of New York. Nov. 22, 1910.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 809, 123 N. Y. Supp. 1147), entered June 1, 1910, affirming a judgment in favor of plaintiff entered upon a verdict in an action for services. The motion was made upon the ground that the affirmance by the Appellate Division was unanimous and permission to appeal had not been obtained. See, also, 125 N. Y. Supp. 1149. J. Hampden Dougherty, for the motion. Leonard F. Fish, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

In re WATER FRONT ON EAST RIVER IN CITY OF NEW YORK. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (138 App. Div. 186, 122 N. Y. Supp. 1034), entered May 6, 1910, which affirmed an order of Special Term confirming an award of commissioners of estimate and assessment. Archibald R. Watson, Corp. Counsel (Theodore Con-

noly and Charles D. Olendorf, of counsel), for appellant, Edmund L. Baylies and Edwin D. Bechtel, for respondent.

PER CURIAM. Order affirmed, with costs CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

WEEKS-THORNE PAPER CO., Appellant, v. **CITY OF SYRACUSE et al.,** Respondents. (Court of Appeals of New York. Jan. 10, 1911.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (139 App. Div. 853, 124 N. Y. Supp. 317), entered July 19, 1910, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to restrain the defendants from an alleged interference with plaintiff's riparian rights. The motion was made upon the ground that the appeal was not taken within the time provided by law. William Rubin, for the motion. George Barron, opposed.

PER CURIAM. Motion denied, with \$10 costs.

WILLIAMS et al., Appellants, v. **GETMAN,** Respondent. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (128 App. Div. 882, 112 N. Y. Supp. 1150), entered October 1, 1908, affirming a judgment in favor of defendant entered upon the report of a referee in an action to recover on a lease. Henry V. Borst and Arleigh D. Richardson, for appellants. Jeremiah Keck and William C. Mills, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WERNER, WILLARD BARTLETT, HISCOCK, CHASE, and COLLIN, JJ., concur.

WILLIAMSON, Appellant, v. **BADEAU,** Respondent. (Court of Appeals of New York. Oct. 28, 1910.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (132 App. Div. 924, 116 N. Y. Supp. 1151), entered May 19, 1909, affirming a judgment in favor of defendant entered upon a decision of the court on trial at Special Term in an action to secure reinstatement as a member of the Consolidated Stock and Petroleum Exchange. Flamen B. Candler and Robert W. Candler, for appellant. William V. Rowe and Hjalmar H. Boyesen, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

WILSON, Respondent, v. **WYCKOFF, CHURCH & PARTRIDGE,** Appellant. (Court of Appeals of New York. Jan. 3, 1911.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (133 App. Div. 92, 117 N. Y. Supp. 783), entered June 22, 1909, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for an alleged breach of contract. S. S. Slater and Frederick S. Randall, for appellant. J. Frederick Eagle, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, WILLARD BARTLETT, and CHASE, JJ., concur. HISCOCK and COLLIN, JJ., dissent. WERNER, J., absent.

In re **WORMSER et al.** (Court of Appeals of New York. Nov. 29, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (136 App. Div. 942, 121 N. Y. Supp. 1151), entered March 12, 1910, which affirmed a decree of the New York County Surrogate's Court judicially settling the accounts of the executors and trustees herein. Alton B. Parker and Claude T. Dawes, for appellant. F. R. Minrath, Henry Siegrist, Jr., and John H. Devine, for respondents.

PER CURIAM. Order affirmed, with costs payable out of the fund.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

In re **WRIGHT.** (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (139 App. Div. 1, 123 N. Y. Supp. 414), entered June 3, 1910, which reversed a decree of the New York County Surrogate's Court settling the accounts of the trustee herein and directed the entry of a decree in accordance with its opinion; also, motion to dismiss said appeal upon the grounds that the said Appellate Division having unanimously reversed the decree of the Surrogate's Court of New York county upon the law and the facts, and having itself determined the facts pursuant to section 2586 of the Code of Civil Procedure, this court has no jurisdiction to review the order of June 3, 1910, and the decree entered thereon, and that the order of June 24, 1910, appealed from, which denied the motion of Margaret M. Wright, as trustee, for an order remitting this proceeding to the Surrogate's Court for a new trial or rehearing, was a discretionary order of said Appellate Division, made pursuant to section 2587 of the Code of Civil Procedure, and not appealable to this court. See, also, 139 App. Div. 909, 124 N. Y. Supp. 1134. Francis B. Wood, for appellant. Godfrey Goldmark, for respondent.

PER CURIAM. Decree of Appellate Division affirmed, with costs, and motion to dismiss appeal denied, without costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. DUNPHY et al., Drainage Com'rs, Appellants, v. **WIGGINS,** Town Sup'r, Respondent. (Court of Appeals of New York. Oct. 18, 1910.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (128 App. Div. 882, 112 N. Y. Supp. 1142), entered May 5, 1908, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to issue town bonds. John R. Keeler and Frank N. Cleaveland, for appellants. Vasco P. Abbott, for respondent.

PER CURIAM. The Appellate Division having declined to amend the order appealed from (137 App. Div. 935, 121 N. Y. Supp. 1143), the order is affirmed, with costs.

CULLEN, C. J., and VANN, WERNER, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur.

